

Kowalski, P. and D. Rabaioli (2017), "Bringing together international trade and investment perspectives on state enterprises", *OECD Trade Policy Papers*, No. 201, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/e4019e87-en>



OECD Trade Policy Papers No. 201

Bringing together international trade and investment perspectives on state enterprises

Przemyslaw Kowalski, Daniel Rabaioli

JEL Classification: F02, F13, F15, F21, F23, F5, F6, G34, G38, H1, H2, H4, H8, K2, K33, L3, L44, L5

OECD TRADE POLICY PAPERS

This paper is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and the arguments employed herein do not necessarily reflect the official views of OECD countries.

The publication of this document has been authorised by Ken Ash, Director of the Trade and Agriculture Directorate

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

This document has been declassified on the responsibility of the Working Party of the Trade Committee under the OECD reference number TAD/TC/WP(2016)23/FINAL.

Comments on the series are welcome and should be sent to tad.contact@oecd.org.

OECD TRADE POLICY PAPERS
are published on www.oecd.org/trade.

© OECD (2017)

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of OECD as source and copyright owner is given. All requests for commercial use and translation rights should be submitted to rights@oecd.org.

BRINGING TOGETHER INTERNATIONAL TRADE AND INVESTMENT PERSPECTIVES ON STATE ENTERPRISES

Przemyslaw Kowalski and Daniel Rabaioli, OECD

State enterprises (SEs) have been increasingly competing with private firms in international markets, in terms of both cross-border trade and FDI. Given both the potentially positive contribution internationally trading and investing SEs can make, as well as the concerns raised about their competitive behaviour, there is an interest in elaborating policy approaches that minimise any potentially distortionary effects and at the same time restrain protectionist policies that may be directed at SEs. The growing interdependency between trade and FDI, the increased contestability and complexity of markets and the varied nature of state intervention in the economy today mean that policy approaches need to consistently cover issues which transcend the traditional boundaries between trade, investment and competition. This paper investigates how international trade and investment perspectives on SEs are being brought together in international trade and investment agreements and how they could be integrated further. It does so by examining both the ability of existing provisions to ensure a level playing field between private firms and SEs and the disparity in approaches to regulating international activities of SEs between international trade and investment treaties. The paper first reviews the work documenting international activities of SEs and the associated concerns, highlighting the example of the steel sector. Next, it discusses some of the non-binding approaches that can be used to level the playing field, before reviewing relevant provisions in multilateral and preferential trade and investment agreements and identifying potential gaps. The concluding section summarises the results and identifies key issues for policy consideration.

Keywords: State enterprises; state-owned enterprises; SOEs; regulation; trade agreements; investment agreements.

JEL code: F02; F13; F15; F21; F23; F5; F6; F21; G34; G38; H1; H2; H4; H8; K2; K33; L3; L44; L5

Acknowledgements

The authors would like to thank Hans Christiansen, Anthony De Carvalho, Michael Gestrin, Julia Nielson, Filipe Silva, Sara Sultan Balbuena, and Monika Sztajerowska for their comments and suggestions.

Table of contents

Executive Summary	4
1. Introduction.....	6
2. International trade and investment by state enterprises	8
2.1 The prominence of state enterprises in the global economy	8
2.2 Level playing field—a common concern of trade and investment regulators.....	10
2.3 Example: state enterprises in the global steel sector	13
2.4 Differences in perspectives between the trade and investment regulators	16
3. Non-binding policy approaches	16
4. Regulation of international trade and investment of state enterprises	18
4.1 Multilateral level: WTO	18
4.2 Regulation at the preferential level	25
5. Concluding discussion	31
References.....	33

Tables

Table 1. Examples of legal international disputes involving SEs.....	9
Table 2. Examples of advantages granted to state enterprises.....	11

Figures

Figure 1. New steel antidumping and countervailing investigations: 1990-2016.....	14
Figure 2. Country origin of additional capacity by steelmaking SOEs.....	15
Figure 3. Separation of commercial and non-commercial activities and provisions to cover public service obligations	17
Figure A1. What part of respondent's commercial operations is harmed the most by foreign governments' preferential treatment of competitors?.....	36
Figure A2. Which forms of preferential treatment granted to privately-owned and state-owned enterprises have the most harmful impact on respondent's sales? (All firms)	37
Figure A3. Competition with foreign SOEs -Trade concerns.....	41
Figure A4. Concerns about foreign SOE investment	42

Boxes

Box 1. Definitions of state enterprises	7
Box 2. Objectives of SEs and their international implications.....	10
Box 3. Ownership as a criterion to establish nationality of foreign services providers in the GATS..	24

EXECUTIVE SUMMARY

State-owned, state-controlled or otherwise state-influenced enterprises—referred to in this paper jointly as “state enterprises” (SEs)—play a major role in the global economy. For example, in 2015, approximately 15% of the world largest firms on the Forbes Global 2000 list had at least 10% state ownership, and the share of international mergers and acquisitions (IM&A) by fully state-owned enterprises increased from 0.9% in 1996 to 7% in 2013. SEs have also been increasingly competing with private firms in international markets and such competition has involved both cross-border trade and FDI. There is a strong interest in ensuring that trade and FDI by SEs are not impeded and can make a positive contribution to the global economy. However, there are also concerns that governments may provide SEs with certain financial or regulatory advantages or influence them to confer such advantages on other firms.

An OECD-wide initiative established in 2015 seeks to deepen the horizontal dialogue between the relevant OECD Committees (OECD, 2014b)¹, gather further evidence on the internationalisation of state-owned enterprises (SOEs) and provide a consultation mechanism for countries to discuss concerns about SOEs operating in international markets. Work carried out thus far reveals a fair degree of convergence across the competition, investment and trade policy areas regarding the treatment of SOEs, but also some disparities. In particular, while the same products can be supplied internationally by means of cross-border trade and through a foreign established presence, rules disciplining the two modes of international business by SOEs and other types of state enterprises remain different.

This paper draws on recent OECD work and related literature and discusses how international trade and investment perspectives on SEs are being brought together and how they could be brought even closer together in the future.

There is considerable scope for levelling the playing field through implementation of the OECD Guidelines on Corporate Governance of State-owned Enterprises (SOE Guidelines). One example is the ongoing initiative to use the Guidelines to create the *OECD Transparency Checklist for SOE Operating Abroad*. In the future, stakeholders could reflect on how to develop the Checklist so that it can be used more consistently in both trade and investment contexts. This could lead to establishment of standards that could inform development of more integrated disciplines in future trade and investment agreements.

At the multilateral level, WTO Agreements already contain some rules that discipline discrimination which may be related to SEs and also grant market access to SEs behaving in a competitive manner. However, in disciplining anti-competitive behaviour by SEs, such as for example trade-distorting subsidies granted by SEs, WTO rules emphasise the ability to demonstrate formal links with the state (e.g. explicit entrustment) or that the enterprises perform governmental functions, which may be difficult. This highlights the potential value of ownership and control as relevant and practical criteria for determining the relationship with the state, the approach taken in some new Preferential Trade Agreements (PTAs), including, for example the EU-Viet Nam FTA and the Trans-Pacific Partnership (TPP).

It can also be difficult to detect a subsidy if operations of SEs are not transparent. Enforcement of existing rules would be strengthened by adopting more extensive requirements on transparency and disclosure with respect to SEs, which could build on the OECD SOE Guidelines.

¹ This work involves the following OECD Committees: Competition Committee; Investment Committee; Steel Committee; Trade Committee, Working Party on Shipbuilding and Working Party on State-Ownership and Privatisation Practice.

WTO provisions in the area of services suffer from the lack of enforceable obligations on subsidies equivalent to those in the area of goods trade. Developing such disciplines could go a long way towards alleviating concerns related to undue advantages granted to foreign state service providers and could also allow multilateral disciplines on services trade to be a model for regulating investment flows.

A number of more recent PTAs, most notably the TPP, build on and try to fill the gaps in the existing WTO rules, providing clearer definitions of relevant concepts and including additional obligations regarding discriminatory behaviour of SEs. Greater clarity is increasingly sought on the type of entities which are the focus of disciplines in order to improve legal certainty in their implementation. Definitions of state ownership and control play an increasingly important role in SE-related provisions. There is also a tendency to include more precise definitions and tests for the presence of advantages granted to and by SEs. More and more trade agreements include transparency requirements.

In the area of investment treaties, which have to date mostly focused on investors' rights, international investment agreements (IIAs) and bilateral investment treaties (BITs), while focusing less on competitive conditions and more on investor protection, also increasingly contain SE-specific provisions. The main issue being clarified is whether investments by SEs are covered by these agreements and whether they can be enforced under investor-state dispute settlement.

The future evolution of SE-related disciplines in trade and investment agreements will have important implications for the shape of future multilateral rules and will also influence competition between regions and groups of countries with different regulatory approaches in terms of attracting trade and investment. The increased contestability and complexity of markets and the more versatile nature of state intervention in the economy today mean that, in order to make market integration more effective, the new agreements will need to consistently cover issues which transcend the traditional boundaries of trade, investment, and competition policies. Development of effective disciplines on SEs will thus have to draw on experiences across different policy domains.

In particular, in trade agreements, countries commit not to discriminate against SEs under the condition that the latter play by market rules in their commercial activities and are not used by states to distort competition. Investment treaties generally focus on protection of investors and typically do not discipline privileged treatment of SEs by their states or pre-establishment policies with respect to investment by state enterprises. This means that, on the one hand, SEs as investors can face more hurdles when seeking to invest in foreign markets (e.g. screening of SE investment). On the other hand, foreign-invested SEs can continue to benefit from some of the competitive advantages extended to them by their home governments. If an international level playing field is to be effectively achieved in the future the trade and investment approaches will have to converge in this respect.

1. Introduction

State-owned, state-controlled or otherwise state-influenced enterprises—referred to in this paper jointly as “state enterprises” (SEs, See Box 1)² have been increasingly competing with private firms in international markets (OECD, 2013a; 2014; 2015a; 2016a, 2016b). Such competition has involved both cross-border trade in goods and services (OECD, 2013a; 2015a) and their provision through foreign commercial presence by means of foreign direct investment (FDI) (OECD, 2014a; 2015a; 2016a).

International trade and FDI underpinned by market principles both allow more efficient allocation of resources, economies of scale, access to better technology, and, ultimately, higher productivity. In the era of sluggish economic growth and weaker trade and investment performance post the 2008-2010 global economic crisis, it is particularly important that trade and FDI, including by SEs, are not impeded and can make a positive contribution to recovery. At the same time, there are concerns—expressed in the context of both cross-border trade and FDI—that foreign governments may provide internationally-competing SEs with certain financial or regulatory advantages or influence them to confer such advantages on other firms (OECD, 2015a; 2016a; 2016b). This may result in goods and services being produced not by those who can do it most efficiently but by those who receive the greatest advantage. Since these potential distortions have their source in the behaviour of foreign governments, the rationale for—and the benefits from—more open trade and investment policies may be undermined and may lead to protectionist responses.

The challenge is thus both to minimise any potentially distortionary effects on international trade and investment created by SEs as well as to restrain protectionist measures directed at them. There are several policy options that can help achieve these objectives, although they differ in terms of the scope of issues covered and their applicability in international contexts (OECD, 2015a; 2016a).

The work carried out under the auspices of the OECD Trade Committee on this topic since 2012 has resulted in two analytical reports (OECD, 2013a; 2015a), two multi-stakeholder OECD workshops held in 2012 and 2014³, and an on-line [Database on National Practices and Regulations with Respect to State Enterprises](#) taking stock of selected relevant domestic policies and international obligations in 43 countries. An OECD-wide initiative established in 2015 seeks to deepen the horizontal dialogue between the different OECD Committees⁴, to gather further evidence on the internationalisation of state-owned enterprises (SOEs) and to provide a consultation mechanism for countries to discuss concerns about SOEs operating in international markets (OECD, 2014b). The results of this initiative to date, including inputs drawing on the OECD Trade Committee’s work, have been summarised in the publication “*State-owned Enterprises as Global Competitors: A Challenge or an Opportunity*” (OECD, 2016b). This report reveals a fair degree of convergence across the different policy areas in terms of their approaches to SOEs and other state enterprises, but also some disparities. In particular, while the same products can be supplied internationally by SEs by means of cross-border trade or foreign establishment (i.e. through FDI), and trade and FDI can be complementary, rules disciplining these two modes of engaging in international business by SEs differ.

² State-owned, state-controlled or otherwise state-influenced enterprises are referred to deliberately in this paper as “state enterprises” in order to make the analysis of concerns related to different state enterprises inclusive and to consider a broad enough set of issues. Ownership, implies certain interests, rights and obligations characteristic to an owner and thus exertion of influence may be more likely. It is also directly observable. Yet, it is also clear that ownership is neither necessary for governments to influence enterprises’ operations, nor does it inevitably entail such influence.

³ Two OECD Workshops on Trade and Investment by State-owned and State-controlled Enterprises brought together different policy perspectives on these issues, and provided an opportunity to present and discuss the latest empirical and policy analysis and to solicit contributions from practitioners, business and academic experts. Documentation for these two events can be consulted at the following links: <http://oe.cd/workshop-competition> and <http://oe.cd/workshop-state-enterprises>.

⁴ This work involves the following OECD Committees: Competition Committee; Investment Committee; Steel Committee; Trade Committee, Working Party on Shipbuilding and Working Party on State-Ownership and Privatisation Practice.

Box 1. Definitions of state enterprises

There is no one official definition of state enterprises, state-owned enterprises, state-controlled or state-influenced enterprises; these entities are defined differently in different legal and policy contexts (e.g. OECD, 2013a, OECD 2015a).

In this paper, **state enterprises (SEs)** are defined purposefully broadly as enterprises whose commercial operations are *de facto* either influenced or controlled by a state regardless of *de jure* ownership or control. This is because *ownership* is neither necessary for governments to influence enterprises' operations, nor does it inevitably entail such influence. This paper therefore, uses the term state enterprises in order to capture a wider set of issues.

A non-exhaustive list of different types of state enterprises which have been the subject of legislation or analysis include:

- **State-Owned Enterprises:** Enterprises which are fully owned by a state, in which the state owns more than 50% or 25% of the shares. In the 2015 edition of the *OECD Guidelines on Corporate Governance of SOEs*, SOEs are defined more broadly by also taking into account control through the board (or other than through *bona fide* regulation).
- **State-Invested Enterprises:** Enterprises in which state ownership exceeds 10% of the voting share.
- **State-Controlled Enterprises:** Enterprises in which a state exerts control through, for example legal stipulations, corporate articles, golden shares or particular shareholding structures.
- **State-Influenced Enterprises:** Enterprises which are not owned or controlled by a state but the decisions of which are indirectly influenced by that state (for example, former state-owned firms enjoying preferential regulations or subsidies).
- **State-Trading Enterprises:** Governmental and non-governmental enterprises which have been granted exclusive rights or privileges, which deal with goods for export and/or import. Article XVII of the GATT 1994 is the principal provision dealing with state trading enterprises.
- **Designated monopolies:** Private enterprises granted monopoly rights by a state.
- **Public bodies:** WTO case law has established that "public body" must be "an entity that possesses, exercises or is vested with governmental authority"; that ownership and control are relevant criteria, but not decisive factors; and that determination has to reflect on what is considered to be government functions in the legal order of the country in question, and may consider the features normally exhibited by public bodies (OECD, 2015a). See Section 4.1.2.
- **Entities providing services in the "exercise of governmental authority":** The General Agreement on Trade in Services carves out from its scope "services provided in the exercise of governmental authority", defined as services which are "supplied neither on a commercial basis nor in competition with one or more service suppliers" See Section 4.1.3.
- **National champions.** Enterprises which may not fulfill any of the criteria listed above but are nevertheless favored by a State for economic or political reasons (e.g. former state enterprises which have been privatised but are still deemed national economic heritage, etc.).

The increased contestability and complexity of markets and the varied nature of state intervention in the economy today, which includes ownership, control or support to modern internationally-competing firms, mean that, in order to make market integration more effective, policy approaches need to consistently cover issues which transcend the traditional boundaries between trade, investment, competition and other policies. An example of such an amalgamation of approaches across different policy areas which is already underway is the inclusion of more advanced and increasingly inter-linked investment, trade and competition provisions related to SEs in some of the newer trade and investment agreements. This study draws on OECD work and other related literature and discusses how international trade and investment perspectives on SEs are being brought together and how they could be brought even closer together in the future.

Coherence between trade and investment rules will be central as countries discuss whether new architectures and new issues need to be pursued at the multilateral level. It will also be important in the context of the conclusion of new preferential trade and investment agreements and plurilateral initiatives, to ensure that they contribute to greater coherence rather than adding an additional layer of complexity.

