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Enhancing the Performance of Preferentially-Treated Entities Through Competition Related Provisions of Free Trade Agreements

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from a Business Perspective
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Enhancing the performance of preferentially-treated entities through competition related provisions of FTAs

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I. RELEVANCE OF STATE-OWNED ENTERPRISES (SOES)

- I. Recognizing that establishing and operating **SOE is a rational policy instrument is essential**. However, **it is important to have a perspective that provides transparency** to ensure that level playing field is not compromised.
- II. In many APEC economies, **SOEs contribute significantly to the local economies** and to the GDP by creating jobs, investing in capital projects, and participating in stock markets.
- III. **Public enterprises holds substantial position of the world's leading companies** with growing influence on the market, so it is required to elucidate the current situation to promote **further fair market competition through advanced FTAs** as such influence will provide significant meaning to discussion of the FTAAP next generation trade and investment issues.

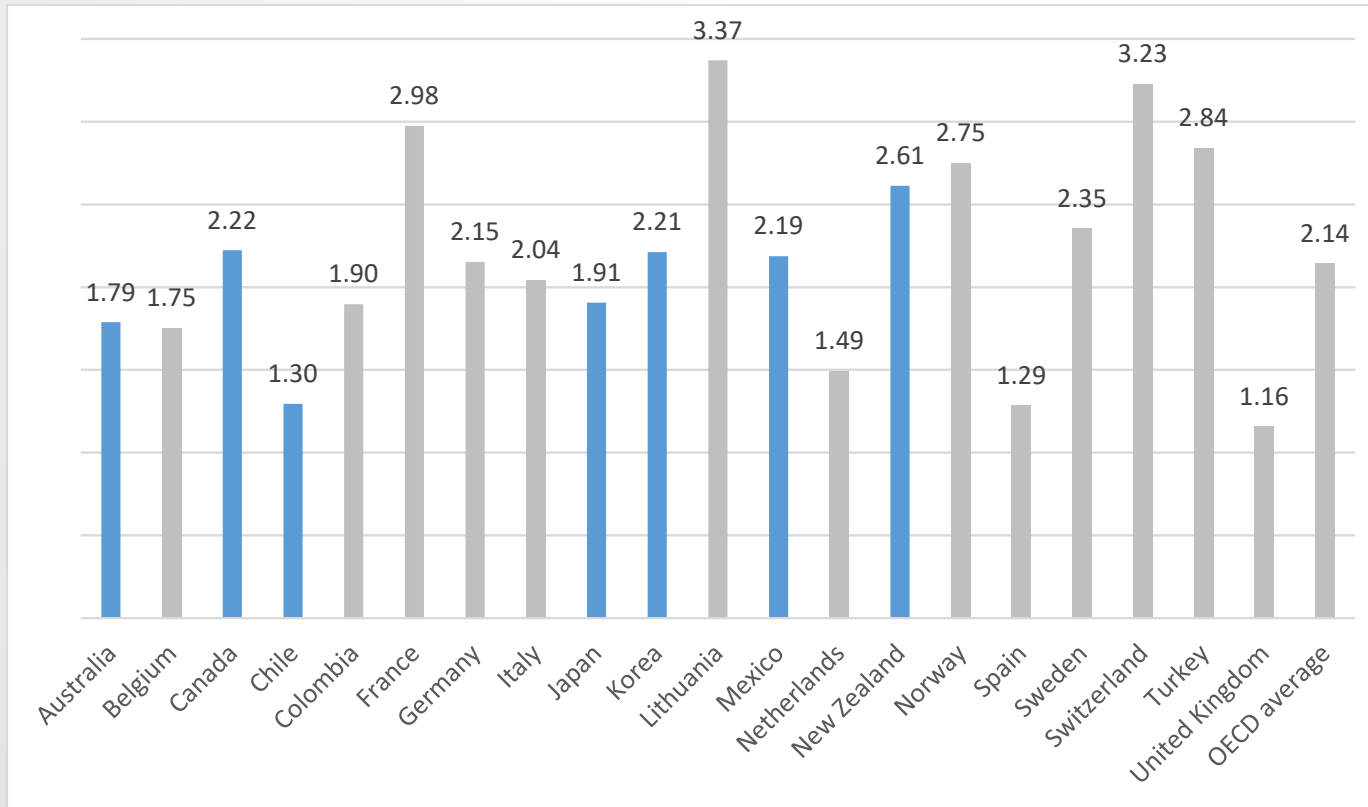
II. WHY WE SHOULD FOCUS THE ANALYSIS IN PREFERENTIALLY-TREATED ENTITIES AND NOT SOLELY IN SOES?

