

CPTPP State-Owned Enterprise Rules and Our Countermeasures

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Abstract

State-owned enterprises (soes) play an important role in the global economy. Some developed countries believe that because of the state nature of SOES, SOES enjoy more privileges and unfair competitive advantages than private enterprises, including government subsidies and regulatory incentives, so that their market competitiveness and overall strength are strong. In order to get rid of the "Official business" advantage of state-owned enterprises, promote the equal competition between state-owned enterprises and private enterprises, and reduce the concern of state-owned enterprises, the rules of our state-owned enterprises are gradually formed. For the first time in the international market, CPTPP specifically regulates the rules of state-owned enterprises. Compared with other free trade agreements, cPTPP's SOE rules are characterized by stronger competition neutrality rules, wider scope of application, more non-commercial aid rules and higher transparency. In the context of China's imminent accession to CPTPP, this paper analyzes the regulation of our state-owned enterprises that have signed the free trade agreement, and finds that the number of state-owned enterprises to be regulated in the free trade agreement is small and the level of regulation is low. Therefore, we must actively negotiate the new issues of state-owned enterprises and actively participate in the construction of international rules of state-owned enterprises. For the CPTPP high-level SOE rules negotiation, we should follow China's national conditions, study the introduction of ownership-neutral competition-neutral principle as the core, and further deepen the reform of state-owned enterprises, state-owned enterprises to standardize the way of subsidies.

Keywords

SOE Rules; Cptpp; Competition Neutrality; Non-Commercial Aid.

1. Introduction

On September 16, 2021, Chinese Minister of Commerce Wang Wentao, on behalf of the Chinese government, delivered a formal written letter on China's accession to the comprehensive and progressive trans-pacific partnership (CPTPP) to New Zealand Minister of Trade and Export Development o'connor, the protector of the CPTPP, thus, substantive negotiations with existing CPTPP members began, in which the provision of special provisions on state-owned enterprises became an important obstacle to China's negotiations with existing members[1].

The SOE rules originated from the theory of "Competition neutrality", which was first put forward by Australia and clearly stipulated in its domestic competition law, since then, with the practice and implementation of the Organization for Economic Cooperation and development (OECD) and other international organizations, the international discussion on the theory of competition neutrality has been increasing, and the rules of competition neutrality have been strengthened, gradually developed into an important part of international economic and trade agreements, CPTPP in the rules of state-owned enterprises are reflected.

On the whole, the existing research results include the basic connotation, origin, evolution from domestic law to international law, which provides a theoretical basis for this study, but there are some deficiencies. At present, the international community has not established a set of

general principles of competition neutrality, and therefore more abstract. In contrast, the SOE system is much richer and more widely practiced. Secondly, in the research object, the existing research mainly focuses on the new generation of economic and trade agreements under the SOE system design, for the formation of SOE system and the reasons for lack of in-depth research. In addition, the existing literature on the core provisions of the state-owned enterprise regulations, the definition and scope of application of the state-owned enterprise, jurisdiction and other key provisions of less research. Finally, in the research orientation, few papers based on the characteristics of China's signed free trade agreements, based on China's position in the CPTPP negotiations, the CPTPP rules of state-owned enterprises analysis[2].

Based on this, this paper intends to use for reference the relevant research results of CPTPP state-owned enterprise rules at home and abroad, and use the method of literature research and rules analysis to guide innovatively the evolution of the principle of competition neutrality, by combing the specific provisions of the CPTPP rules of Chinese enterprises, this paper sums up its possible impact on our country, and combs the relevant provisions of the existing FTA rules of Chinese Enterprises, and according to the current economic development and legal environment, clarify the SOE rules should follow the positioning, and then discuss China's accession to the high standard of SOE terms[3].

2. Analysis of CPTPP SOE rules

2.1. Business considerations

In the early days of the WTO, the "Commercial consideration clause" introduced by the United States is an important rule that our state-owned enterprises must abide by when they participate in international trade, and it made it clear that it must operate on a "Private enterprise" model. The term "Commercial considerations" derives from Article XVII, paragraph 1, of the General Agreement on Tariffs and trade, which states that the principle of non-discriminatory treatment must be observed in the buying, selling or selling of goods, moreover, the General Agreement on Tariffs and trade has a fundamental obligation under import and export measures that may have an impact on private traders. In addition, the GATT provides that, unless otherwise stipulated in the agreement, the buying and selling activities of such enterprises should also be based on commercial considerations only, so that enterprises of the same nature in member countries have full competition opportunities[4]. The purpose of this provision is to link trade considerations with most favoured nation treatment. This means that a state's state-owned trading company may be considered to be fulfilling its most favoured nation obligations if it purchases solely on the basis of commercial considerations.