The objective of this paper is to inform the future development of regulation on international trade and investment of SEs by examining both the ability of existing provisions to ensure a level playing field, and the disparity in approaches to regulating international activities of SEs between international trade and investment treaties. The paper first reviews the work documenting cross-border activities of SEs and the associated concerns, highlighting the example of the steel sector. Next, it discusses some of the non-binding approaches that can be used to level the playing field, before reviewing relevant disciplines in multilateral and preferential trade and investment agreements. The concluding section summarises the results and identifies key issues for further research and policy consideration.

2. International trade and investment by state enterprises

2.1 *The prominence of state enterprises in the global economy*

It is difficult to quantify the economic importance of all the enterprises that may fall under the broad definition of a SE, let alone estimate their impact on cross border trade or FDI. However, quantification exercises that focus on specific subsets of SEs which are easier to define, such as the majority state-owned enterprises (SOEs), suggest that their role in the global economy has been growing and has achieved economically significant levels.

A number of studies have attempted to assess the prominence of SOEs among the world's largest enterprises. For example, a report prepared for the OECD Trade Committee estimated that in the financial year 2010-2011, approximately 10% of the 2000 largest firms globally on the Forbes Global list were majority SOEs (OECD, 2013a). Using a similar methodology, a report prepared under the OECD initiative on New Approaches to Economic Challenges suggested further that the share of SOEs among the 2000 largest firms had increased to 14% in the business year 2012-13 (OECD, 2014a). A report prepared under the auspices of the OECD Investment Committee found an even higher incidence (19%) of state ownership among the Fortune's Global 500 world's largest firms in 2011 and also showed that their importance had grown strongly over the last decade, with the share of SOE revenues among the Fortune Global 500 increasing from 6% in 2000 to 20% in 2011 and the share of SOE employment represented by these firms increasing from 19 to 30% over the same period (OECD, 2013b). The latest assessment by OECD (2016b) based on the 2015 Forbes 2000 Global ranking which looked at state-invested enterprises (SIEs, defined as enterprises in which state ownership exceeded 10% of the voting share), showed that more than 15% of the world's largest enterprises were SIEs.

These studies also suggest that state enterprises are most prominent in—although not restricted to—the large emerging economies. For example, 70 out of the 204 majority SOEs among the 2000 world's largest companies in 2012 were owned by central or local governments of the People's Republic of China (hereafter “China”), followed by India (30 enterprises), Russian Federation (9), the United Arab Emirates (9) and Malaysia (8). These countries also tended to have the highest shares of state-ownership among their largest firms. In industrialised countries, the state sector was significantly smaller but remained important across the board in a few countries, including Norway, France, Ireland, Greece and Finland (OECD, 2013a). In 2014, 128 out of the 326 SIEs among the 2000 world's largest companies in 2014 were Chinese, 34 were Indian, 13 French, 11 Emirati, 10 Russian, 9 Saudi Arabian and 9 Qatari (OECD, 2016b).

Rigorous assessments of the importance of SE activity in international markets are very few due to the shortage of firm-level data which would contain both information on international activities of firms, state-ownership and other types of relationships with the state. Data gaps are particularly acute for cross-border trade. However, studies which consider sectoral distribution of SEs suggest that these firms are concentrated in economic sectors in which international competition is already acute or which are internationally contestable, or which are concentrated and dominated by large players or which were previously run as state monopolies but have been partially privatised.

For example, in the financial year 2012, majority SOEs accounted for 20% or more of world's largest companies in: mining of coal and lignite and mining support activities; civil engineering; land transport and transport via pipelines; extraction of crude petroleum and gas, and telecommunication and financial services. Manufacturing of metals was another area where state ownership was quite prominent (13% of sector's largest firms) (OECD, 2013a; see also Section 2.3). Similarly, among all the SIEs on the 2015 Forbes Global 2000 ranking, the highest proportion operated in finance, public utilities (electricity, gas, distribution, transport and communication), manufacturing, metals and mining and petroleum (OECD, 2016b). Products of many of these sectors are intensely internationally traded and their ownership is increasingly transnational. Many of the sectors are also playing important upstream and downstream roles in international supply chains (OECD, 2015a).

More precise evidence has been collected on FDI, drawing on data on foreign subsidiaries and international mergers and acquisitions (IM&A). OECD (2013a) found that less than 2% of all foreign subsidiaries in 2012 had SOEs as their parent companies. This was considerably lower than the share of SOEs among the Global 2000 list, suggesting that private firms were overall more active internationally than SOEs, a

finding confirmed in an econometric exercise which controlled for individual firm characteristics (OECD, 2013a). The study found also that SOEs from OECD countries tended to be relatively more domestically oriented than SOEs from emerging economies.

Based on methodology proposed in OECD (2013b), OECD (2016b) has found that IM&A by fully state-owned enterprises increased considerably, from 0.9% in 1996 to 7% of total IM&A by value in 2013. IM&A by SOEs spiked in the aftermath of the 2008-2009 financial crises and has remained above the pre-crisis average since then. It has been posited that this was due to SOEs being relatively less affected by the crisis and benefitting from the weakening of their competitors to acquire corporate assets abroad (OECD, 2016b). In contrast to intensifying international acquisitions by SOEs, international acquisitions in which SOEs were targets remained flat, which suggests a certain asymmetry in the ability to take over.

The increase in SOE IM&A since the global economic crisis has been clearly driven by enterprises from emerging economies; in 2013, for example, IM&As by Chinese SOEs accounted approximately for 50% of all IM&As by SOEs (OECD, 2016b). OECD (2013b) has shown that SOE IM&A tended to be concentrated in oil and gas (34% of total value of IM&As), utility and energy (19%), mining (7%) and metal and steel (5%).

Although different in nature, an additional piece of evidence about the presence of SEs in international markets are international legal trade, investment and competition policy disputes involving SEs under EU and WTO rules, as well as BITs and national competition laws. While they provide an indication of the incidence of SEs in international markets, they also necessarily reflect both perceptions about SEs' anti-competitive behaviour and the ability of the existing legal frameworks to remedy this. While the list in Table 1 is not exhaustive, it does show that the issue of competitive practices of SEs has been raised a number of times in international fora (see also Box 2).

Table 1. Examples of legal international disputes involving SEs

Case	Legal context	References
Maffezini vs. Spain	Argentina-Spain BIT, ICSID Convention	OECD (2013a)
CSOB vs The Slovak Republic	Czech Republic-Slovakia BIT, ICSID Convention	(Section 4.2 of this paper)
EDF and the European Commission	EU State Aid rules	OECD (2013a)
DS160 Korea – Measures Affecting Imports of Fresh, chilled and Frozen Beef	WTO	OECD (2013a)
DS276 Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain	WTO	OECD (2013a)
DS379 United States –Definitive Anti Dumping and Countervailing Duties on Certain Products from China	WTO	OECD (2013a) and OECD (2015a)
DS413 China – Certain measures affecting electronic payment services	WTO	OECD (2013a)
DS436 United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	WTO	OECD (2015a)
A numbers of cases on abuse of dominance and cartels and restrictive agreements involving SOEs in postal services, telecommunications, energy and transport services	National and EU competition laws	OECD (2016b)
A numbers of cases of merger scrutiny involving SOEs by the European Commission	EU	OECD (2016b)

Source: Authors' elaboration.

Box 2. Objectives of SEs and their international implications

There are legitimate economic and non-economic reasons for establishing and maintaining state enterprises. In some circumstances, intervention through state enterprises may deliver outcomes which may be preferable to those that would be attained by unregulated, or poorly regulated, markets. Particularly at earlier stages of economic and institutional development, correcting domestic market failures, providing public goods, and fostering economic development may in some cases argue for state control or support of certain entities (see e.g. OECD, 2015f).

For example, state monopolies may be a sensible economic policy in industries with substantial economies of scale and important externalities. State enterprises can also be useful as instruments of provision of public or merit goods which would not be supplied by competitive markets at socially optimal levels. They have also been used to foster development of industries that are considered economically desirable and that would not otherwise be developed through private investment (e.g. OECD, 2012c).

Pursuit of such public objectives by commercially active state enterprises necessarily involves some form of preferential treatment *vis-à-vis* other market players (see Table 2).⁵ It is this preferential treatment and the fact that public objectives set for state enterprises may differ across countries which is a source of tension in international contexts.

In a domestic context both the government and the public have an interest in clearly agreeing on the objectives of state enterprises as well as on the types of preferential treatment afforded to them.⁶ In addition, both are interested in minimising the unintended distortions so that, to the extent possible, goods and services are produced by those that can do this most efficiently. In an international context, citizens in different countries can have diverging views on the role of state enterprises in the economy and thus on the rationale for, and forms of, preferential treatment afforded to them. It is not unconceivable that some countries may also deliberately use state enterprises to pursue strategic economic and political objectives to the detriment of their foreign competitors. Approaches to regulating the state sector tend to vary across countries which in itself may distort the international level playing field. Enforcement may be less stringent or simply absent when state enterprises compete in foreign markets. Finally, disclosure and transparency, which take on particular importance in state sector management, are also more elusive in an international context.

In practice, state enterprises may pursue a mix of public and commercial objectives. A study comparing motivations for Chinese SOEs' internationalisation versus the motivations for privately owned companies found, for example, that state ownership for Chinese firms determines "half-political and half profit-driven" behaviour. In particular, while the main motivations for both categories of firms were accessing new resources, new technology or new strategic assets, SOEs were also driven by the need to comply with Chinese government policy, namely achieving one of four goals –introduction of advanced technology, access to raw materials, foreign exchange earnings and expansion of exports (Ren and Jack, 2014).

Similarly, a 2014 OECD survey on Chinese SOEs identified both profit-oriented and policy reasons as the main determinants of their internationalisation. In particular, profit-driven reasons included: better allocation of resources globally and integration of the company's product line; whilst motivations likely to be driven by Chinese government policy were catering for the Chinese domestic market and acquisition of advanced technologies and management experience. However, a similar survey of Chinese SOEs commissioned by the Business Council of Australia, did not mention serving policy objectives. This type of survey evidence should nonetheless be taken cautiously as it is most likely affected by the sensitivity of the issue and the unwillingness of managers to disclose information which may harm the reputation of the business (OECD, 2015a; OECD, 2016b).

Source: Authors' elaboration drawing significantly on OECD (2015a).

2.2 Level playing field—a common concern of trade and investment regulators

Economic literature has long supported the argument for a strong relationship between FDI and trade (e.g. Lipsey and Weiss, 1984, Swedenborg, 1979). However, the nature of this relationship is not straightforward either from a theoretical or empirical standpoint (Bouras and Raggad, 2015). The two activities have traditionally been thought of as either alternative ways of serving foreign markets or complementary activities. On the one hand, since FDI can serve as a means of replicating similar productive activities in a different country, higher trade and transport costs can lead to substitution of trade for FDI. For example, in a study comparing US production by Japanese firms and Japanese exports to the United States in the period 1978-1991, Blonigen et al. (2004) found a strong substitution effect in the automotive industry which coincided with reduction of US imports of Japanese automotive parts. On the other hand, if FDI is a way of organising production along the supply chain (e.g. splitting up the production process across different geographical locations in order to lower the costs of production), FDI and trade could be considered as complements (Chiappini, 2016).

⁵ In some cases, it can also involve unintended market distortions, which is related to the fact that state enterprises may be less efficient than their private counterparts (OECD, 2015a; OECD, 2015f).

⁶ To achieve these objectives, appropriate provisions can be included in domestic company law, competition and state aid regulations, and regulations relating specifically to the state sector.

The actual nature of the relationship between trade and FDI is likely to depend on the specifics of industry or even on the firms in question; in a cross-sectorial analysis of Japanese exports and outward FDI, Chiappini (2016) found, for example, that trade and FDI complement each other in electric machinery, transportation equipment and precision machinery (which happens to be a sector characterised by some of the highest degrees of production fragmentation globally, e.g. OECD, 2013c), while they are found to substitute for each other in the chemical products industry—a sector known for still high levels of tariff and non-tariff protection. Similarly, Dauti (2016) found FDI and exports to be strongly related in South East European countries and that the direction of the correlation depended on sector of economic activity.

The lower transport and communication costs that underpin global value chains have meant decreasing cost differences between supplying foreign markets by means of cross-border trade and foreign commercial presence. At the same time, FDI has become a primary vehicle for locating supply chain activities in different countries to take advantage of varying production costs and trade opportunities. These stronger interdependencies—either in the form of complementary or substitution effects—mean that loopholes and inconsistencies in rules governing trade by SEs can affect FDI by SEs and vice versa.

These interdependencies between trade and FDI are reflected in the shared principal concern of both the trade and investment communities related to internationally-active SEs: advantages unavailable to private firms and which might place the latter on an unequal footing when competing in international markets. Drawing on OECD (2015a; 2016b), Table 2 sets out the most common advantages granted to SOEs discussed in the literature.

Table 2. Examples of advantages granted to state enterprises

Types of preferential treatment	Description
<i>Preferential financing from and for SOEs, state banks or other (state-backed) financial institutions</i>	Preferential financing can entail: (i) favourable requirements with respect to rate-of-return on capital of SOEs; (ii) favourable requirements with respect to dividends of SOEs; (iii) direct financial state support (not linked to public service obligations); (iv) recapitalisation of SOEs at lower than market rates; (v) provision of credit below the market interest rate; and, (vi) provision of state-backed guarantees. This concern can extend to preferential lending by state-owned financial institutions to private companies (e.g. for the expansion/maintenance of their production capacities).
<i>Privileged access to information</i>	If SOEs are privy to privileged information from governments, including classified intelligence, confidential cabinet decisions, etc. then this could be perceived as an unfair advantage and can have an impact on market confidence. SOEs may also be perceived to have access to data and information which are not available to their private competitors or only available to a limited extent (i.e. planned regulation, procurements, technical specifications, sanitary rules, environmental policies, laws, taxation initiatives).
<i>Outright subsidies/Tax concessions</i>	Some SOEs receive direct subsidies from their government or benefit from other public forms of financial assistance to sustain their commercial operations. For example, while tax concessions can often be found in the form of schemes aimed at compensating SOEs for their public service obligations at home (e.g. delivery of postal service or transport services in remote areas which would not be commercially viable), if schemes are proportional to the business volume rather than public service obligations themselves this can be seen as a form of preferential treatment and tantamount to selective government subsidies.
<i>In-kind subsidies</i>	Another form of subsidisation is in-kind benefits, for instance where state-owned operators in network industries receive benefits such as land usage and rights of way at a price significantly below that which private competitors would have to pay in like circumstances. These exemptions artificially lower SOEs' costs and enhance their ability to price more efficiently than competitors. Other examples include preferential access to inputs such as labour and infrastructure.
<i>Grants and other direct payments.</i>	Grants or other direct payments can include: (i) policies that support R&D; environmental and green programmes; (ii) general economic development policies (e.g. industrial policy); (iii) sector or product-specific economic development policies; and, (iv) support for the provision of public services; all of which if not provided equally to competitors in the same market could create a non-neutral situation (to the extent that they can be considered distortive or only applicable to certain specific enterprises or groups of enterprises). ¹

Types of preferential treatment	Description
<i>Privileged position in the domestic market</i>	In many cases, governments entrust SOEs with exclusive or monopoly rights over some of the activities that they are mandated to pursue. This can be seen, for example, in postal services, utilities and other universal services that the state decided to pursue through state-controlled entities. Where SOEs continue to benefit from a legal or natural monopoly this may be of little practical consequence for the competitive landscape, but a number of SOEs in the network industries operate as vertically integrated structures with incipient monopolies in parts of their value chains. This can have a direct effect on relative competitiveness, and may also allow them to influence the entry conditions of would-be competitors across a number of commercial activities. Moreover, concerns may arise as to preferences towards SOEs in domestic public procurement.
<i>Explicit or implicit guarantees</i>	State guarantees for SOEs can be of concern if they reduce the cost of borrowing and enhance their competitiveness vis-à-vis their privately-owned rivals. In practice, it can be difficult for the state to convince markets that a given enterprise is not subject to such guarantees.
<i>Exemptions</i>	SOEs in some sectors and/or some corporate forms may enjoy outright exemptions from bankruptcy rules. This is of concern because equity capital is locked, and SOEs can generate losses for a long period of time without fear of going bankrupt. Exemptions from anti-trust enforcement can also create opportunities for SOEs to engage in anti-competitive behaviour. For example, it may allow SOEs to engage in predatory behaviour.
<i>Preferential regulatory treatment</i>	SOEs which are not subject to the same regulatory regimes as private firms can lower their operating costs. This can entail: (i) simplified procedures to obtain licences or permits; (ii) granting of special rights to extract resources; (iii) exemptions for application of general laws and regulations; (iv) exemptions from regulatory compliance (e.g. environmental or technical specifications); (v) exemptions or non-compliance with information disclosure requirements; (vi) unjustified denial of approvals to potential competitors; (vii) exemptions from building permits or zoning regulations; and, (viii) obtaining of grandfather clauses.
<i>Preferential treatment in public procurement</i>	Preferential access to information about upcoming public procurement contracts and tenders (i.e. technical or other specifications essential for awarding the contract); or outright favouritism of SOEs in awarding contracts can give an upper hand to an SOE vis-a-vis a potential competitor.
<i>Price support</i>	Price support refers to policy measures that can create a gap between domestic market prices and reference prices of a specific commodity.
<i>Support in the form of commercial diplomacy</i>	Reliance on the government's backing and diplomatic relations to pursue business opportunities, otherwise not commercially possible without such support or not available to competitors, can give SOEs an upper hand vis-a-vis competitors.