- I. Although it is a fact that **public companies** are at the **center of challenges of competitive market environment**, however, there exists a situation where **private entities become anti-competitive players as well**. Thus, market distortion caused by private companies needs to be considered and addressed.
- II. *Preferential Regulatory Treatment* includes subsidies and non-commercial assistance provided to preferentially-treated entities (either private or public enterprises) used for domestic policies that **may create anti-competitive impacts** to the marketplace, and **anti-competitive behaviour** used for actions that have a detrimental effect on the competitive market environment.
- III. The anti-competitive behaviour of **Preferentially-treated entities (PTEs)** can **distort both domestic and international markets**; unless there exists proper regulations and laws, it could limit competition, distort prices, harm consumers, create inefficiencies and build trade barriers either for local or foreign companies.

III. MEASURING PREFERENTIALLY-TREATED ENTITIES

Measuring the efficiency, the transparency and the good governance of PTEs are key to advancing the competition agenda including PTEs.

Indicator of Product Market Regulation Public Ownership



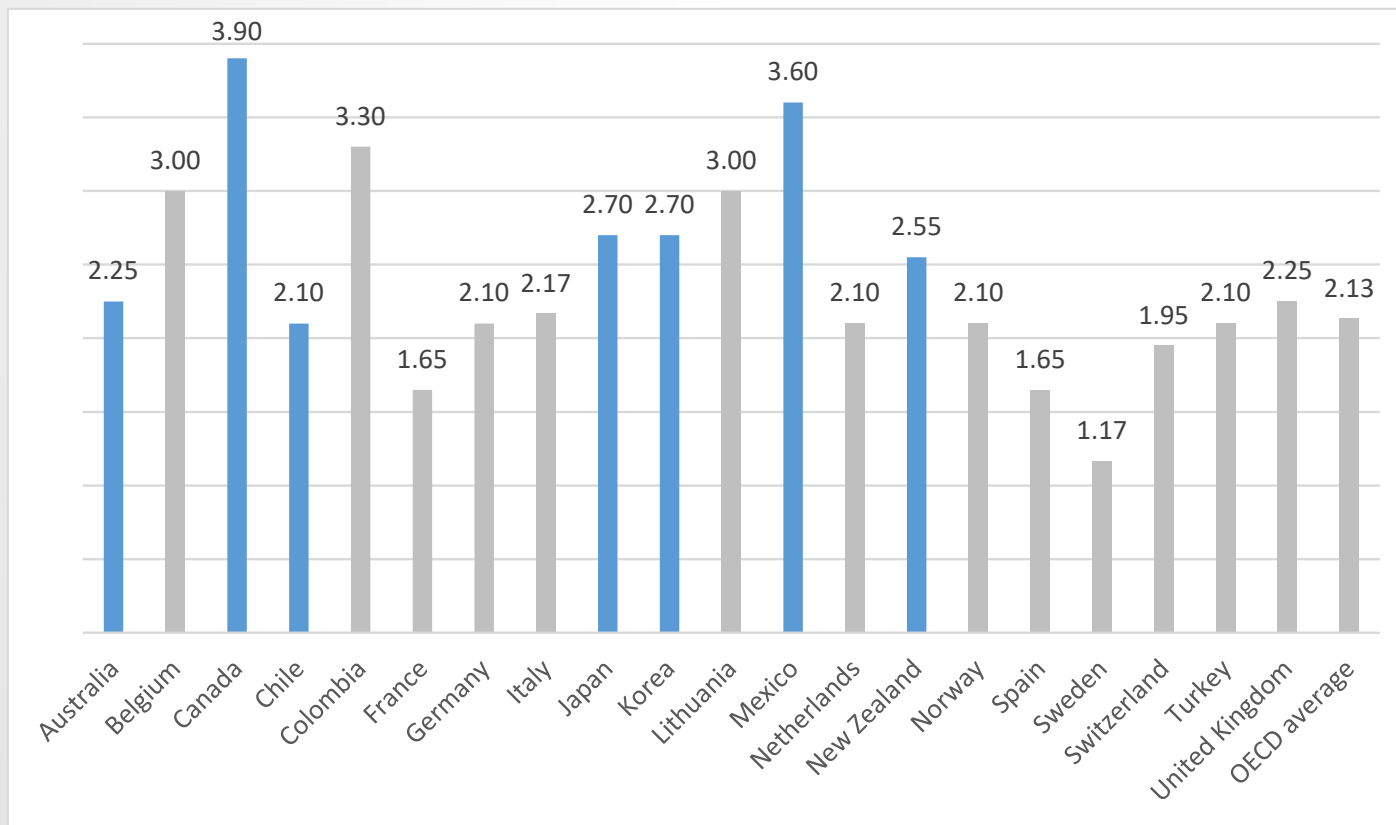
Source: Navarro, J. (Author) based on OECD 2018 PMR database

Note: The USA did not complete OECD data Collection

III. MEASURING PREFERENTIALLY-TREATED ENTITIES

Good governance of state-owned enterprises (SOEs) is fundamental for these firms to operate efficiently and compete fairly in the marketplace.