It should be noted that in GATT and CPTPP, most favoured nation treatment in the purchase and sale of goods through state-owned trading companies is different from what is commonly referred to as the most favoured nation treatment given by member states. First, the General Agreement on Tariffs and trade allows state-owned trading companies to make certain exceptions to their responsibilities for non-discriminatory treatment based on commercial considerations, for example by limiting or reducing non-discriminatory treatment. State-owned foreign trade enterprises may price the same product in different markets to meet market demand. Second, CPTPP allows soes to further reduce or limit non-discriminatory treatment based on commercial considerations. That is, the state-owned enterprise may either procure and sell to an entity on the basis of differentiated price-related conditions, or on that basis, provided that commercial considerations are met[5].

In addition, CPTPP member states have a great deal of autonomy in the application of commercial considerations responsibilities. Paragraph 1(b) of Article 17 of the General Agreement on Tariffs and trade provides that state trading companies shall be based only on commercial factors or only on commercial factors, including the qualifying word "Solely".

However, CPTPP only stipulates that the procurement and sales of state-owned enterprises must be in line with commercial considerations, the parties can be based on their own judgment to judge. From this point, we can see that CPTPP respects the commercial decision made by state-owned enterprises in the market competition to a greater extent, thus further strengthening the marketization of state-owned enterprises[6].

2.2. Non-discriminatory treatment

The CPTPP's provisions on non-discriminatory treatment in relation to state-owned enterprises require state-owned enterprises in member states not to discriminate against them on the basis of their nationality when making procurement and sales decisions. First, in the procurement of goods and services, goods and services provided by one member state to companies in another member state are no more expensive than those provided by it to companies in its own country or to companies in other countries. Secondly, in the sale or service of a member state, an enterprise of another member state is treated no less favourably than it would treat its domestic enterprise or an enterprise of another state and an investment enterprise in the relevant domestic market.

From this point of view, China's non-discriminatory treatment of enterprises under the CPTPP provisions have a broader scope of application, it can be applied to goods and services, but also can be applied to international investment and so on. In addition, the us-singapore bilateral economic and Trade Agreement on the United States, Singapore have made different provisions, CPTPP on all members have the same requirements. In contrast to the most favoured nation treatment only for state-owned trading enterprises in the GATT, CPTPP provides for a non-discriminatory treatment whereby state-owned enterprises provide equal treatment to enterprises of their member states, it also makes provision for the observance of the principle of national and most favoured nation treatment.

2.3. Non-commercial assistance

The non-commercial aid rule is the most special provision in the CPTPP state-owned enterprise rule, which is actually the transplantation and innovation of SCM agreement subsidy rule. Article 17.1 of the CPTPP lays down four constituent elements of non-commercial assistance: namely, the existence of an act of assistance that is provided on the basis of the government's ownership and control of state-owned enterprises, the provider is the government of one country, the recipient is the state-owned enterprise, and the consequence of the aid action is the adverse effect and harm to other countries. An Aid that meets these criteria may constitute non-commercial assistance under the CPTPP. The constitutive requirements of the subsidy rules of SCM agreement are the existence of financial subsidy, the specificity of subsidy, the main body of subsidy must be government or public institution, and the subsidy confers certain interests on certain enterprises or industries, to the detriment of another member. By comparing the components of non-commercial aid and subsidy, we can see that they are similar to the components of subsidy rules in SCM agreement. The term "Assistance" means that the government transfers funds directly, or financing or assignment of debt occurs, which is similar to the concept of financial assistance as defined in Article 1 of the SCM agreement. In terms of adverse effects and damages to other countries, it is similar to the provisions of the SCM agreement concerning losses arising out of subsidies. However, the "Non-commercial assistance" stipulated in the "State-owned enterprises" chapter of CPTPP is a special provision for state-owned enterprises, and its scope of application is far broader than the SCM agreement, in essence, it is a selective reference to the subsidy rules in the SCM agreement.