1. See also OECD Policy Guidance for Investment in Clean Energy Infrastructure www.oecd.org/daf/inv/investment-policy/CleanEnergyInfrastructure.pdf

Source: Based on OECD (2016b).

Two recent surveys undertaken by the OECD illustrate the similarities in perceptions of such advantages from the trade and investment perspectives and attempt to gauge the relative importance of these advantages as seen by business and policy makers.

The *OECD Business Survey on State Influence on Competition in International Markets* conducted in 2014, found that the economic effects of preferential treatment granted to foreign SOEs influenced respondents' sales in both domestic and foreign markets (OECD, 2015a). Domestic and foreign investments were reported to have been affected to a lesser extent than sales although the impact on foreign investments was larger than on domestic investment (Figure A1 OECD, 2015a).⁷

⁷ The *OECD Business Survey on State Influence on Competition in International Markets*, conducted in 2014 was designed to document specific advantages granted to state enterprises that result in most cross-border distortions and to compare them with advantages granted to private enterprises. The survey was sent to a balanced sample of representatives of enterprises operating in the sectors characterised by traditionally close relations between the state and business (e.g. manufacture of steel, mining of steelmaking raw materials, air transport services, telecommunications services, energy) and, to ensure a fair coverage in all other sectors, to several national and international business associations for further circulation among their members. Approximately 650 enterprises accessed the on-line survey and 157 of them completed it either fully or

When asked about the different forms of preferential treatment, tax concessions and in-kind subsidies granted to both state-owned and privately-owned companies by foreign governments were reported as having a strong negative impact on sales by the largest number of respondents, with the degree of reported impact increasing with state ownership. Other forms of preferential treatment granted to state-owned competitors reported to have a strong impact on sales were grants and other direct payments, concessionary financing, government guarantees and preferential regulatory treatment (Figure A3. OECD, 2015a).

The *OECD Survey on State-Owned Enterprises in the Global market-place* was conducted in early 2015 with participation of officials from 17 jurisdictions responsible for investment, trade and state-ownership policies (OECD, 2016d). While the questionnaire was tailored to the specificities of the different policy areas and as such does not allow for a direct comparison of similarities and differences in perceptions between the different policy communities, a number of parallels are clear. Responses to the trade section of the questionnaire revealed, for example, that 80% of respondents deemed that SOEs involved in international trade of goods and services benefitted from preferential treatment, and approximately half of respondents considered that foreign SOEs were accorded such treatment more frequently than private competitors (Figure A3). 73% said that preferential treatment of SOEs had some or a strong impact on the size and direction of trade of goods and services, while 20% felt that the determination of such preferential treatment was more difficult when the SOE was involved (for more details see OECD, 2016d).

Investment regulators, when asked about their concerns about foreign SOEs seeking to invest in their jurisdictions, and given a wide range of options to choose from, indicated that maintaining a level playing field through prevention of subsidisation and other benefits in the form of tax exemptions or favourable access to finance at home, was their primary concern; 54% of respondents indicated this issue was a significant concern while 38% indicated it was somewhat of a concern (Figure A5). By comparison, national security, a typical concern expressed in the context of foreign investments by SEs (e.g. OECD 2016b), was deemed to be a significant concern by 33% of respondents and somewhat of a concern by 17% of respondents (OECD, 2016d).

2.3 Example: State enterprises in the global steel sector

Recent developments in the steel sector are an interesting illustration of the concerns about maintaining a level playing field when private and state actors compete with each other in international trade and investment markets (e.g. OECD, 2016b). Due to its historical role in industrialisation, high entry and exit costs and strong upstream and downstream linkages to other economic activities, the steel sector has always occupied a special place in economic policy. In many countries, including several OECD members in the past, policies towards the sector included direct state ownership of steelmaking firms as well as state support to private actors. Today, the global steel sector is largely dominated by private producers, although government ownership and other forms of state intervention continue to play a significant role in some countries. This leads to questions about the extent to which investment, production and trade decisions in the global sector are based on market conditions.

In recent years, for example, concerns have been expressed about the extent to which state involvement may have aggravated the current overcapacity crisis in the sector (OECD, 2016b). Excess world steelmaking capacity (the difference between crude steel production capacity and demand) has surged from around 205 million tonnes in 2006 to a level estimated at more than 750 million tonnes in 2015, or from approximately 14% to more than 30% of installed capacity. This has resulted in the deterioration of profitability of steelmaking firms and significant trade disturbances and trade policy actions (OECD, 2016b; 2016f).

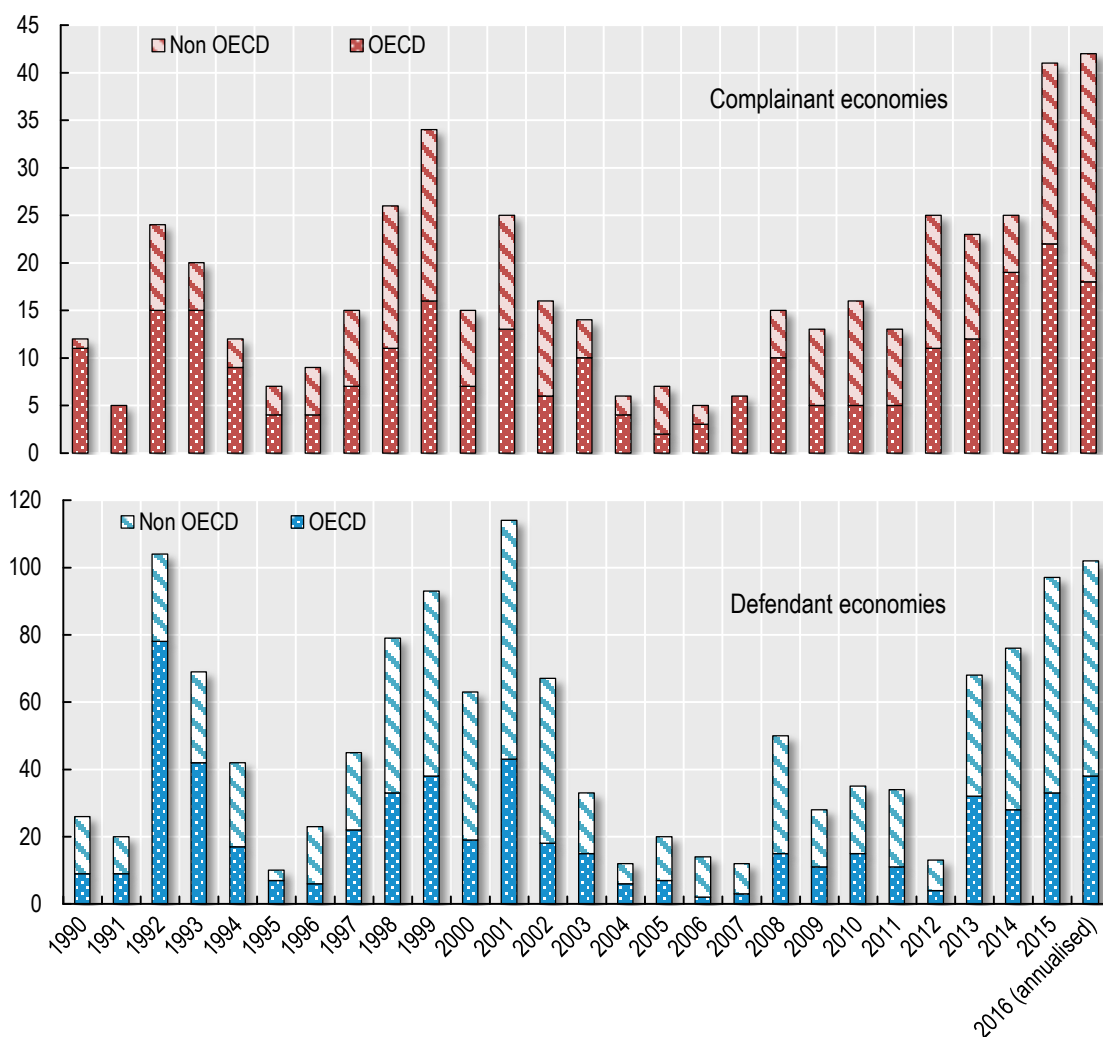
According to the WTO, steel accounts for the highest share (26%) of total trade remedy measures (antidumping, countervailing and safeguard measures) currently in force. It accounts for a particularly high share (44%) of countervailing duty measures, which are aimed directly at remedying government subsidisation

partially. The response rate differed significantly across economic sectors, undermining the actual representativeness of the sample. However, the varied response rate was clearly related to the extent to which state presence was seen as problem (i.e. the steel sector recorded the highest response rate) as well as to the sensitivity and complexity of the topic; the fact that the sensitive information provided may be identified and, as a result, harm enterprises' business operations was among the most frequently indicated reasons for not responding (for more details see OECD, 2015a).

(OECD, 2016f). OECD data examining trade remedy trends over time shows that the number of new antidumping and countervailing cases reached a historical high in 2015, and that trend appears to be continuing (Figure 1; OECD, 2016f).

Figure 1. New steel antidumping and countervailing investigations: 1990-2016

(Jan.-Jun., annualised). Top 15 complainant and defendant economies, new AD/CVD cases, 2001-2016 (Jan.-Jun.)"



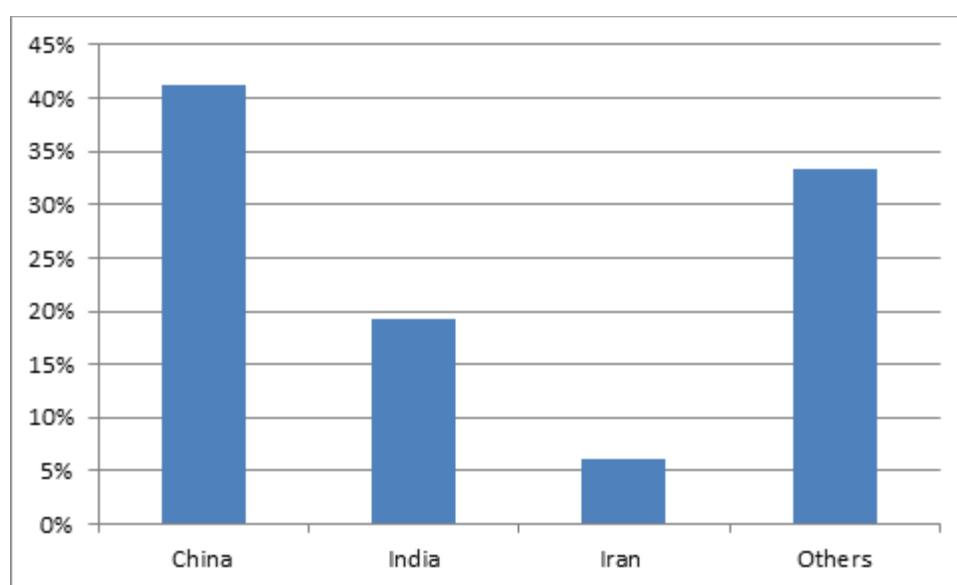
Notes: The data for 2016 refer to the annualised level from January-June. Each complaint in the panel above can target multiple defendants. A given jurisdiction can appear repeatedly as defendants in the lower panel.

Source: OECD, drawn from OECD (2016f).

The increase in excess steelmaking capacity since 2006 reflects continued investment in new capacity while global steel demand growth weakened significantly, and even became negative in 2015. While overcapacity leads to a deterioration of industry profitability, which for private investors normally means downscaling their investment in order to minimise fixed costs, this may be less so for state firms which may face softer budget constraints and may be guided by strategic, rather than commercial, objectives. The key concern with state involvement in this context is the extent to which the investment decisions, which sometimes involve FDI, of state enterprises are market-based and how they are contributing to excess capacity (OECD, 2016b). These concerns have also been expressed vividly in the *OECD Business Survey on State Influence on Competition in International Markets* which delved into preferential treatment of SOEs and where the steel sector accounted for the highest number of responses (20% of the total) (see OECD, 2015a).

SOEs play an important role in the steel industry and their production shares have been increasing in the most recent years, notably in several emerging economies. OECD (2015b) estimated that enterprises where the state owned more than 20% of shares accounted for one fourth of the steel production of the 40 largest steel producers in the world in 2013, while enterprises with more than 50% of state ownership accounted for less than one fifth. OECD (2013a) estimated that majority SOEs accounted for 13% of world's largest manufacturers of fabricated metals on the Forbes Global 2000 list. In addition, the *Steelmaking Capacity Database*, developed by the OECD in order to better assess the evolution of steelmaking capacity, reveals that the total planned or underway capacity addition associated with SOE investments was 124 million tonnes, corresponding to more than one-third of the capacity addition of all proposed future investment projects (OECD, 2015e). China accounts for 41% of the additional capacity while India and Iran account for, respectively, 19% and 6% (Figure 2). These estimates suggest that not only is state ownership in the steel sector above the levels seen in many other sectors (see also Section 2.1) but that steelmaking SOEs are contributing significantly to capacity growth in a sector that is struggling with very high overcapacity.

Figure 2. Country origin of additional capacity by steelmaking SOEs



Source: own calculation based on OECD (2016b): State-Owned enterprises as global competitors. Also see OECD World Crude Steelmaking Capacity Database: <http://www.oecd.org/sti/ind/steelcapacity.htm>

Considering the country of origin of state investors and the location of their investments, we see that, in contrast with private companies, capacity expansion by SOEs in the steel industry is more domestically-oriented; only 8% of the total capacity expansion undertaken by SOEs takes place abroad (and this is equivalent to 15% of the total capacity expansion abroad), while the corresponding share for private steelmaking firms is at 79%. We also see that most of the SOE capacity expansion abroad is undertaken by China (more than 95%) and is located in Indonesia (51%), South Africa (25%) and Malaysia (18%). The domestic orientation of SOE investments has several potential explanations; it might reflect a number of factors such as a privileged position of SOEs to invest in domestic markets, protectionism against their investment in foreign markets, or their competitive disadvantage as foreign investors stemming from lower levels of technological or managerial expertise. However, OECD (2012b) showed that SOEs were among the most active foreign investors in steelmaking raw materials.

A related analysis prepared for the OECD Steel Committee suggests also that, on average, steelmaking SOEs were less profitable and more indebted than private firms over the last ten years, while also being much larger than their private competitors (OECD, 2016b). At the same time, there are indications that some continued to receive preferential project financing from state-owned banks even as overcapacity was expanding (OECD, 2015d). All this suggests that state ownership and other forms of state support may have contributed to the crisis which has global trade and investment repercussions.

2.4 Differences in perspectives between the trade and investment regulators

While maintaining a level playing field is clearly a common concern of both trade and investment policy-makers, there are also some differences between trading products across borders and delivering them to foreign markets by means of foreign establishment. These differences underpin some of the disparities in regulation of international trade and investment in general and, in particular, they explain some of the differences in approaches to disciplining international activities by SEs by trade and investment regulators.

Foreign establishment generally means operating in the regulatory framework of the foreign country, including company and competition laws, reporting standards, products, labour and environmental standards and many others. It also means enlargement of the domestic capital base and expansion of economic activity (e.g. employment or links with domestic firms) in the host economy which may result in a different calculation in relation to investor's competitive behaviour (e.g. the host country may offer special treatment or exemptions, or be prepared to tolerate some anticompetitive practices). At the same time, foreign establishment also means acquisition of foreign assets which brings in additional considerations related to national security and long-term economic strategy on the part of the host country (OECD, 2016b).

While cross-border trade does not generally require compliance with the foreign domestic regulatory framework with regard to production, it requires compliance with national and international product standards such as, for example, technical and sanitary and phytosanitary standards. Arm's-length trading activities of firms located abroad can generate employment or investment in trading partner countries, albeit under more indirect links (e.g. through GVCs). At the same time, some potential anticompetitive behaviour of foreign firms might perhaps be perceived more benignly, particularly when they do not have a sufficiently large impact on the domestic market.

3. Non-binding policy approaches

Given both the potentially positive contribution internationally trading and investing SEs can make, as well as the concerns raised about their competitive behaviour, there is an interest in elaborating policy approaches that minimise any potentially distortionary effects and at the same time restrain undue protectionism that may be directed at SEs. Promotion of reforms at the national level with respect to domestically-owned state firms in the areas of corporate governance of the state sector, competition policy and competitive neutrality policies is one set of viable options (OECD, 2013a; 2015a; 2016a; 2016b), in particular if it can be internationally co-ordinated. This approach is attractive because reforms undertaken unilaterally can cover a potentially wider set of issues, but it also faces some challenges.