Governance of SOEs



Source: Navarro, J. (Author) based on OECD 2018 PMR database
Note: The USA did not complete OECD data Collection

IV. THE EUROPEAN UNION-SINGAPORE FREE TRADE AGREEMENT (EUSFTA)

EUSFTA is a good template for economies that are still not ready to include a dedicated chapter on preferentially-treated entities (PTEs).

- **Article 11.3** from EUSFTA **states that nothing in this chapter will prevent a party from establishing public undertakings**, or entrusting undertakings with special or exclusive rights according to its respective law. **However, the article establishes some boundaries**, such as:

each Party shall ensure that undertakings entrusted with special or exclusive rights do not use those special or exclusive rights to engage either directly or indirectly...in anti-competitive practices in another market in respect of which such undertakings have no special or exclusive rights, that adversely affect investments, trade in goods or services of the other Party (Art. 11.3.3)

- Furthermore, EUSFTA specifies in **article 11.4** that while nothing in its chapter shall be construed to prevent a Party from maintaining state monopolies, **each Party** shall adjust its state monopolies of a commercial character to **ensure no discrimination is exercised by such enterprises**.

V. COMPARISON OF THE CONTENTS OF CHAPTERS ON PREFERENTIAL REGULATORY TREATMENT OF THE CPTPP, USMCA AND EVFTA

- **CPTPP, USMCA and EVFTA** have included high quality rules in their respective FTAs, **promoting a level playing field for all and preserving the right of states** to define SOEs presence as a part of their public policies.
- Under these three agreements, **public services are fully safeguarded** and nothing in their chapters affect the ability of Parties to continue providing these services for their population as a part of their governmental functions.

Topic	CPTPP (Ch. 17)	USMCA (Ch. 22)	EVFTA (Ch. 11)
Definition	Art. 17.1	Art. 22.1	Art. 11.1
Scope	Art. 17.2	Art. 22.2	Art. 11.2
Delegated Authority	Art. 17.3	Art. 22.3	-
Non-discriminatory Treatment and Commercial Considerations	Art. 17.4	Art. 22.4	Art. 11.4
<i>Non-discriminatory treatment</i>	Art. 17.4 (1)	Art. 22.4 (1)	Art. 11.4 (1)
<i>Prohibition of anticompetitive practices by designated monopolies</i>	Art. 17.4 (2)	Art. 22.4 (2)	Art. 11.4 (1)
<i>SOEs purchases and sales based on commercial considerations</i>	Art. 17.4 (1)	Art. 22.4 (1)	Art. 11.4 (1)
Non-commercial assistance	Art. 17.6 & 17.7	Art. 22.6 & 22.7	-
Courts and Administrative Bodies	Art. 17.5	Art. 22.5	Art. 11.5
<i>foreign-owned enterprises subject to jurisdiction same than locals</i>	Art. 17.5 (1)	Art. 22.5 (1)	-
<i>exercise of regulatory discretion by administrative regulators of SOEs</i>	Art. 17.5 (2)	Art. 17.5 (2)	Art. 11.5 (2)
Transparency	Art. 17.10	Art. 22.10	Art. 11.6
Technical Cooperation	Art. 17.11	Art. 22.11	Art. 11.7
Committee on State-Owned Enterprises and Designated Monopolies	Art. 17.12	Art. 22.12	-
Exceptions	Art. 17.13	Art. 22.13	Annex 11-A
Further Negotiations	Art. 17.14	Art. 22.14	-
Dispute settlement process	Art. 17.15 and Annex 17-B	Art. 22.15 and Annex 22-B	-
Corporate Governance mention	Art. 17.11	Art. 22.11	Art. 11.5
Playing field mention	Art. 17.12	Art. 22.12	-

VI. CONCLUDING RECOMMENDATIONS

- I. It is important to highlight that the **existence of PTEs is justified and needed** because they often fill a strategic function in their economies. However, **their participation needs to align with the principles of fair competition, avoiding negative effects and distortions in the marketplace.**
- II. **it is paramount to revise PTEs rules by increasing their transparency, guaranteeing a professional management** supported by appropriate board of directors, and promoting a level playing field for the benefit of all.
- III. High standard provisions on preferential regulatory treatment should provide effective solutions to the fact that **businesses often cannot compete against PTEs on an equal basis** because they obtain support from their governments or public bodies. Thus, **operations of PTEs** should be aligned **under internationally recognized standards and principles of corporate governance.**
- IV. Regulations on PTEs should aim for **avoiding preferential treatment to a particular enterprise when it engages in commercial activities**, while also **avoiding the creation of monopolies and neutralizing government intervention** in the marketplace.

THANK YOU

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