2.4. Transparency obligations

The CPTPP makes more detailed and stringent provisions on transparency obligations. There are two types of transparency obligations: active and passive. In terms of positive transparency

obligations, CPTPP member states should publish a detailed list of their existing state-owned enterprises to other members within six months of the entry into force of the text of the agreement, and in the form of an announcement, or on their government or any official web site to publish their new designated monopoly, the expansion of existing monopoly and the terms of the provisions[7].

In response to negative transparency obligations, CPTPP specifies two types of situations. Information on any policies or programmes relating to the provision of non-commercial assistance that have been adopted or maintained by the member states concerned, but requiring that the activities of the states in question affect trade and investment among the member states, it requires that all parties understand how these policies or programmes operate and evaluate their actual or potential impact accordingly. To this end, the member states requested should provide the following information in a timely and expeditious manner. First, how aid is delivered, including grants and loans. Second, recipients of aid and state-owned enterprises that have received or may receive it. Third, laws and regulations based on non-commercial funded projects. Fourth, indicate the average number of units of assistance in goods in the previous year and, if not, provide the total amount or annual budget; describe the amount, total amount or annual budget of assistance in services provided in the previous year. Fifth, the duration or validity of an insurance policy or program. Sixthly, a description of the amount, interest and fees charged for assistance in the form of a loan or loan guarantee, the fees charged for assistance in the provision of goods or services, the amount of investment in equity assistance provided and the shares acquired, and an assessment of investment decisions. Seventh, the availability of relevant statistics could be used to assess the impact of non-commercial assistance on trade and investment among member states[8].

3. The influence of CPTPP state-owned enterprise rules on our country

3.1. The continued strengthening of the rules of competition neutrality has raised new demands in general

Since 2017, US, EU, Japan and other countries have issued six joint trade ministerial statements on issues such as state-owned enterprises (soes) and government subsidies. Specifically, in the framework of WTO, there are: the establishment of public organizations under the WTO system identification criteria, to increase information transparency, to correct state-owned enterprises to the distortion of competition, the establishment of government subsidy system. Therefore, the United States, Europe and Japan are actively promoting "Competition neutrality" and trying to establish a new set of "Non-market country" identification standards outside the WTO framework in order to limit the "Overseas expansion" of Chinese state-owned enterprises, and through the promotion of "Competitive neutrality", China is forced to assume corresponding international responsibilities[9].

The system of competition neutrality plays an important role in correcting the unfair distribution of resources. It can effectively regulate the government's improper interference in market competition and prevent state-owned enterprises from gaining competitive advantage, to achieve fair competition between private enterprises and state-owned enterprises. The function of the competition neutral system is to create a fair competition environment and to coordinate the relationship between the government and the market, thus providing a new way to coordinate the conflict between the market and the government. The idea of China's increasing competitive neutrality is gradually integrating with the new generation of high-level and high-standard trade rules, which provides new demand for China's international trade behavior, it also provides new impetus for China's development in international trade.

The supervisory system of state-owned enterprises (soes) in Europe, and other countries, whose core is "Competition neutrality", often leads to the competitive advantage of soes

because of the support and support of the government, thus endangering the fair competition of enterprises, this action deviates from the property rights-neutral orientation of competitive neutrality, and is unfair “Competitive neutrality” of European and American countries to Chinese state-owned enterprises (Soes) in order to prevent Chinese soes from entering the global market. Developed countries are generally concerned about the growth and rise of China and other emerging economies, and CPTPP's state-owned enterprise regulations also contain the impetus for the developed countries to push for a new round of trade rules restructuring, to some extent, this kind of external pressure helps to promote the reform of our state-owned enterprises and the issue of subsidies, and to create a fair market competition environment. The root cause of frequent disputes among soes is the lack of a fair market environment. CPTPP's SOE rules focus on competition and try to create a fair market environment, the principle of competition neutrality has been strengthened and a series of high-level rules have emerged, such as “Non-commercial assistance”, “Transparency” and so on. For example, in non-commercial aid, member governments can not bail out state-owned enterprises, avoiding improper subsidies to state-owned enterprises, excessive interference in the market and monopolization of state-owned enterprises, these are all requirements for fair competition among market players.

Competitive neutrality is a competitive mechanism in emerging markets, and its position and role in China's economic and trade is beyond doubt. The introduction of a competition-neutral system in China can promote conflicts between Chinese enterprises and other countries in the field of international trade and investment, thereby reducing the degree of market distortion and encouraging China to continue deepening reforms[10].