A difficulty with regulating state enterprises at the international level is that a number of countries use state enterprises to help deliver important public services or meet public policy objectives at the national level. This suggests that domestic reforms and softer forms of international co-ordination of these reforms might have better potential for covering a wider range of issues and delivering desired outcomes. The OECD Guidelines on Corporate Governance of State-owned Enterprises⁸, which were updated in 2015 (OECD, 2015b)⁹, list and elaborate on a number of guiding principles in areas such as: legal and regulatory framework; principles of the state acting as an owner; state-owned enterprises in the marketplace; equitable treatment of shareholders; relations with stakeholders; transparency and disclosure; and the responsibilities of the boards of state-owned enterprises. The Guidelines are not binding for any OECD government, however they are part of the OECD

⁸ In the 2015 edition of the Guidelines SOEs are defined taking into account a number of criteria, beyond the corporate form, which include the degree of ownership and control. Control is defined broadly to include: where the state is the ultimate beneficiary owner of the majority of voting shares; or otherwise exercising an equivalent degree of control (through the board), or other than through bona fide regulation.

⁹ See more information on OECD Guidelines on Corporate Governance of State-owned Enterprises with the following link:

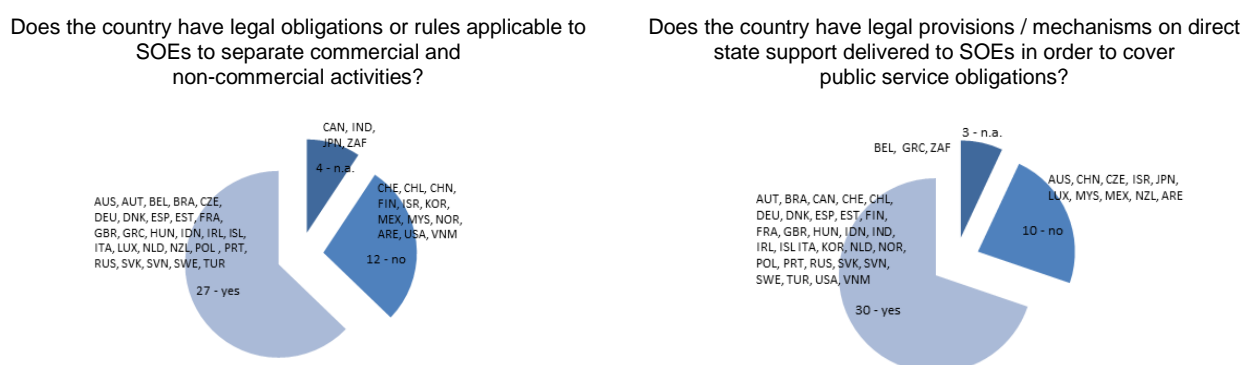
www.oecd.org/daf/ca/revisionoftheoecdguidelinesoncorporategovernanceofstate-ownedenterprises.htm.

acquis, with which countries acceding to the OECD are expected to associate themselves.¹⁰ In addition, several non-Members are either already adhering or expected to adhere to the Guidelines in the future. The general approach of the Guidelines is to focus on corporate outcomes while giving individual jurisdictions freedom to decide on whether and how to achieve these.

Chapter III of the Guidelines on “State-owned enterprises in the marketplace”, in particular, recommends the maintenance of a level playing field among state-owned and privately-owned incorporated enterprises engaging in economic activities, and elaborates on what in practice this should involve. Among others, specific recommendations cover: separation between the state’s ownership function and other state functions that may influence the conditions for state-owned enterprises; standards of transparency and disclosure regarding costs of SOEs combining economic activities with public policy objectives and funding by the state of the latter; extension of application of relevant general laws to SOEs; various requirements to ensure SOEs face market-consistent access to financing; and competitive behaviour of SOEs as both bidders and procurers in public procurement.

As documented in the on-line [OECD Database on National Practices and Regulations with Respect to State Enterprises](#) for a sample of 43 countries, policies in some of these areas vary, including across OECD countries (see an example in Figure 3 and OECD, 2015a). This suggests that there may be considerable scope for levelling the playing field through implementation of the Guidelines.

Figure 3. Separation of commercial and non-commercial activities and provisions to cover public service obligations



Source: OECD Database on National Practices and Regulations with Respect to State Enterprises; OECD (2015a).

Some of the limitations of the Guidelines in international context include the absence of explicit consideration of cross-border issues, their status as a “Recommendation” which is non-binding for adherents, and voluntary implementation by countries which are not adherents.

Nevertheless, the Guidelines are a useful reference for advocacy-oriented approaches to creating a level playing field in international markets. In addition, they hold potential for more direct applications in an international context. They could in principle be employed in both the trade and investment arenas, although so far they have been mostly used as a benchmark to assess the quality of potential cross-border state investors by investment regulators. This can be explained by the lack of specific multilateral rules on investment governing both market access and rules of competition (with the notable exception of GATS mode 3, see below). The lack of such rules in general, and in the context of SEs in particular, both makes it legally possible and provides incentives for countries to assess the quality of investors (e.g. through SE-specific screening mechanisms).

An application of the Guidelines may seem less pressing and straightforward in the area of international trade, where multilateral rules exist at the WTO level and take a predominantly ownership-neutral approach (Section 4.1). However, as argued by Kowalski (2014), there are a number of WTO provisions (e.g. on subsidies) where the Guidelines could readily make a useful contribution, in particular in relation to

¹⁰ In other words, the application of accessing countries is reviewed vis-à-vis their political commitment towards adopting OECD Recommendations, including the Guidelines on Corporate Governance of SOEs.

transparency and disclosure. Indeed, the Guidelines have been recently referenced in the transparency and corporate governance section of the European Union's initial proposal for legal text on state-owned enterprises of the Transatlantic Trade and Investment Partnership (EC, 2015).¹¹

The OECD Freedom of Investment (FOI) Roundtable in collaboration with the OECD Working Party on State-ownership and Privatisation Practices have also recently considered a report entitled “*Assessing Foreign State-owned Enterprises: A Guidance for Regulators Based on the OECD Guidelines on Corporate Governance of SOEs*” (OECD, 2016c). The report aims to orient investment regulators towards the most relevant provisions of the 2015 OECD SOE Guidelines with regard to foreign investment policies. The FOI Roundtable concluded that provisions in the Guidelines were relevant and pertinent to conceptualize the relationship of SOE governance with investment regulation and encouraged the OECD Secretariat to develop a structured reporting template. As a result of this effort, the “*OECD Transparency Checklist for SOE Operating Abroad*” (OECD, 2016e) developed a first “structured reporting template” that closely follows the Guidelines and is intended to be used by SOEs as a credibility-enhancing mechanism when expanding commercial operations abroad. It is also intended to create a common understanding and clear expectations of what are considered generally accepted standards of good practice for use by investment regulators when assessing foreign SOE investment.

The success of this initiative will initially depend on the uptake of the Checklist by investment regulators, as this will also provide an incentive for SOEs to also use the checklist. In the future, interested parties could reflect on how to develop the Checklist so that it can be used more consistently in both trade and investment contexts. This would have to take into account disciplines and approaches that already exist at the WTO and those that are being developed in PTAs and BITs (see the next Section). If fruitful, this process could lead to establishment of standards that could inform development of more integrated disciplines in future trade and investment agreements.

4. Regulation of international trade and investment of state enterprises

As argued above, promotion of domestic reforms with respect to state firms in the areas of corporate governance of the state sector can be an attractive approach, especially if it is implemented in a coordinated or binding manner. Absent such approach, such reforms may fall short of providing the sort of certainty and consistency that are needed to boost confidence and sustain opening of international markets.

Elaboration of harmonised and enforceable conditions for both market access and competition of internationally active SEs, although more difficult to achieve, might have a potential of delivering more coherent and dependable results. While not perfect, such disciplines already exist at the WTO level covering international trade in goods and services and some aspects of international investment. A number of more recent preferential trade agreements (PTAs) build on and try to fill the gaps in the WTO rules by providing clearer definitions of relevant concepts and by including additional obligations regarding discriminatory behaviour of SEs. International investment agreements (IIAs) and bilateral investment treaties (BITs), while coming from a perspective that focuses less on competitive conditions and more on investor protection, also increasingly contain SE-specific provisions.

This section reviews the most important of these provisions in light of the evidence on the nature of SEs’ international activities and the related concerns reviewed in Section 2. One set of issues discussed throughout concerns the scope and depth of existing provisions as well as their ability to ensure a level playing field. Another set of questions relates to the disparity in approaches to regulating international trade and investment of SEs and the issues this creates.

4.1 Multilateral level: WTO

The general approach taken in WTO law is to discipline discriminatory actions of governments which may distort competition in international markets, while at the same time leaving Members freedom in terms of how they manage their domestic economies, including the state sector. Consequently, WTO Agreements adopt a

¹¹ See: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf

neutral approach to state ownership¹² and contain only a limited number of specific provisions concerning specific types of enterprises. However, WTO Agreements include several disciplines which may be used to curb anti-competitive behaviour by states involving state enterprises to the extent they affect international trade of goods and services. The relevant WTO disciplines are summarised below.

4.1.1 WTO disciplines on trade-distorting government policies that may advantage state enterprises

First, there are the WTO rules that discipline some of the trade-distorting government policies that may be directed at state enterprises or any other enterprises.

For example, the WTO Agreement on Subsidies and Countervailing Measures (ASCM) prohibits or disciplines various forms of trade-distorting financial preferences both when they are granted to state enterprises and private firms. According to ASCM Art 1.1, a subsidy is deemed to exist if there is a financial contribution by a government in the territory of a Member and a “benefit” is consequently conferred. Financial contributions include direct transfer of funds, foregoing of government revenue through tax credit, provision of goods and services and payment to a funding mechanism entrusted to carry out these functions. While export subsidies and those favouring the use of domestic over imported goods are prohibited due to their evident distortionary effects (Art 3), other subsidies are generally allowed although they can be “actionable” when they cause adverse effects to the interest of other Members (Art. 5).¹³ In case of recognition of a subsidy within the meaning of Art 5, the member is required to take appropriate steps to either remove the adverse effect or suppress the subsidy. Where injury is being caused to a domestic industry, the member can impose countervailing duties after a proper countervailing duty investigation has been conducted. Alternatively, the ASCM lays out a procedure to remedy the situation first through consultations and then through the Dispute Settlement Body (DSB)—the WTO State-to-State Dispute Settlement (SSDS) mechanism (Art 7).

The provisions of the ASCM thus address one of the key concerns raised in the context of SEs: subsidisation. However, a number of issues may arise in applications of these provisions to SEs.

First, the identification of the presence of a “benefit” may be not always possible, especially in the case of state enterprises. For example, whether provision of equity investment by government can be considered as conferring benefit depends on whether it can be regarded as inconsistent with the usual investment practice of private investors in the territory of that Member (ASCM, Art 14(a)). This criterion may be more difficult to interpret in the case of SEs where states invest or operate companies precisely because private investors would have behaved differently. Similarly, the conditions for establishing the presence of such benefit require a comparison with a local marketplace benchmark, for example in the case of government loans and guarantees (Art 14(b)), which may be impractical in economies with large degrees of state intervention because of the market distortions already present.^{14 15}

Second, it can be difficult to detect a subsidy to a state enterprise if, for example, its finances are not separated from the finances of the state itself, or if the operations of such enterprises are not transparent. This can be, for example, the case when there are no legal obligations or rules applicable to state enterprises to separate commercial and non-commercial activities, as is the case in several jurisdictions (Figure 3 above and

¹² Some SOE-specific provisions have been added in the WTO accession protocols of China and Russia (see OECD, 2013a).

¹³ In particular, three types of adverse effects may take place. First, the subsidy may constitute *direct injury* to the domestic industry of another member. Second, it may cause nullification of benefits of concessions bound under Art II of the GATT. Finally, the subsidy may cause *serious prejudice* to the interest of another member, as it is the case for subsidies to cover operating losses sustained by an industry or an enterprise (Art 6 ASCM).

¹⁴ Qin (2004) for example argues that in the case of China, where State control is prevalent, there is no market benchmark (Qin, 2004).

¹⁵ The Appellate Body Report on “US-Lumber CVD Final” addresses this issue by allowing the use of an alternative benchmark which relates to “prevailing market conditions in the country of provision”. However, the report does not specify how to analyse these “prevailing conditions”, therefore leaving gaps in the interpretation of the law.

OECD, 2015a). Thus, even though the ASCM offers advanced provisions on subsidies, these are difficult to enforce in the case of state enterprises. Enforcement of the ASCM with regard to state enterprises would be strengthened by more extensive rules on transparency and disclosure for these entities. The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015a) which list and elaborate guiding principles in a number of areas, including transparency and disclosure of the corporate accounting system of SOEs, could be a useful starting reference point for this exercise (OECD, 2013a and Section 3).

Another significant shortcoming of existing WTO subsidy disciplines in this context is that there are no equivalent subsidy rules for services. The ASCM does not apply to trade in services and no specific disciplines have been developed yet for services subsidies. Such subsidies are subject to basic GATS disciplines, including the MFN obligation and, where WTO members have chosen to make relevant commitments, the National Treatment obligation. GATS Article XV mandates WTO members to negotiate with a view to developing multilateral disciplines addressing trade-distorting subsidies but the negotiations have not resulted in new disciplines yet (see also Section 4.1.3 on the GATS).

Another example of disciplines on trade-distorting government policies that may advantage state enterprises is Article III of the General Agreement on Tariffs and Trade (GATT) which establishes the principle of National Treatment on taxation and regulations and requires that any taxes, regulations and other government measures should not be applied to imported or domestic products so as to afford protection to domestic production. This also applies to domestic production by SEs and therefore in principle disciplines a wide variety of measures governments can use to benefit their SEs.¹⁶ However, because of the focus on non-discrimination in terms of imports, it could be argued that provisions of Article III may not apply to tax or regulatory advantages that may be extended to SEs which have invested abroad and localised production in foreign subsidiaries while selling them domestically or in foreign markets.

4.1.2 WTO disciplines on actions of state enterprises as extensions of governments

Second, in principle all WTO obligations (e.g. subsidisation under the ASCM, Most-Favoured Nation, National Treatment, bans on import and export restrictions), which normally bind governments and not enterprises, can be applied to state enterprises if the complainant in a dispute is able to demonstrate that such enterprises are acting as “extensions” of governments, which may be defined differently depending on the context.

For example, benefits granted by SEs to other SEs or private firms can be considered as subsidies within the meaning of the ASCM if the granting SEs can be considered “public bodies”. As discussed in OECD (2015a) WTO case law has established that “public body” must be “an entity that possesses, exercises or is vested with governmental authority.” It has also established that ownership and control are relevant criteria in the determination of whether an entity is a “public body”, but they are not decisive factors.¹⁷ In particular, determination of “public body” status has to reflect on what is considered to be government functions in the legal order of the country in question, but it may also consider the features normally exhibited by public bodies (OECD, 2015a). Thus, this approach does not single out any particular type of entity as being considered to be a vehicle for subsidies. This lends this approach useful flexibility and allows it, in principle, to “catch” subsidies by a wider range of SEs. At the same time, it can be seen as creating uncertainty and potentially risking downplaying the importance of interests, rights and obligations that are implied by ownership or control. In an alternative approach, a certain level of state ownership or control could be presumed to indicate a “public body” status especially since a benefit also needs to be demonstrated to determine a subsidy.

A related concept, which can be used in the WTO to discipline subsidies granted by SEs which are not “public bodies” is the notion of “indirect subsidies”. According to WTO jurisprudence, an indirect subsidy exists when (1) a private body has been explicitly “entrusted” or “directed” by the government to carry out a

¹⁶ For example, subsidies in the form of preferential credit terms for the purchase of local products are prohibited (see e.g. Panel Report on “Italian Discrimination Against Imported Agricultural Machinery”).

¹⁷ According to the WTO case law, determination of “public body” status has to reflect on what is considered as government functions in the legal order of the country in question but it may also consider what features are normally exhibited by public bodies (Kowalski and Perepechay, 2015).

subsidy function within the meaning of Art 1.1 of the ASCM and (2) a pass-through of the “benefit” to an entity subject to countervailing duty investigations is presumed (Qin, 2004). However, in the case of at least some SEs, such as for example state-owned banks, explicit acts of entrustment may be absent and the arm’s length relation between the banks and the final recipients may raise further issues in presuming an actual pass-through¹⁸ even though these entities may *de facto* be extending below-the market financing to market players. Qin (2004), for example, suggested that this may have been the case in China in 2003 when the China Development Bank issued a bond through which SEs could retire their existing high-cost foreign debt. Thus, the criteria needed to establish the existence of an indirect subsidy, raise issues similar to those seen with the “public body” status.

