

國營事業跨國商業活動之競爭議題與新貿易規範之必要性

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摘要

在全球化的浪潮下，國營事業（State-Owned Enterprises, SOE）從事跨國商業活動（貿易或投資）之情形與日俱增，各國以國營事業之方式處理市場失靈與扶植產業發展，雖有其正當的政策考量，但因國營事業享有政府補助或協助，在從事跨國商業活動時較一般民營企業具有特殊的競爭優勢，因此所產生貿易扭曲效果或貿易障礙，具有損害他國貿易利益的不利影響，已成為國際貿易場域所要處理的問題。

世界貿易組織（World Trade Organization, WTO）及其前身關稅暨貿易總協定（General Agreement on Tariff and Trade, GATT）雖訂有補貼及國營貿易事業等規定。然而，此等貿易規範受限於時空發展及爭端解決實務見解等因素，已無法處理國營事業從事跨國商業活動所衍生的競爭與貿易爭議。鑑於各國對國營事業之定義、性質與功能常有不同的政策考量，為緩和國營事業所生不公平競爭或貿易扭曲之不利影響，經濟合作暨發展組織（Economic Cooperation and Development Organization, OECD）發展並倡議「競爭中立（Competitive Neutrality）」原則，提供各國處理國營事業競爭議題之規範參考。此外，隨著全球經濟整合的趨勢，復在多邊貿易架構下欠缺有效處理國營事業跨國競爭議題之情形下，各國轉而透過雙邊或區域自由貿易協定納入新的貿易規範，處理國營事業因其享有特殊競爭優勢所產生的貿易障礙議題。

本文旨在探討國營事業從事跨國商業活動所衍生的競爭與不公平貿易爭議，及各國在優惠性貿易協定架構下嘗試建立處理國營事業跨國競爭議題之新貿易規範。本文首先指出國營事業從事跨國商業活動時所衍生的競爭與不公平貿易爭議之型態，接著探討多邊貿易架構下對國營事業之現行規範及其局限，第三部分探討各國在雙邊或區域貿易協定架構下所訂的貿易規範，對此，除於必要時探討已生效之自

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由貿易協定外，例如：北美自由貿易協定、美國—新加坡自由貿易協定等，本文將著重於探討「跨太平洋夥伴全面進步協定 (Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP)」有關國營事業專章之新規範，例如：國營事業之定義及適用範圍、非歧視原則與商業考量、非商業協助及透明化義務等規定。本文除分析此等新貿易規範與既有多邊貿易規範之差異，藉以瞭解此等新貿易規範之特殊性及重要涵義外，並評估此等新貿易規範對解決國營事業跨國競爭議題之必要性及有效性。本文初步認為此等新貿易規範對解決國營事業跨國競爭議題有其必要性，但在諸多排除適用與豁免條款下，能否達成預期之效果，值得進一步商榷。

關鍵字：國營事業、指定獨占事業、競爭中立、商業考量、非商業協助、跨太平洋夥伴全面進步協定

Abstract

With the trend of globalization, state-owned enterprises (SOEs) were increasingly engaged in cross-border commercial activities of trade or investment, and gaining more competitive advantages than its private competitors because of the regulatory favoritism or preferential treatment granted by the state. While SOEs served legitimate policy tool to cure market failures and foster industrial development, it has long been discussed how to level the playing fields between SOEs and private enterprises in the global trade and investment market, and become an important competition issue needed to be addressed under the international trade regime in order to prevent SOEs from causing trade-distortive effects on trading partners.

This paper tries to discuss the competition issues involved with the cross-border commercial activities of SOEs, and examine the new disciplines introduced in the mega free trade agreements, focusing on the rules in Chapter 17 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). With a brief indication to the principle of competitive neutrality, developed by the Economic Cooperation and Development Organization (OECD), the first part will explore the economic rationale and negativities of SOEs policy, and identify various types of problems with respect to the SOEs' commercial activities at the international level. The paper will next to examine current trade or investment rules under the World Trade Organization (WTO) or bilateral

or regional free trade or investment agreements with a view to identify the insufficiency and limitations of existing rules and judicial practices. Finally, this paper will examine the new disciplines on SOEs introduced in the CPTPP with a particular focus on the innovative aspects of these SOEs rules compared with existing rules.

The SOEs chapter has been considered an ambitious and innovative efforts of norm-making on SOEs such as the broad concept of SOEs, rules on non-discrimination, commercial considerations and non-commercial assistance and extensive transparency rules. While these new rules may be desirable and targeting on competition issues of SOEs, the effectiveness of these rules may be further observed or evaluated given the fact that plenty of exclusions and exceptions were embedded in the chapter, and some unprecedented rules demanded further interpretations or clarifications if enforced by parties after the agreement entering into effect.

Key words: State-Owned Enterprises (SOEs), Designated Monopolies, Competitive Neutrality, commercial considerations, non-commercial assistance, CPTPP