3.2. The expansion of the scope of state-owned enterprises (soes) has deterred large soes from going global

The state-owned enterprise rules in CPTPP are not limited to the current CPTPP members, but with its huge influence and radiation, China and other non-members also have some constraints. From a horizontal perspective, the SOE system can be extended to the areas of competition policy, regulation, investment and dispute resolution, and even has a significant impact on the state and the reform path of state-owned enterprises. From this point of view, the CPTPP agreement on the broader definition of “State-owned enterprises” means that more state-owned enterprises are included in the scope of regulation, thus bringing greater potential impact on China.

In the early days, the definition of state-owned enterprises was defined in the WTO and economic and trade agreements. As the influence of our state-owned enterprises in the world is growing, the definition of state-owned enterprises is becoming clearer and clearer, and the implementation mechanism is relatively weak, this makes it difficult to solve the problem of competition distortion caused by unfair competitive advantage. In contrast to the single ownership division in previous agreements, CPTPP requires state-owned enterprises not only to be commercial, but also to be defined in terms of ownership, control and director appointment. In the CPTPP, the concept of “State-owned enterprise” in the SOE rules has been extended, which extends the scope of application of the SOE rules in the CPTPP. Article 17.13 of the CPTPP states that small-scale enterprises are not subject to SOE regulations, that is, enterprises with annual revenue of less than \$200 million from commercial activities in any one of the past three financial years from special drawing rights. Especially for state-controlled enterprises at the level of the central government, this provision reflects the regulation of large state-owned enterprises if it becomes a model for state-owned enterprise rules, for enterprises capable of conducting international trade and investment, more soes will be regulated in our country. In addition, unlike the state-owned enterprises in the SCM agreement, CPTPP has extended the recipients to foreign state-owned enterprises. If our country accepts this clause,

it is possible to take advantage of it and bring most of our state-owned enterprises into the subsidy provider or recipient, which will affect their foreign economic activities and restrain them from "Going out"[11].

3.3. The broad scope of regulation of non-commercial aid makes countervailing measures less difficult

The CPTPP's SOE rules provide for a non-commercial aid system for SOES, which makes it easier to interpret ordinary government actions as subsidies to soes, according to its rules, it can be inferred that the non-commercial rights obtained by the state-owned enterprises are targeted and meet the exclusive needs, and that the state-owned enterprises, as recipients, if they can not prove that such rights and interests are not exclusive, then, other member states could then make positive countervailing decisions against the enterprise. In addition, compared with the SCM agreement, which only regulates commodity trade, the negative impact and damage clauses of non-commercial aid extend its scope of application from commodity trade to service industry and investment, thus making its scope of application broader.

In CPTPP, the determination of the subject of subsidy provided by "Non-commercial assistance" in the regulations of state-owned enterprises breaks the restriction of the subject of subsidy in SCM agreement and avoids the traditional "Public organization dispute", it reduces the difficulty of determining whether a government action can be considered a subsidy. Unlike the term "Government and institution" in the SCM agreement, CPTPP does not use the term "Public institution", but rather refers to a country's government and state-owned enterprises as providers of non-commercial assistance, rather, it completely disengaged from the definition of public organizations in the SCM agreement. From this point, we can see that the "Non-commercial assistance" is essentially to broaden the scope of the "Assistance" object, which requires some state-owned enterprises to prevent the normal operation[12].

4. Responses to the CPTPP rules on state-owned enterprises

4.1. Actively participate in the development of International Rules for SOES

At present, the world economic structure is undergoing a profound adjustment, the reality of state-owned enterprises and economic policy requirements of various countries, developed countries to reshape the rules of international trade has also emerged huge differences, in particular, the interests of developed countries and emerging economies, so that in the reform of state-owned enterprises is still facing a huge game space. In China, where there are many state-owned enterprises, we must make full use of the existing bilateral, multilateral and regional systems to express the positions and demands of the state-owned enterprises, stand in the perspective of emerging market countries, and play a leading and exemplary role, fight for the legal rights of a large number of soes.

We must firmly support a new round of SOE reform under the WTO system. We should adhere to the fundamental principle of "Common but different", strictly abide by the rules of ownership neutrality, and not discriminate in the name of competition neutrality. At the same time, we should also pay attention to exchanges and consultations with OECD and other international organizations, conduct more in-depth research on the way that state-owned enterprises participate fairly in international markets, and form a series of research reports, to help carry forward the concept of competition neutrality and the implementation of rules, in order to find more valuable solutions to solve the competition problems of our enterprises, so as to enhance the sense of participation of state-owned enterprises in the formulation of rules[13].