Another set of provisions that disciplines situations where SEs can be used by governments as vehicles to influence international trade is contained in Article XVII of the GATT on State-Trading Enterprises (STEs). While the original text of Article XVII defines an STE to be a “state enterprise” or “any enterprise which is granted exclusive or special rights or privileges”, the current “working definition” of STEs puts emphasis on the latter.¹⁹ Thus, other state enterprises, which cannot be proven to have been granted exclusive or special rights or privileges, are not considered STEs even though their actions may be trade-distorting. The Article aims to discipline cases where the level of purchases or sales conducted by STEs is not based on economic principles but rather on political considerations. However, the case law has established a narrow interpretation of the provisions of the Article to mean that STEs can act in an anti-competitive manner insofar as they do not violate general principles of non-discriminatory treatment prescribed by the GATT; no separate obligation is applied to STEs to operate in accordance with “commercial considerations” (e.g. Nakagawa, 2012).

Moreover, the wording of Article XVII(b) presents some ambiguities regarding the obligation to “afford the enterprises of the other contracting parties adequate opportunity [...] to compete for participation” in their purchases or sales. In particular, WTO jurisprudence interpreted the word “enterprise” in this article as referring only to the STEs of Member countries, thus excluding private companies. The implication of this interpretation is therefore that behaviour of a STE disadvantaging non-government commercial entities with respect to opportunities to compete is not covered by the article. This effectively limits the effects of these provisions to a small subset of firms (Smith, 2006) and does not adequately address the wider issue of market distortions caused by the privileged position of STEs vis-à-vis private companies.²⁰

Some WTO members have agreed to further market opening in the area of government procurement; that is, purchases of goods and services by public bodies for governmental purposes. The WTO Agreement on Government Procurement (GPA) obliges member countries’ entities covered by the agreement to open their contract solicitations to competition from all other GPA countries without discriminating between foreign and domestic products and suppliers.²¹ In negotiating GPA commitments, WTO members can, in their schedules to the Agreement, both list relevant state enterprises and add qualifying provisions that limit the extent of their obligations (OECD, 2015a). The WTO GPA signatory countries as well as those in the process of accession are

¹⁸ See the Panel Report on “United States-Measures Treating Exports Restraints as Subsidies” and on “Lumber CVD Final”, for a complete discussion on indirect subsidisation.

¹⁹ Specifically, the working definition defines STEs as: “Governmental and non-governmental enterprises which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence their purchase or sales in the level or direction of imports or exports.”

²⁰ These issues came up in “Canada-Measures Relating to Export of Wheat and Treatment of Imported Grain”. In this case the US claimed that the Canadian Wheat Board was engaging in unfair trading practices due to its losses being guaranteed by the government of Canada and the fact that the enterprise was paying a significantly lower price to producers. These trading practices were therefore impeding US private firms from competing. In that occasion the Appellate Body deliberated that the obligation not to disadvantage private companies was outside the scope of Art XVII(b), which instead referred to STEs.

²¹ See the text of the revised WTO GPA, Article 4. The revised version of 1994 WTO Agreement on Government Procurement (GPA) entered into force on 6 April 2014.

often reluctant to name their state enterprises as procuring bodies²² as these entities would automatically lose their discretionary power to favour national industry when making purchasing decisions (Mathieson, 2010). Thus, in the context of new countries' adherence to GPA and member-countries' cooperation within GPA, there are some discussions on the scope of the agreement as a response to the problem of the under-coverage of state enterprises (Mathieson, 2010; see also OECDh).

Overall, while the WTO contains a number of rules relevant for disciplining actions of state enterprises, these do not always seem well adapted to situations where state actors compete actively with private competitors in mixed markets. The existing rules put emphasis on the ability to either demonstrate formal links with the state (e.g. explicit entrustment or granting of special rights and privileges) or that the enterprises perform governmental functions, when no equivalent formal links would be expected to exist between related private corporate entities.²³ They may thus be argued to be of limited use in curbing anti-competitive actions of modern internationally-active state enterprises which are owned, controlled or influenced by the state but which have not been explicitly entrusted or granted exclusive or special rights or privileges or which are not performing governmental functions. There may thus be value in considering ownership and control (Section 4.2.1) as relevant and practical criteria for determining the relationship with the state. This is the approach taken in some of the new PTAs, including, for example the EU-Viet Nam FTA and the TPP. Ownership is also acknowledged as a useful criterion in merger scrutiny by competition authorities or in national policies with respect to corporate governance or competitive neutrality of the state sector (Section 3).

In fact, elements of an ownership-specific approach have already been adopted in the WTO law through incorporation of the Accession Protocols of China, Viet Nam and the Russian Federation, which explicitly refer to state ownership and similar concepts and wherein the acceding countries make specific commitments with respect to SOEs. For example, Paragraph 78 of the report of the Working Party on the Accession of Viet Nam, which belongs to Viet Nam's accession commitments, states:

“The representative of Viet Nam confirmed that Viet Nam would ensure that all enterprises that were State-owned or State-controlled, including equitized enterprises in which the State had control, and enterprises with special or exclusive privileges, would make purchases, not for governmental use, and sales in international trade, based solely on commercial considerations, e.g., price, quality, marketability, and availability, and that the enterprises of other WTO Members would have an adequate opportunity in accordance with customary business practice to compete for participation in sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of Viet Nam would not influence, directly or indirectly, commercial decisions on the part of enterprises that are State-owned, State-controlled, or that have special and exclusive privileges, including decisions on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement and the rights accorded to non-governmental enterprise owners or shareholders. The Working Party took note of these commitments.”

4.1.3 WTO disciplines on trade in services—a bridge between trade and investment regulation?

The General Agreement on Trade in Services (GATS) disciplines government measures that can impede international trade in services, including measures which affect services suppliers of a Member having commercial presence in the territory of any other Member (i.e. Mode 3 of services trade). The Agreement is a key element of multilateral disciplines on SEs because many such enterprises operate in services sectors such as telecommunications, energy or postal services, which were traditionally seen as the domain of the state and non-tradable, but have since become increasingly internationally contestable, including owing to privatisation processes and the adoption of the GATS.

The GATS is “the only multilateral agreement that contains legally binding and enforceable rules with regard to measures affecting foreign investment” (De Meester and Coppens, 2013).²⁴ It is a bridge between

²² To benefit from GPA provisions the members must either provide definitional characteristics or catalogue all of their government entities on central and sub-central levels that will be bound by the GPA rules.

²³ For example, ownership would normally be is a sufficient criterion for the purposes of merger scrutiny.

²⁴ The Trade-Related Investment Measures (TRIMs) Agreement prohibits investment-related measures that are inconsistent with national treatment and quota prohibition relating to goods trade under the GATT.

international trade and investment law in the sense that it combines the sometimes different approaches to regulation of international commercial activities seen in these two areas of regulation. In particular, the GATS applies the economic efficiency perspective which typically guides trade agreements, to investment. It recognises rules-based provision of services as economically beneficial and encourages its balanced liberalisation. At the same time, the Agreement contains provisions aimed at protecting foreign investors seen more typically in investment agreements which rarely explicitly focus on efficiency and competition.²⁵ The GATS bridges some of these disparities between trade and investment law while leaving others open. These improvements and remaining gaps have important implications for ensuring a level playing field between private and state enterprises. In this sense, the negotiations under the Trade in Services Agreement (TiSA) are exploring further advances in the definition of international rules for trade in services.

In accordance with the trade legal tradition, the GATS sets State obligations towards other Member States. It contains a cross-sectoral most-favoured nation (MFN) clause for trade in services analogous to the MFN clause for goods in the GATT. In particular, Art II prohibits member States from treating services and service suppliers of any other Member less favourably than they treat like services from any other country. This clause specifically addresses distortions in trade in services through discriminatory treatment amongst foreign investors. However, in contrast to the traditional GATT disciplines, other provisions, in particular those on Market Access (Art XVI) and National Treatment (Art XVII) do not apply transversally, but are subjected to each member's decision to explicitly commit to them—and the extent to which they commit to them—in particular sectors by means of their inclusion in each country Schedules of Specific Commitments (Leroux, 2007).

GATS Art XVI on Market Access prohibits governments from taking specific quantitative measures to restrict market access where commitments have been taken (Members may place restrictions on the extent of market access committed, provided these are specified in the schedule). This does not include qualitative limitations, which opens up a possibility that SEs can be discriminated against for example for reasons of “public interest” or “national security” as it is the case in a number of countries which have inward FDI policies specific to SOEs (see OECD, 2015a). According to the National Treatment obligation (Art XVII), States should provide equality of competitive opportunity to national and foreign like services and service suppliers in sectors subject to commitments (and to the extent committed). This implies that countries cannot favour their own SEs in a sector whenever they have committed to full National Treatment in that specific sector. This obligation appears both in the GATT, for sale and purchase of goods, and in some investment treaties, for equality of treatment between all national and like foreign investors (see also Section 4.2.2).

Following the WTO ownership-neutral approach, the GATS does not single out state enterprises, state trading enterprises or state-owned enterprises explicitly, but contains two related concepts (see also Box 3). First, it carves out from the scope of the Agreement “services provided in the exercise of governmental authority”. These services are defined as services which are “supplied neither on a commercial basis nor in competition with one or more service suppliers”. This means that, on the one hand, some domestic state enterprises delivering services provided in the exercise of governmental authority are excluded from the scope of the agreement and, on the other, that services provided by state enterprises otherwise are covered by the GATS (these conditions are cumulative; both must be met). Under the GATS Members also need to ensure that monopoly suppliers (including state enterprises) act in a manner consistent with members' specific commitments, as well as with the MFN obligation, in the supply of their services.²⁶

However, on top of the difficulties that may come up when determining the “exercise of governmental authority” (Section 4.1.2), the term “commercial basis” is not further defined in the GATS and may therefore leave room to different interpretations, ranging from the mere charging of a symbolic price to purposeful profit maximisation behaviour (Adlung, 2006). Interpretations of the actual consequences of this carve-out vary.

²⁵ For example, Art XII obliges State not to cause “unnecessary damage to the commercial, economic and financial interest” of other member States, in case of exceptional restrictions to capital transfer.

²⁶ The provision only applies to the supply of services and not to their purchase (Adlung, 2005). This is a clear efficiency-inspired provision coming from the trade legal tradition, which builds on a similar provisions present in GATT regarding the supply of goods on the part of trading monopoly.

Sinclair (2002) argues, for example, that these key terms have been subject to varying interpretations by countries, for example in the context of postal services. Implications for health and education services, where models vary significantly among countries, have also been the subject of considerable debate.²⁷

Box 3. Ownership as a criterion to establish nationality of foreign services providers in the GATS

The concept of ownership is used in the GATS to establish the nationality of foreign services providers. For the GATS to apply, the commercial presence should be either owned or controlled by “nationals” of a Member State, where “owned” implies a 50% equity interest and “controlled” means having the “power to name a majority of directors” (Art XXVIII(n)). However, in some cases shareholders may be dispersed in such a way that they may not be recognised as belonging to any country, or an enterprise is recognised as belonging to a State whose investors do not control the company (as it would be the case, for example, in presence of a blockholder holding a minority of shares and dispersed shareholders from a Member State holding the remaining shares).

This can be important because, contrary to investment treaties where investors may challenge States directly through Investment-State Dispute Settlement (ISDS, see Section 4.2.6)), the GATS is subject to the WTO State-State Dispute Settlement (SSDS). This implies that service suppliers established through a commercial presence which believe they have been damaged by the violation of a provision in the GATS need to refer to their home State for a claim to be raised. However, the specific requirements which should be satisfied for these investors to be recognised to be of that Member state—and therefore within the meaning of the GATS—may in effect raise issues regarding the effective recognition of damage, particularly for multinational enterprises with dispersed shareholdings (Zdouc, 1999).

An important gap in the area of services is the absence of specific WTO disciplines—equivalent to the ASCM in the area of goods—on subsidies in the services sectors. This is a significant gap considering the important presence of state enterprises in the services sector as well as the vertical links that exist between goods and services sectors. Article XV of the GATS deals explicitly with subsidies, but it only envisages consultations with a view to developing rules at a later stage. This implies that the affected States are not able to resort to dispute settlement and seek remedies. Nonetheless, subsidies to domestic SEs could also be challenged on the basis of the National Treatment provision, depending on Country Schedules of Specific Commitments; a foreign supplier who has established a commercial presence in this country could claim that subsidies to an SE are negatively affecting its supply of services (De Meester and Coppens, 2013). However, the scarcity of case law regarding subsidy coverage under the National Treatment provisions in the GATS suggests that there is uncertainty in the effectiveness of such an approach. Moreover, several states have inserted subsidy-related exceptions to the commitment on National Treatment under Mode 3 (Adlung, 2005).²⁸

Interestingly, the GATS contains some obligations with respect to anticompetitive behaviour of service suppliers which may restrict trade in services (Art IX). This includes an obligation on Members to enter consultations at the request of any other Member and provide relevant publicly available information which may help assessing the practice under inquiry. Although, as it is the case for Article XV, only “sympathetic consideration” is required of Members in respect of this Article, the inclusion of a reference to anticompetitive practices is another signal that levelling the playing field among service providers is an important aim of the GATS.

In a nutshell, unlike WTO rules governing trade in goods, the GATS can discipline discriminatory government behaviour related to own state enterprises when they compete with foreign service providers in the domestic services market and specifies conditions for market access to foreign state entities which are generally not distinguished from foreign private entities. However, it suffers from the lack of enforceable obligations on foreign services providers equivalent to those in the area of goods trade (e.g. subsidies, commercial considerations). Further developing such disciplines could go a long way towards alleviating concerns related to “undue” advantages granted to foreign state service providers. More generally, they would also increase the

²⁷ Some have argued that the exclusion has been interpreted quite narrowly; for example, public monopolies in the health sector have been deemed not to be “services supplied in the exercise of governmental authority” unless they are provided free of charge. Analogously, they argue that public education may not be covered by the carve-out if the public institution competes with private providers www.iatp.org/files/GATS_and_Public_Service_Systems.htm

²⁸ These include the United States, Switzerland and Australia.

chance of multilateral disciplines on services trade becoming a model for regulating investment flows (De Meester and Coppens, 2013).

4.2 Regulation at the preferential level

Rules related to state enterprises in selected existing PTAs generally build on and try to fill the gaps in WTO rules. This may involve: providing more specific definitions, which go beyond the concepts already present in the WTO, of enterprises that are bound by provisions of these agreements in the same way as States; more precise interpretations of certain related concepts; and, indeed, additional obligations on state enterprises in terms of competitive behaviour, transparency and consultation. International investment agreements (IIAs) and bilateral investment treaties (BITs), while coming from a perspective that focuses less on competitive conditions and more on investor protection (e.g. Wagner 2014), also increasingly contain SE-specific provisions.

These developments suggest that upgrading of international regulation of cross-border activity of SEs is already underway. However, the PTAs and BITs in question naturally reflect specificities and sensitivities of the signatory countries and adopted rules typically differ from one agreement to another. They provide some indications of directions in which multilateral rules could evolve in the future but the potential for their harmonisation at the multilateral level remains unclear. While some of the differences in SE-related provisions across existing agreements are marginal, others are more substantial and reflect different values and norms. There are also disparities in approaches to regulating international trade and investment of SEs, although some new agreements, such as the Trans-Pacific Partnership (TPP), already include more inter-linked investment, trade and competition provisions.

The subsequent review of regulation of international trade and investment of SEs in existing PTAs and BITs follows a list of key issues that are addressed in these agreements.

4.2.1 Definition of state enterprises

As already foreshadowed, in principle, an enterprise does not need to be owned or controlled by the state to effectively be favoured by it. In particular, private enterprises may act on the instruction or under the influence of a State in carrying out their activities. It may therefore make sense to specify general competition and subsidy rules that are capable of disciplining all forms of anti-competitive state behaviour. This is the approach taken for example in the WTO and the EU (e.g. OECD, 2013a).

At the same time, if certain state enterprises are more probable vehicles of anti-competitive behaviour of states, as a preventive measure, it may be more practical to define them and hold them to the same standard as States themselves. The latter approach is taken in the North American Free Trade Agreement (NAFTA), for example, where a “state enterprise” is defined as “an enterprise owned or controlled through ownership interest by a Party” (Art 1505). Other PTAs with provisions on SEs negotiated by the United States, such as the US-Colombia FTA and the US-Korea FTA use definitions similar to that of NAFTA, as does the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Sometimes, different definitions are adopted depending on the party. In the US-Singapore FTA, for example, in the case of the United States, “government enterprise” means “an enterprise owned, or controlled through ownership interests by a Party” while in the case of Singapore it means “an enterprise in which that Party has effective influence”.

The Trans-Pacific Partnership (TPP) negotiated between twelve countries of the Pacific Rim builds on these earlier approaches and clarifies what is meant by ownership or control. It elaborates a definition of “state-owned enterprises” which are enterprises “principally engaged in commercial activities in which a party directly owns more than 50% of the share capital; controls, through ownership interests, the exercise of more than 50% of the voting rights; or holds the power to appoint a majority of members of the board of directors.” These enterprises are covered by the advanced provisions of TPP Chapter 17 on “State-owned Enterprises and Designated Monopolies (see Section 4.2.3) aiming to ensure a level playing field between private and state-owned firms.

In the TPP, “commercial activities” are further defined as “activities which an enterprise undertakes with an orientation toward profit-making and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise”. This

separates the commercial state-owned enterprises that are covered by Chapter 17 provisions from those that do not compete in the marketplace. The definition follows a similar logic to the definition of “economic activities” in the OECD SOE Guidelines²⁹ and alleviates the kind of ambiguity that may be present, for example, when interpreting the concept of “commercial basis” in the GATS where it is not specifically defined (Section 4.1.3).

The purpose of defining SEs in investment agreements is different. These agreements generally focus on protection of investors rather than promoting competition. Preferential IIAs which include BITs and investment chapters in relevant PTAs have so far focused on investors’ rights and rarely on obligations and they are mostly enforced through investor-state complaints mechanisms, although it appears that almost all investment treaties also contain state-state dispute settlement (SSDS) provisions. The main issues in this context, particularly with BITs, are whether investments by state enterprises are covered by these agreements and whether they can be enforced under investor-state dispute settlement (ISDS) (see also Section 4.2.6).

The majority of IIAs do not mention or specifically distinguish between investors on the basis of ownership or control. This may give rise to some uncertainty with respect to the coverage of these agreements to state enterprise investment, although it may be interpreted that they are nonetheless implicitly covered by the treaties (OECD, 2016a). In the past few years, BITs have come to address one type of state enterprises—SOEs—regularly by stipulating that they cover international investments by SOEs (OECD, 2016a). In particular, some 287 out of 2,959 treaties, mainly negotiated by Australia, Canada and the United States, specify that state-owned enterprises are equally protected (OECD, 2015c), although sometimes they do not provide more specific definition of such enterprises. Some treaties including SOEs amongst the “investors”, such as, for example, the Austria-Georgia BIT and US-Moldova BIT provide definitions similar to NAFTA. In the Kuwait-South Africa BIT, “State entity” is defined as an entity with similar purposes as a “department of government, corporation, institution or undertaking wholly or partially owned or controlled by government and engaged in activities of commercial nature” (OECD, 2015c). These inclusions usually clarify that these firms have the same rights as private investors and protect them from expropriation and discriminatory treatment motivated by political reasons. Exceptionally, three BITs negotiated by the United Kingdom, Germany and Switzerland with Panama exclude Panama’s state-owned enterprises.

4.2.2 *Countries’ non-discriminatory treatment of SEs*

As discussed above, the WTO framework contains norms granting non-discriminatory treatment (NDT) of like goods and, under certain conditions, services. As discussed in Section 4.1, these can prove useful in curbing anti-competitive behaviour by SE. As these provisions are present at the multilateral level, existing PTAs often only include clauses referring to this general obligation.

On the investment side, most BITs contain provisions on NDT of foreign investors, including, as discussed above, state-owned enterprises. BITs contain a “most-favoured nation” obligation, which requires states to accord to nationals of the other contracting party no less favourable treatment than that they accord to a third member state. In a similar fashion to the “national treatment obligation” in the WTO framework, national treatment provisions in BITs require contracting parties to accord to investments or investors from other parties no less favourable treatment than they accord to nationals. In contrast to similar provisions in the WTO, non-discriminatory treatment rules in BITs are not driven by economic efficiency or level playing field considerations but have instead been developed to ensure protection of, and grant certain rights to, foreign investors.

In particular, NDT treatment can be granted either in the pre-establishment and post-establishment phases or only in the post-establishment phase (Wang, 2016, Kantor, 2012). The former is considered more liberal than the latter, since investors, including SEs, may still encounter discrimination in their attempt to establish their investment. Some treaties have extended non-discriminatory treatment to pre-establishment on the basis of “negative lists” or reservations whereby some sectors or types of establishment are specifically restricted or excluded. While the sectoral nature of the “negative list” does not specifically impose market access restrictions to SEs, these enterprises are sometimes mentioned in other parts of treaties, such as country reservations. For

²⁹ See “Applicability and Definitions”, OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015).

example, in the EU-Korea FTA, cross-sectorial “investment in Spain by foreign governments and foreign public entities, directly or through companies or other entities controlled directly or indirectly by foreign governments” needs approval by the government. In CETA, Canada maintains the reservation to review acquisitions made by foreign investors when the Canadian business is valued more than CAD \$1.5 billion. However, in the case of acquisitions by state-owned enterprises, the review threshold is fixed at CAD \$369 million (Ackurst et al., 2016).

As a complement to the provisions on discriminatory treatment, BITs also contain a “fair and equitable treatment” (FET) clause, which ensures maintenance of a minimum standard in accordance with international law. Some case law has interpreted FET as prohibiting arbitrary obligations on investors, denial of justice and discrimination of foreign investors on the basis of specific targeting. However, there is no general consensus as to what FET implies, since some arbitration decisions are contradictory. In particular, while, in principle, it could be argued that discriminating against state enterprises as investors could be considered as non-compliant with FET, no such SE-specific disputes on FET have arisen so far (e.g. UNCTAD, 2012).

In some investment treaties, NDT provisions apply only in “like circumstances” or in “like situations”. This implies that, in order to be covered by these provisions, SEs should have a certain degree of “likeness” with private firms. As most treaties do not define the meaning of these concepts, the interpretation of “like circumstances” is mainly undertaken through case law. In particular, most cases have maintained a competition-based reading, which is analogous to the interpretation of the scope of non-discriminatory treatment of *like* goods and services in the WTO (Kurtz, 2002). For example, in the ADM vs Mexico case the tribunal argued that the investor and the comparator “compete face to face in the same market” (Wang, 2016). The implication of such interpretation for SEs as investors is that they are less likely to be discriminated against in the application of investment treaties on the basis of alleged non-likeness based solely on their state-ownership. The predominant interpretation focusing on terms of competition is an important overlap between trade and investment law. However, this interpretation has been challenged in the Indian Model BIT, where state-owned enterprises are deemed “unlike” their private counterparts because of their different ownership status, which excludes them from the non-discriminatory treatment provisions. Similar considerations have been implicitly made in the resolution of the United Parcel Service Case (Wang, 2016).

4.2.3 Advantages granted to and by state enterprises

As already foreshadowed, investment agreements come from a perspective that focuses less on competitive conditions. However, some include provisions that attempt to ensure efficient competition between state and private enterprises, or specifically mention the principles of “competitive neutrality”.³⁰ Some older BITs, for example, make explicit reference to competitive neutrality between SEs and private firms in respect of non-discrimination treatment considerations. For example, the US-Panama BIT (1983) and the US-Bangladesh BIT (1986) require parties to provide conditions of competitive equality to privately-owned enterprises where investments are in competition with investments owned or controlled by parties (OECD, 2015c).

Trade agreements traditionally focus on opening of markets and at the same time eliminating state-related distortions. Competitive neutrality-related issues are thus at their heart although, as we have seen with the SE-related provisions in the WTO law, there are also some gaps. These are increasingly being filled in competition-related chapters of PTAs.

For example, in NAFTA, US-Korea or Colombia-US FTAs, state-owned enterprises are bound by the same non-discriminatory obligations as governments.³¹ Similar provisions are also present in some of the agreements involving the European Union such as the EU-Viet Nam or EU-Korea FTAs. The US-Singapore FTA has additional transparency provisions, prohibits direct government influence on SOEs, collusion and other

³⁰ Competitive neutrality has been defined at the OECD as a situation in which “no entity operating in an economic market is subject to undue competitive advantages or disadvantages” (OECD, 2011).

³¹ Art 1503 of NAFTA for example obliges parties to ensure that their state enterprises accord “non-discriminatory treatment” in the sale of their goods or services to “investments in the Party’s territory of investors of another Party”. Similar provisions are present in a range of FTAs negotiated by the US (Willemyns, 2016) and CETA.

anti-competitive activities and foresees a progressive reduction in the number of Singapore's SOEs. In the Singapore-Australia FTA, Art. 4 of Chapter 12 requires parties to "take reasonable measures to ensure that government at all levels do not provide any competitive advantage to any government-owned business in their business activities simply because they are government owned".

The Treaty on the Functioning of the European Union (TFEU) is an interesting example of an international agreement that includes disciplines that help ensuring a level playing field, even if they are ownership-neutral. Art. 107.1 of the TFEU prohibits state aid which distorts competition and affects trade between EU member States by favouring certain undertakings or the production of certain goods.³² State aid rules cover both aid to private and public companies and include: capital injections, grants, tax reductions and tax holidays, reductions in social security costs and warranties. The selected types of state aid that are allowed have to be notified and approved by the European Commission, and the Commission has also the power to recover incompatible state aid. The EU has also strong EU-level public procurement rules. Cases of allegedly illegal existing aid and aid granted without the authorisation of the Commission are handled by the Commission itself, which may impose recovery obligation to the Member State. In addition, the European transparency directive requires that commercial and non-commercial activities of public companies should have separate accounts (OECD, 2013a).

The TPP Chapter 17 on "State-Owned Enterprises and Designated Monopolies" introduces a new quality in regulation of international activities of SEs. It provides more precise definitions of state and state-owned enterprises (see above) and sets out rules for their behaviour to the extent it may affect trade, in goods and services, as well as investment between TPP Parties, including in third markets. It further provides specific definitions of advantages granted to SEs and by SEs in the form of non-commercial assistance and definitions of related adverse effects and injury; requirement of both non-discrimination and commercial considerations when engaging in commercial activities; more extensive transparency provisions; and inclusion of provisions on dispute settlement. The treaty also extends the provision of non-discriminatory treatment by SEs of foreign goods and services suppliers both in their sale and purchase activities to non-Parties. As such the TPP does fill many, if not most, loopholes with respect to state enterprises that have been identified in the WTO law and, in addition, extends the focus on competitive conditions to investment.

4.2.4 Competition issues

An important issue related to the establishment of a level playing field between SEs and private companies is the extension of competition rules to SEs. There are several general issues with the application of competition law to anti-competitive behaviour of SEs, which are related to the fact that traditional antitrust law is predominantly focused on preventing dominant companies or cartels from restricting competition, and thus normally assumes profit-maximisation as a competitive benchmark (OECD, 2011; OECD, 2016b). Nevertheless, particularly when SEs enjoy privileged market position or receive undue advantages from the state, they may engage in anticompetitive behaviour without necessarily aiming at profit maximisation.³³ They may also follow non-commercial considerations in the purchase or sale of their goods or services, therefore hampering the efficient functioning of the market.

While NAFTA does not explicitly require states to restrict anticompetitive behaviour of SEs, it sets a government obligation to prevent general anticompetitive practices. A more specific approach is taken for monopolies; a government designated monopoly "should not use its monopoly position to engage, either directly or indirectly" in ways that adversely affect an investment of an investor of another Party, including "through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory

³² Selectivity of the aid on the basis of the industry, the number of jobs or the geographical spread is sufficient for a measure to qualify as state aid under Article 107.1 (Luya, 2015). However, in order to prevent normal shareholder behaviour from being classified as state aid, considerations should be made whether the state was acting as a shareholder or a public authority. For the measure not to be considered as state aid, it should be deemed that it would also have been adopted under normal market conditions by a private investor (OECD, 2013a).

³³ This can include exclusive purchase or predatory pricing practices, refusing to supply inputs indispensable to competition in an ancillary market or collusion between firms (Willemyns, 2016).

conduct”. NAFTA also includes a clause requiring parties to ensure that designated monopolies act according to “commercial considerations” in their “purchase or sale of the monopoly good or service in the relevant market”, namely according to the normal business practices of privately-held enterprises. The US-Colombia FTA and the US-Korea FTA, among others, contain similar provisions.

In recent PTAs negotiated by the US, provisions applicable to monopolies are more generally extended to SEs. In the US-Singapore FTA, for example, Singapore is required to ensure that government enterprises do not engage in collusive practices such as entering into agreements among competitors restraining competition on price or output and engage in exclusionary practices which lessen competition.³⁴ The US-Singapore FTA also extends the commercial consideration obligation to SEs. Commercial considerations obligations on SEs are also included in CETA, the TPP and the EU-Viet Nam FTA.

One shortcoming of the existing competition-related provisions in PTAs is that they are rarely subject to dispute settlement. For example, Article 8 of Chapter 12 on Competition Policy of SAFTA specifies that “neither party shall have recourse to any dispute settlement procedures under this Agreement for any issue arising or relating to this Chapter.” Other PTAs contain similar provisions. Provisions contained in the TPP seem to hint at an improvement; while still no dispute settlement mechanism is provided for general competition provisions, Article 17.5 requires each party to “provide its courts with jurisdiction over civil claim against an enterprise owned or controlled through ownership interest by a foreign government based on a commercial activity carried on its territory”.³⁵

When not covered by dispute settlement, to be effectively enforced, competition provisions would need to be transposed into national legislation. However, as foreshadowed previously, national competition law in general assumes profit maximisation as a driving force, this leading to issues regarding identification of anticompetitive practices from SEs. In particular, in the case of SEs, an important anticompetitive effect is “non-recoupment predation”³⁶, which does not involve profit maximisation. Moreover, this fragmentary approach may lead to an uneven international regulatory framework (Willemys, 2016), implying that a number of potential distortions remain not being adequately addressed.

Within the European Union, Art 86 TFEU requires public undertakings or undertakings to which Member States grant special or exclusive rights to comply with the competition rules present in the Treaty. In particular, according to Art 102 TFEU, any abuse by one or more undertaking of a dominant position within the internal market is judged “incompatible in so far as it may affect trade between Member States”. On the basis of the Antitrust Regulation, the Commission is also endowed with the power to investigate potential infringements of Article 102 and impose fines to firms engaging in anti-competitive behaviour.

4.2.5 Transparency

As already highlighted in earlier sections, transparency and disclosure of information are particularly important in the case of SEs as they allow identification of either undue advantages granted by States to SEs or actions undertaken according to non-commercial considerations, facilitating compliance with treaty provisions and effective dispute settlement. While investment agreements do not set obligations on States to ensure SE transparency, PTAs have gradually included transparency clauses. These partially fill gaps in the WTO Agreements where transparency provisions on state enterprises are limited to the obligation to notify STEs under GATT Article XVII. For example, the US-Singapore FTA requires each party to make available, at the request of the other Party, public information about government enterprises and designated monopolies and exemptions to measures prohibiting anticompetitive business conduct. Analogous provisions are present in the US-Colombia FTA.

³⁴ Chapter 12, Art 12.3 para 2d.

³⁵ Note that this obligation does not apply when the party does not provide jurisdiction over similar claims against private enterprises.

³⁶ This identifies a situation in which a company is not able to collect enough profit to make up for its losses sustained during a predatory attack.

Article 17.10 of the TPP contains more elaborate provisions on transparency. In particular, other than providing a public list of state enterprises, on reasonable request of another party, a party is obliged to disclose information about the percentage of shares they own in a specific enterprise, a description of any special share held, the titles of any government official serving, the entity's annual revenue, exemptions and immunities granted to the entity and publicly available information. Article 6 of the EU-Viet Nam FTA contains a similar provision. However, this latter FTA also requires notification of any "cross-holdings and other links with different enterprises or groups of enterprises". In the European Union, the Transparency Directive requires public companies having both commercial and non-commercial activities to keep separate accounts. This is useful to identify any possible case of cross-subsidisation.

The transparency and corporate governance section of European Union's initial proposal for legal text on state-owned enterprises in the Transatlantic Trade and Investment Partnership (TTIP) also contains obligations on provision of information about SEs. It references the OECD Guidelines on Corporate Governance of State-Owned Enterprises as a high standard of transparency and corporate governance.³⁷

4.2.6. *Dispute settlement*

PTAs and BITs use different approaches to solve potential disputes regarding the implementation of countries international obligations, which has some implications for curbing anti-competitive behaviour of SEs.

In the WTO, disputes are solved through State-to-State dispute settlement (SSDS), on the basis of the procedures detailed in the WTO Dispute Settlement Understanding (DSU), involving deliberations by a Panel and, as a last resort, of the WTO Appellate Body. Disputes in PTAs are generally solved through the same SSDS mechanisms based on the DSU, with some simplifications. SSDS is an important way for solving controversies as the procedure is well defined, therefore implying legal certainty (OECD, 2012a). However, SSDS does not allow private commercial actors subject to injury to directly raise a dispute against the infringing State. This implies that these third parties need to notify the alleged violation to their own State, should they want to obtain remedy from the injury.