4.2. Gradually introduce "Ownership-neutral" competition-neutral rules

At present, the international definition of the concept of competition neutrality and the design of the system of rules have not yet formed a consistent understanding, many countries have not

established a specific framework of the theory of competition neutrality, only the concept of competition neutrality is integrated into competition policy or competition law. On the whole, the current competition-neutral system is still in the stage of fair form, there are great differences in national conditions, the number of state-owned enterprises and their role in the domestic economic development is not consistent, if we do not consider the difference of application environment and apply the concept and rules of "Competition neutrality" of Australia or OECD directly, it will bring negative effects to many developing countries, including our country, they can not concentrate on the development of their own high-tech, revitalizing their own industries, thereby losing the opportunity to upgrade in the world value chain. At present, the developed countries, represented by the United States and Europe, attach great importance to the competitive behavior of state-owned enterprises and try to integrate the principle of competition neutrality into their free trade agreements, to ensure "Fairness" in international economic and trade rules. Developed countries have been discriminating against state-owned enterprises, thinking that state-owned enterprises will inevitably bring unfair results, so there are some deviations in their concept of competition neutrality. State-owned enterprises (soes) in developing countries are usually so large that they play an important role in the development of national economy. It is difficult for them to accept the purposeful competition-neutral rules set by developed countries for soes, unless international competition rules can be constructed in line with the concept of competition neutrality, which will take time to achieve.

4.3. Adhere to the definition of state-owned enterprise that conforms to China's national conditions

The CPTPP's rules on soes do not require governments to reduce their stakes in them, let alone set them up or privatise them. In the 1980s, the Soviet Union privatized the state-owned enterprises, but the effect was not ideal. A series of monopolies and financial crises appeared, which seriously affected the fair competition of the market. The experience of the Soviet Union shows that the reform of state-owned enterprises involves many factors and is a difficult problem to be solved systematically.

The original intention of CPTPP is to eliminate the unfair competitive advantage of state-owned enterprises because of their special status, and it will not affect the basic socialist economic system. However, it should be noted that the SOE provisions in the CPTPP cover a wide range of soes. In future negotiations on soe-related issues, the state's commitment to the definition of SOES, it will affect the number of state-owned enterprises that are regulated, so we should be cautious about this issue and give the definition of state-owned enterprises that best suits China's national conditions[14].

At present, the concept and scope of state-owned enterprises have not formed a clear and unified definition standard in our country. In CPTPP, the definition of state-owned enterprise has broken through the limitation of ownership, but in our country's legal practice, it still tends to divide state-owned enterprise according to the standard of ownership, in accordance with the principle of full state ownership, majority ownership or minority ownership, state-owned enterprises can be divided into three types: wholly state-owned, holding and shareholding, and under different circumstances, the government has different influences on the decision-making of state-owned enterprises. State-owned enterprises often make important economic and secondary decisions in their operations. In these problems, the degree of state-owned enterprises and the degree of state-owned enterprises, mainly depends on the nature of the nature of the state-owned enterprises and the nature of the policy. According to the law of the People's Republic of China on the state-owned assets of enterprises, the state has the power to participate in major business decisions, including the restructuring of some state-owned enterprises, bankruptcy applications, etc. , the final decision on major business decisions is in

the hands of the government, while less important business decisions are generally coordinated through the market, but the final decision is still in the hands of the board of directors. From this it can be seen that some major business decisions are made by the state rather than by the government. For major wholly state-owned enterprises, wholly state-owned companies and state-owned capital holding companies, as well as other wholly state-owned enterprises and wholly state-owned companies, according to the conditions of ownership, can be considered as CPTPP state-owned enterprises. But in the case of state-controlled companies, it is not a state-owned enterprise if the government owns less than half of the shares and does not have significant delegated power.

5. Conclusion

Based on the problems existing in our state-owned enterprises, we can expect the difficulty of negotiating the rules of state-owned enterprises when we join CPTPP in the future. However, as the future state-owned enterprises are bound to become the key regulatory objects of international economic and trade agreements, our country should also actively face the challenge of rules, under the background of the current international economic and trade rules facing a new round of restructuring, actively participate in the formulation of new rules of state-owned enterprises, actively strive for the reasonable interests of our country and other developing countries, and cooperate with other countries to establish a fair and competitive international market environment.

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