Differently from the WTO, several BITs give not only states, but also investors, the right to resort to dispute settlement mechanisms (Investor-State Dispute Settlement, or ISDS) through international arbitration. In most BITs the definition of "investor" does not distinguish between state-owned or privately-owned entities and in many cases it specifies that state-owned entities may qualify.³⁸ Some trade agreements allow ISDS for violation of provisions contained in their investment chapters especially the non-discriminatory treatment principle. This approach, typical of agreements negotiated by the US, such as NAFTA, the KORUS FTA³⁹ and the TPP, has lately been reflected by the European Union in the EU-Viet Nam trade agreement and in CETA. However, provisions contained in other chapters are still not subject to ISDS but require resolution through the traditional State-to-State procedures (Feldman, 2010).

Under the ICSID Convention, SEs can stand against states, as long as they are recognised to be a "national" of a Contracting Party, therefore enjoying the same rights of private firms regarding dispute settlement. The literature traditionally subjects recognition to the so-called "Broches test", according to which a state-owned enterprise should not be disqualified unless it is acting either as an agent of the government or is discharging an essentially governmental function. As of today, the Broches test has been applied only in the CSOB vs The Slovak Republic case where the Slovak Republic claimed that CSOB was a state agency of the Czech Republic rather than an independent commercial entity and thus the real party to the dispute should be the Czech Republic. However, in contrast to the spirit of the test, in that decision the tribunal determined that, even if CSOB was acting as an agent of the government, the definition of "national" applied, as its activities were commercial in nature. Other cases such as CDC vs Seychelles, HEP vs Slovenia and Telenor vs Hungary have instead recognised SEs' right to stand under ICSID without applying the test. The case law, and especially

³⁷ See: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf

³⁸ For example, in the Japan-Vietnam BIT, "investor" is "any entity constituted or organised under the applicable laws and regulations" of the home country.

³⁹ Grimmett (2012) provides a full discussion on dispute settlement provisions in the KORUS FTA.

the interpretation of the Broches test in the *CSOB vs The Slovak Republic* case, leaves therefore doubts regarding the criteria used to define state-owned enterprises as nationals under ICSID. Clearer drafting in BITs and PTAs with investment chapters could safeguard against such confusion.

5. Concluding discussion

State enterprises (SEs) have been increasingly competing with private firms in international markets. Such competition has involved both cross-border trade of goods and services and FDI. There is a strong interest in ensuring that trade and FDI, including by SEs, are not impeded and can make a positive contribution to the global economy, but there are also concerns that governments may provide SEs with certain financial or regulatory advantages or influence them to confer such advantages on other firms. The latter can undermine the rationale for—and the benefits from—more open policies related to international trade and FDI. The challenge is thus both to minimise any potentially distortionary effects on international trade and investment created by state enterprises as well as to restrain undue protectionism that may be directed at them.

There are several policy options that can help in achieving these objectives although they differ in terms of the scope of issues they can cover as well as in their applicability in international contexts.

Promotion of domestic reforms with respect to own state firms in the areas of competition, competitive neutrality policies and corporate governance is one set of viable policy options. This approach is attractive in the sense that reforms undertaken unilaterally can cover a potentially wider set of issues. In particular there is considerable scope for levelling the playing field through implementation of the OECD Guidelines on Corporate Governance of State-owned Enterprises. One example is the on-going initiative to use the Guidelines to create the *OECD Transparency Checklist for SOE Operating Abroad*. In the future, stakeholders could reflect on how to develop the Checklist so that it can be used more consistently in both trade and investment contexts. This paper argues that there are indeed a number of areas in the context of the WTO and preferential trade and investment agreements where the Guidelines could readily make a useful contribution, in particular in relation to informing discussions on transparency and disclosure. This could lead to establishment of standards that could inform development of more integrated disciplines in future trade and investment agreements.

At the multilateral level, WTO Agreements already contain some rules that on the one hand discipline discriminatory government behaviour which may be related to SEs and, on the other, ensure market access to SEs behaving in a competitive manner. For example, market access and national treatment commitments in the GATT ensure non-discrimination access—including for state enterprises—and the WTO Agreement on Subsidies and Countervailing Measures (ASCM) contains prohibitions on certain types of subsidies which could be granted to or by SEs. However, WTO rules were developed when state firms were oriented primarily towards domestic markets, or were concentrated in declining or special sectors; they have not been developed with a purpose of regulating activities of modern internationally-integrated SEs.

In particular, while the WTO contains a number of disciplines relevant for disciplining actions of SEs, they emphasise the ability to demonstrate formal links with the state (e.g. explicit entrustment or granting of special rights and privileges) or that the enterprises perform governmental functions, which may be difficult to establish. This highlights the value that may exist in explicitly acknowledging ownership and control as relevant and practical criteria for determining the relationship with the state.

It can also be difficult to detect a subsidy to a state enterprise if, for example, widespread distortions in an economy would not allow comparison to non-subsidised firms through the use of a local marketplace benchmark or if operations of such enterprises are not transparent. More extensive requirements on transparency and disclosure with respect to state enterprises could make a useful contribution to addressing this issue.

WTO provisions in the area of services suffer from the lack of enforceable obligations on subsidies equivalent to those in the area of goods trade. Developing such disciplines could go a long way towards alleviating concerns related to “undue” advantages granted to foreign state service providers. More generally, they would also increase the chance of multilateral disciplines on services trade becoming a model for regulating investment flows (De Meester and Coppens, 2013).

A number of more recent PTAs, most notably the TPP, build on and try to fill the gaps in the existing WTO rules by providing clearer definitions of relevant concepts and by including additional obligations regarding discriminatory behaviour of SEs. This can involve providing specific definitions of enterprises that are bound by provisions of these agreements in the same way states are, and, indeed, additional obligations on state enterprises in terms of competitive behaviour, transparency and consultation. IIAs and BITs, while coming from a perspective that focuses less on competitive conditions and more on investor protection, also increasingly contain SE-specific provisions.

Although a significant heterogeneity across the different PTAs, IIAs and BITs makes generalisations difficult, certain common trends can be identified. For example, more clarity is increasingly sought on the type of entities which are the focus of disciplines in order to improve legal certainty in their implementation. In particular, the definitions of state ownership and control play an increasingly important role in specifying SE-related provisions. There is also a tendency to include more precise definitions and tests for the presence of advantages granted to SEs and by SEs to the extent they may affect trade, in goods and services, as well as investment. These are welcome developments; case law, while illuminating regarding the interpretation of vague provisions in specific situations, leads at times to contradictory interpretations or shows the presence of gaps and ambiguities in the underlying legal concepts. Competition-related provisions in PTAs are rarely subject to dispute settlement but more and more trade agreements include transparency requirements. In the sphere of investment treaties, which have so far mostly focused on investors' rights and not specifically on levelling the playing field, the main issue is whether investments by state enterprises are covered by these agreements and whether they can be enforced under investor-state dispute settlement.

These developments suggest that upgrading of international regulation of cross-border activity of SEs is already underway. However, the PTAs and BITs in question naturally reflect specificities and sensitivities of the signatory countries and adopted rules typically differ from one agreement to another. They provide some indications of directions in which the multilateral rules could evolve in the future but the potential for their harmonisation at the multilateral level remains unclear. While some of the differences in SE-related provisions across existing agreements are marginal, others are more substantial and reflect different values and norms. On the one hand, the fragmented rules can be seen as second-best to harmonised disciplines at the multilateral level. On the other, they can make a positive contribution in the absence of relevant initiatives at the multilateral level and can even be seen as entailing coherent solutions leading to efficient regulation from an economic viewpoint (e.g. Delimatsis, 2011).

The future evolution of SE-related disciplines in PTAs and BITs will not only have important implications for the shape of future multilateral rules, but, more practically, the quality of rules will influence competition between the different rule-making blocks in terms of attracting trade and investment. The increased contestability and complexity of markets and the more versatile nature of state intervention in the economy today mean that in order to make market integration more effective the new agreements will need to consistently cover issues which transcend the traditional boundaries of trade, investment, and competition policies. This paper argues that this process should involve taking stock of experiences across the different policy domains. The problem of ensuring a global level playing field between SEs and private actors is a vivid illustration of some of the challenges that need to be overcome in this respect and how the different areas of policy making can draw on their respective experiences.

In particular, the approach adopted in international trade agreements means that countries commit not to discriminate against state enterprises (or any other enterprises for that matter) under the condition that the latter play by market rules in their commercial activities and are not used by states to distort competition. Investment treaties generally focus on protection of investors and typically do not discipline privileged treatment of SEs by their states or pre-establishment policies with respect to investment by state enterprises. This means that, on the one hand, SEs as investors can face more hurdles when seeking to invest in foreign markets (e.g. screening of SE investment). On the other hand, foreign-invested SEs can continue to benefit from some of the competitive advantages extended to them by their home governments. If an international level playing field is to be effectively achieved in the future the trade and investment approaches will have to converge.

References

- Ackhurst, K., S. Nattrass, and E. Brown (2016), CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade. *ICSID Review*, 31(1), 58-76.
- Adlung, R. (2006), Public Services and the GATS. *Journal of International Economic Law*, 9(2), 455-485.
- Adlung, R. (2016), International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS. *The Journal of World Investment & Trade*, 17(1), 47-85.
- Blonigen, B.A., K. Tomlin and W.W. Wilson (2004), “Tariff-jumping FDI and Domestic Firms’ Profits”, *Canadian Journal of Economics*, 37 (August 2004): 656-77.
- Blyschak, P. (2010), State-owned enterprises and international investment treaties: When are state-owned entities and their investments protection. *Journal of International Law and International Relations*. 6, 1.
- Bouras, H. and B. Raggad (2015), Foreign Direct Investment and Exports: Complementarity or Substitutability An Empirical Investigation. *International Journal of Economics and Financial Issues*, 5(4).
- Chiappini, R. (2016), Do Overseas investments create or replace trade? New insights from a macro-sectoral study on Japan. *The Journal of International Trade & Economic Development*, 25(3), 403-425.
- Dauti, B. (2016), Trade and foreign direct investment: Evidence from South East European countries and new European Union member states. *Zbornik radova Ekonomskog fakulteta u Rijeci: časopis za ekonomsku teoriju i praksu*, 34(1), 63-89.
- Delimatsis, P. (2011), “The Fragmentation of International Trade Law”, *Journal of World Trade* 45, No 1., (2011): 87-116.
- De Meester, B. and D. Coppens (2013), Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows? *Regulation of Foreign Investment: Challenges to International Harmonization*, 21.
- Feldman, M. (2010), The standing of state-owned entities under investment treaties. *Yearbook on International Investment Law & Policy*, 2011.
- Grimmett, J. J. (2012, March), Dispute Settlement in the US-South Korea Free Trade Agreement (KORUS FTA). *Congressional Research Service Report for Congress (March 21)*. Washington.
- Kantor, M. (2012), Little Has Changed in the New US Model Bilateral Investment Treaty. *ICSID review*, 27(2), 335-378.
- Kowalski, P. (2014), “Strengthening the Rules on State Enterprises” in Evenett S. and A. Jara (eds.), *Building on Bali: A Work Programme for the WT*, A VoxEU e-book, Centre for Economic Policy Research, London.
- Kurtz, J. (2002), A general investment agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD multilateral agreement on investment. *University of Pennsylvania Journal of International Economic Law*, 23(4).
- Leroux, E. H. (2007), Eleven Years of GATS Case Law: What Have We Learned?. *Journal of International Economic Law*, 10(4), 749-793.
- Lipsey, R. E. and M.Y. Weiss (1981), Foreign production and exports in manufacturing industries. *The review of Economics and Statistics*, 488-494.
- Luya, R (2015), *EU State Aid Law and National Tax Ruling*, European Parliament, Directorate General for Internal Policies.
- Mathieson, (2010), “Accessing China’s Public Procurement Market: Which State-Influenced Enterprises Should the WTO’s Agreement Cover”, Vol. 40, No. 1, *Public Contract Law Journal*.
- Nakagawa, J. (2012, July), Regulatory Harmonization Through FTAs and BITs: Regulation of State Owned Enterprises (SOEs). In *Society of International Economic Law (SIEL)*, 3rd Biennial Global Conference.

- OECD (2011): Capobianco, A. and H. Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options", *OECD Corporate Governance Working Papers*, No. 1, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/5kg9xfghdghg6-en>
- OECD (2012a): Gaukrodger, D. and K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, 2012/03, OECD Publishing DOI: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>
- OECD (2012b), "State Ownership in the Steel Industry: Issues for Consideration", internal working document, Directorate for Science, Technology and Industry.
- OECD (2012c), "Competitive Neutrality: Maintaining a Level Playing Field Between Public and Private Business", OECD Publishing. Available at: <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/50302961.pdf>
- OECD (2013a): Kowalski, P., M. Büge, M. Sztajerowska and M. Egeland, "State-Owned Enterprises: Trade Effects and Policy Implications", *OECD Trade Policy Paper*, No. 147, OECD Publishing. DOI: <http://dx.doi.org/10.1787/5k4869ckqk7l-en>
- OECD (2013b): Gestrin M. and Y Shima, "A Stock-Taking of International Investment by State-owned Enterprises and Relevant Elements of National and International Policy Frameworks", unpublished OECD document.
- [OECD \(2013c\), *Interconnected Economies: Benefiting from Global Value Chains*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264189560-en.](http://dx.doi.org/10.1787/9789264189560-en)
- OECD (2014a): Christiansen, H. and Y. Kim (2014), "State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field," *OECD Corporate Governance Working Papers*, No. 14, OECD Publishing. DOI: <http://dx.doi.org/10.1787/5jz0xvfv16nw-en>
- OECD (2014b), "State-owned Enterprises in the Global Marketplace; A road-map for Freedom of Investment Roundtable work in 2015-16", unpublished OECD document available as: [DAF/INV/WD\(2014\)16/REV2](http://dx.doi.org/10.1787/DAF/INV/WD(2014)16/REV2).
- OECD (2015a): Kowalski, P. and K. Perepechay, "International Trade and Investment by State Enterprises", *OECD Trade Policy Paper No. 184*, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/5jrtcr9x6c48-en>
- OECD (2015b), *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 2015 Edition, *OECD Publishing*, Paris. DOI: <http://dx.doi.org/10.1787/9789264244160-en>
- OECD (2015c): Shima, Y. (2015), "The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey", *OECD Working Papers on International Investment*, No. 2015/01, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/5js7svp0jkns-en>
- OECD (2015d), "Excess Capacity in the Global Steel Industry and the Implications of New Investment Projects", OECD paper available as: [DSTI/SU/SC\(2014\)16/FINAL](http://dx.doi.org/10.1787/DSTI/SU/SC(2014)16/FINAL).
- OECD (2015e), "Public Financial Support to New Investments in the Global Steel Industry: Work in Progress" Internal working document, Directorate for Science, Technology and Industry. Available as: [DSTI/SU/SC\(2015\)2/REV1](http://dx.doi.org/10.1787/DSTI/SU/SC(2015)2/REV1).
- OECD (2015f), *State-Owned Enterprises in the Development Process*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264229617-en>
- OECD (2016a): Biau, C., A. Capobianco, M. Chammas, H. Christiansen, M. Gestrin, P. Kowalski and S. Sultan, *Governments as competitors in the global marketplace: Options for ensuring a level playing field*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/
- OECD (2016b), *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?*, *OECD Publishing*, Paris. DOI: <http://dx.doi.org/10.1787/9789264262096-en>
- OECD (2016c), "Assessing Foreign State-owned Enterprises: A Guidance for Regulators Based on the OECD Guidelines on Corporate Governance of SOEs", currently available as: [DAF/INV/WD\(2016\)2](http://dx.doi.org/10.1787/DAF/INV/WD(2016)2).

- OECD (2016d): Sultan Balbuena, S., “Concerns Related to the Internationalisation of State-Owned Enterprises: Perspectives from regulators, government owners and the broader business community”, *OECD Corporate Governance Working Papers*, No. 19, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5jm0xvx0b223-en>
- OECD (2016e): OECD Transparency Checklist for SOEs Operating Abroad, A Draft Reporting Template, available as [DAF/INV/WD\(2016\)15](#).
- OECD (2016f), Recent Developments in Steel Trade and Steel Trade Policy Measures” available as: [DSTI/SU/SC\(2016\)4](#).
- OECD (2016g), Recent Market Developments in the Global Steel Industry, available as [DSTI/SU/SC\(2016\)3](#).
- OECD (2016h), Emerging Policy Issues: Taxonomy of Trade-Affecting Measures in Government Procurement Process, unpublished OED document, available as: [TAD/TC/WP\(2016\)10/REV1](#).
- Qin, J. Y., (2004), WTO regulation of subsidies to state-owned enterprises (SOEs)—A critical appraisal of the China Accession Protocol. *Journal of International Economic Law*, 7(4), 863-919.
- Ren, M., and R. Jack (2014), China's 'Steel Hunger': A Comparative Analysis of SOE and NSOE Internationalization Motivations and Attitudes towards Risk. *Contemporary Management Research*, 10(4), 325.
- Sinclair, S. (2002, April), The GATS implications for postal services. In *Remarks prepared for Universal Postal Union seminar “Mind the GATS: Defining UPU Developing Country Interests in GATS negotiations* (Vol. 9).
- Smith, V. H. (2006), Regulating State Trading Enterprises in the GATT: An Urgent Need for Change? Evidence from the 2003-2004 US-Canada Grain Dispute. *Agricultural Marketing Policy Paper*, (12).
- Swedenborg, B. (1979), *The multinational operations of Swedish firms: An analysis of determinants and effects*. Stockholm: Industrial Institute for Economic and Social Research.
- Wagner, M. (2014), Regulatory Space in International Trade Law and International Investment Law. *University of Pennsylvania Journal of International Law*, 36(1).
- Wang, L. (2016), Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements? *ICSID Review*, 31(1), 45-57.
- Willemyns, I. (2016), Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction? *Journal of International Economic Law*, 19(3), 657-680.
- Zdouc, W. (1999), WTO dispute settlement practice relating to the GATS. *Journal of International Economic Law*, 2(2), 295-346.

Annex 1.

Figures

Figure A1. What part of respondent's commercial operations is harmed the most by foreign governments' preferential treatment of competitors?



Source: OECD Business Survey on State Influence on Competition in International Markets, Kowalski and Perepechay (2015)

Figure A1. What part of respondent's commercial operations is harmed the most by foreign governments' preferential treatment of competitors (*continued*)

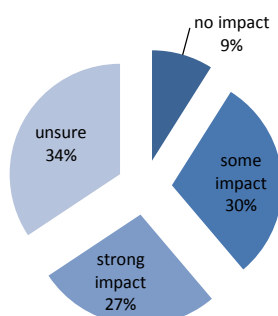


Source: OECD Business Survey on State Influence on Competition in International Markets, Kowalski and Perepechay (2015).

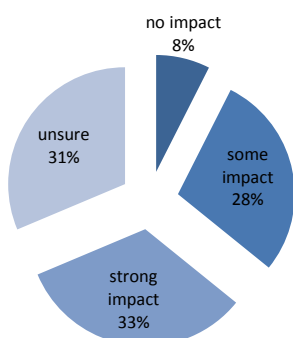
Figure A2. Which forms of preferential treatment granted to privately-owned and state-owned enterprises have the most harmful impact on respondent's sales? (All firms)

Privately-owned enterprises

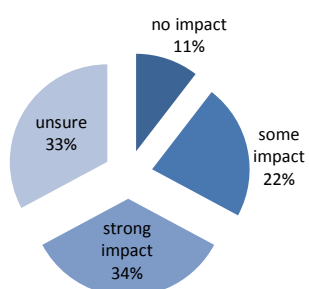
Grants and direct payments



Tax concessions

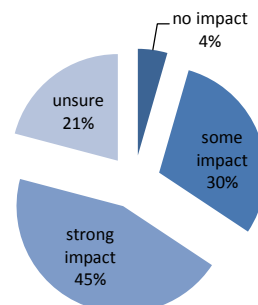


In-kind subsidies

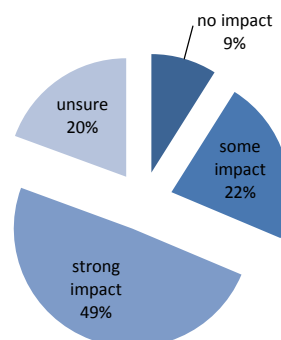


State-owned enterprises

Grants and direct payments



Tax concessions



In-kind subsidies

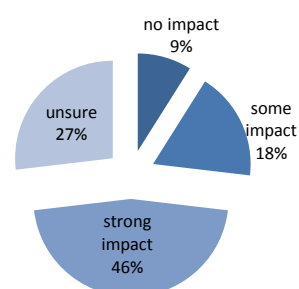
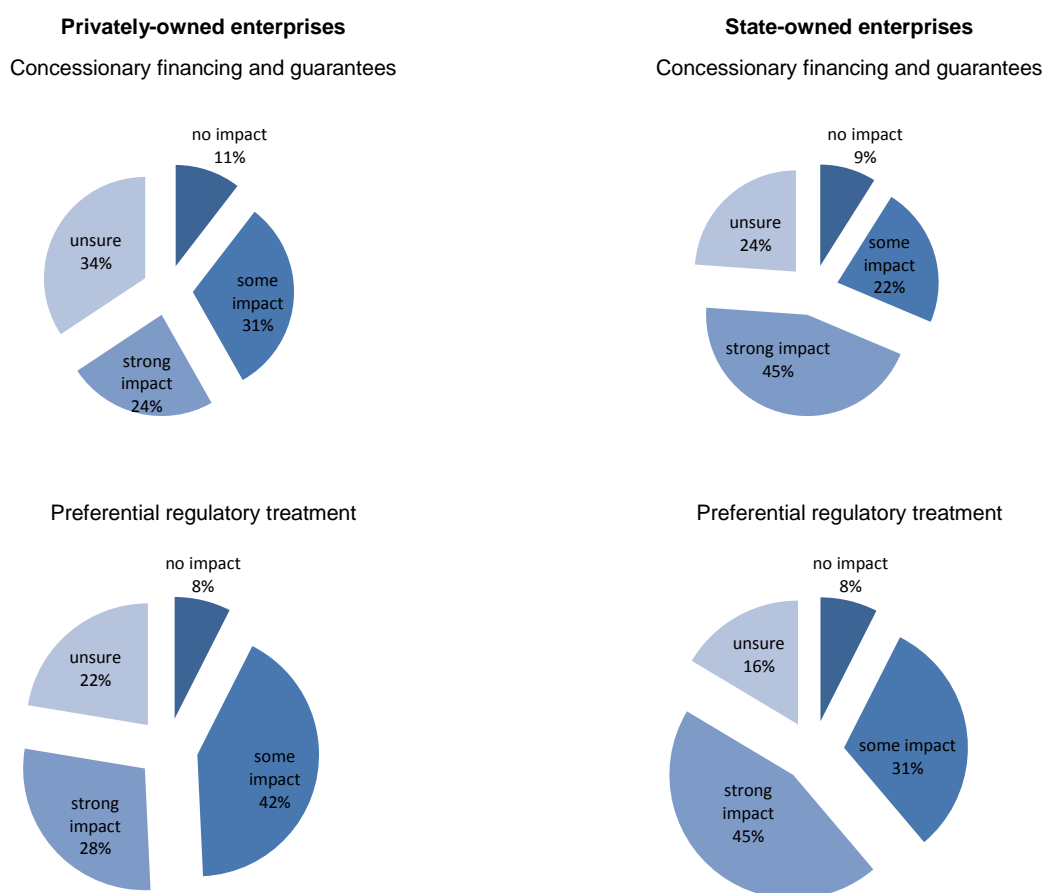


Figure A2. Which forms of preferential treatment granted to privately-owned and state-owned enterprises have the most harmful impact on respondent's sales? (All firms) (continued)



Source: OECD Business Survey on State Influence on Competition in International Markets.

Figure A2. Which forms of preferential treatment granted to privately-owned and state-owned enterprises have the most harmful impact on respondent's sales? (All firms) (continued)

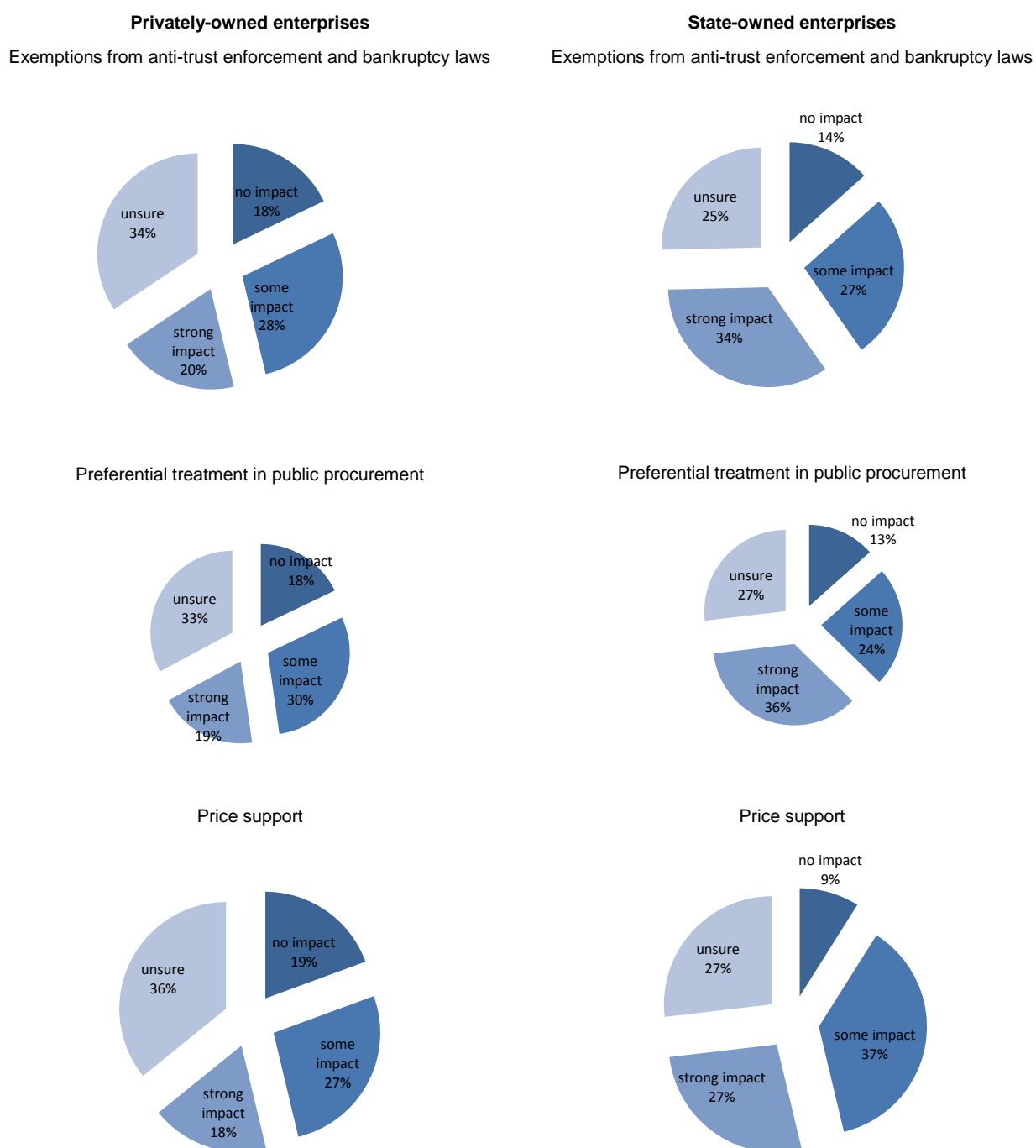
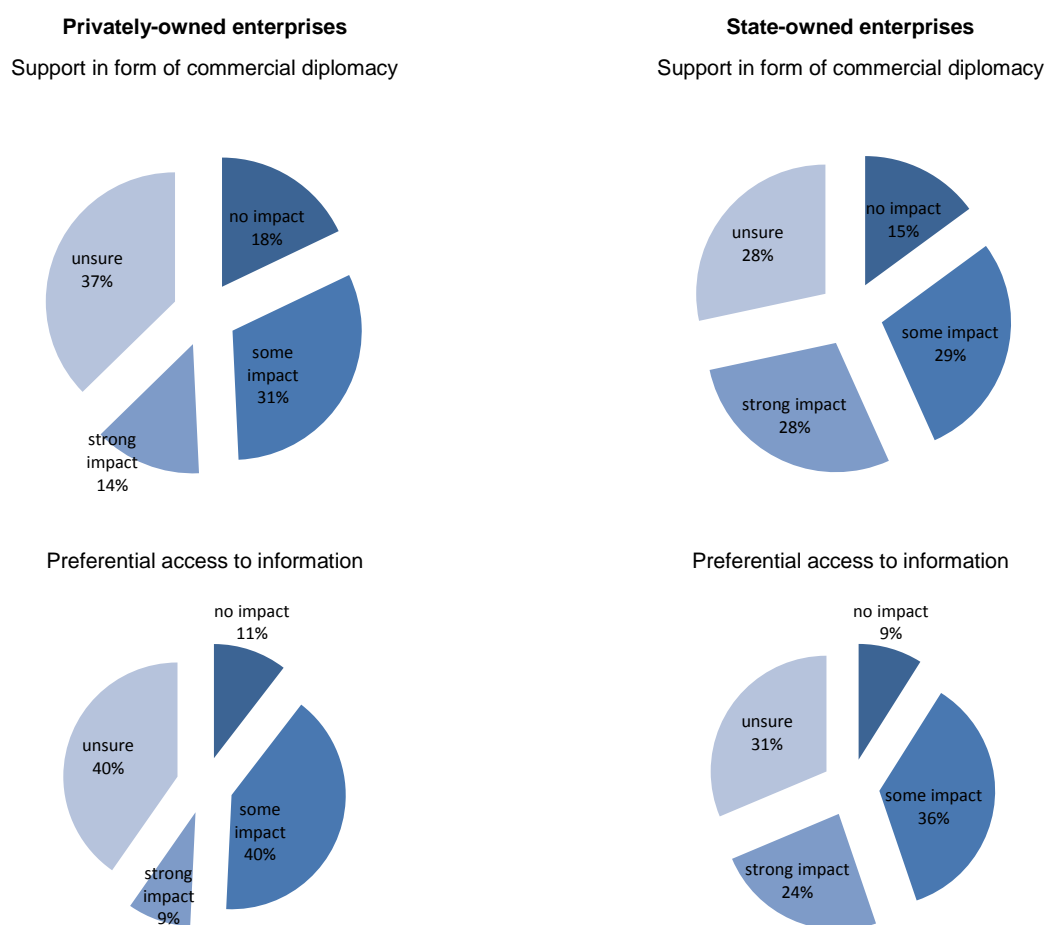


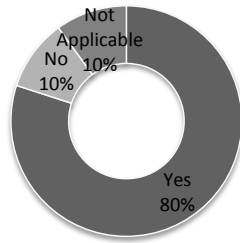
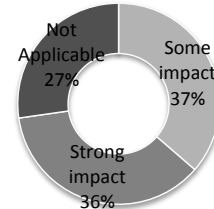
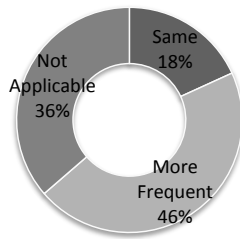
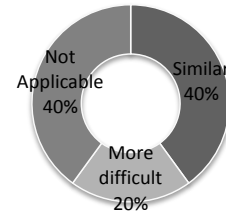
Figure A2. Which forms of preferential treatment granted to privately-owned and state-owned enterprises have the most harmful impact on respondent's sales? (All firms) (continued)



Source: OECD Business Survey on State Influence on Competition in International Markets, Kowalski and Perepechay, 2015.

Figure A3. Competition with foreign SOEs -Trade concerns

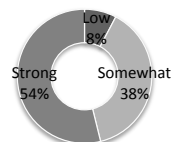
Trade in goods and services

SOE Preferential treatment**SOE preferential treatment (trade impact)****SOE vs POE preferential treatment****SOE vs POE preferential treatment (observable differences)**

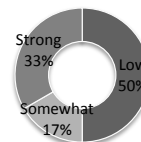
Source: OECD Survey on State-Owned Enterprises in the Global Marketplace (2015)

Figure A4. Concerns about foreign SOE investment

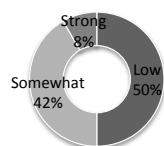
Maintain a level playing field



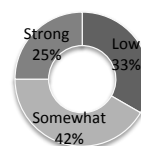
National Security



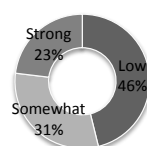
Protect national champions



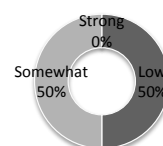
Public Interest



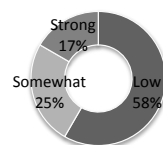
Insufficient information



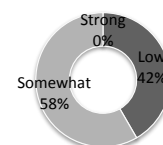
Re-nationalisation



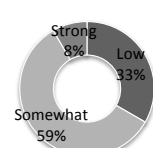
Corruption Risk



SOE governance



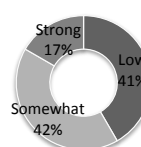
Ad hoc political intervention



Competition enforcement



Net economic Benefits



Source: OECD Survey on State-Owned Enterprises in the Global Marketplace (2015).