



**Asia-Pacific  
Economic Cooperation**

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**Comprehensive and Progressive Agreement for  
Trans-Pacific Partnership Chapter on State-Owned  
Enterprises: Its Breakthroughs, Limitations and  
Implications for Newly Entering Economies and  
Business**

Submitted by: Kobe University



**Free Trade Area of the Asia-Pacific Policy  
Dialogue on Competition Related Provisions  
from a Business Perspective  
17-18 September 2020**

CTI-EC FTAAP Policy Dialogue on Competition Related  
Provisions from a Business Perspective  
(September 17-18, 2020)

# CPTPP Chapter on State-Owned Enterprises: Its Breakthroughs, Limitations and Implications for Newly Entering Economies & Business

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# 1. Introduction

- (1) Trans-Pacific Partnership Agreement (TPP) : Signed Feb. 4, 2016; but Jan. 2017, President Trump withdrew.
  - (2) With leadership of Japan as well as Viet Nam, the Comprehensive and Progressive Agreement for TPP (**CPTPP or TPP11**) signed Mar. 8, 2018, **entered into force Dec. 30, 2018.**
  - (3) Among the most difficult issues like Market Access in Goods and Services, Investment, IP, etc., **Rules on State-owned Enterprises (SOEs)**: U.S. proposal strongly resisted by Viet Nam, Malaysia, but introduced in Ch.17
- **What are its breakthroughs & limitations of the TPP/CPTPP Chapter on SOEs, and its implications, particularly for Newly Entering Economies & Business?**

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## 2. Background

(1) Around World Financial Crisis in 2008-9, More Concern about SOEs: **Expanding Presence of SOEs not only at home markets but also global** & complaints about preferential treatment (inc. subsidies) to SOEs and **lack of competitive neutrality**

*E.g.*, [OECD \(2016\), State-owned Enterprises As Global Competitors: A Challenge or an Opportunity?](#)

- Emerging Challenges also in International Economic Law:  
**How to create brand-new disciplines over SOEs?**
- Issue 1: SOEs as Public Bodies who Grant Subsidies
- **Issue 2: SOEs as Competitors who Receive Subsidies**
- Issue 3: SOEs as Market Participants with Political Objectives

# SOEs as Competitors who Receive Subsidies

(Trade in Goods)

- **Overcapacity in Steel, Aluminum *etc.***

Preferential treatment incl. Subsidies to SOEs caused overcapacity, which, in turn, may have caused depression or suppression of the price in the world market

*E.g.*, Steel Global Forum, DS519, US Trade Expansion Act Sec.232 Investigation Report on Steel/Aluminum (Jan. 2018)

Similar may happen (or may have already happened) **also in solar panels, semiconductors, electric vehicles...**

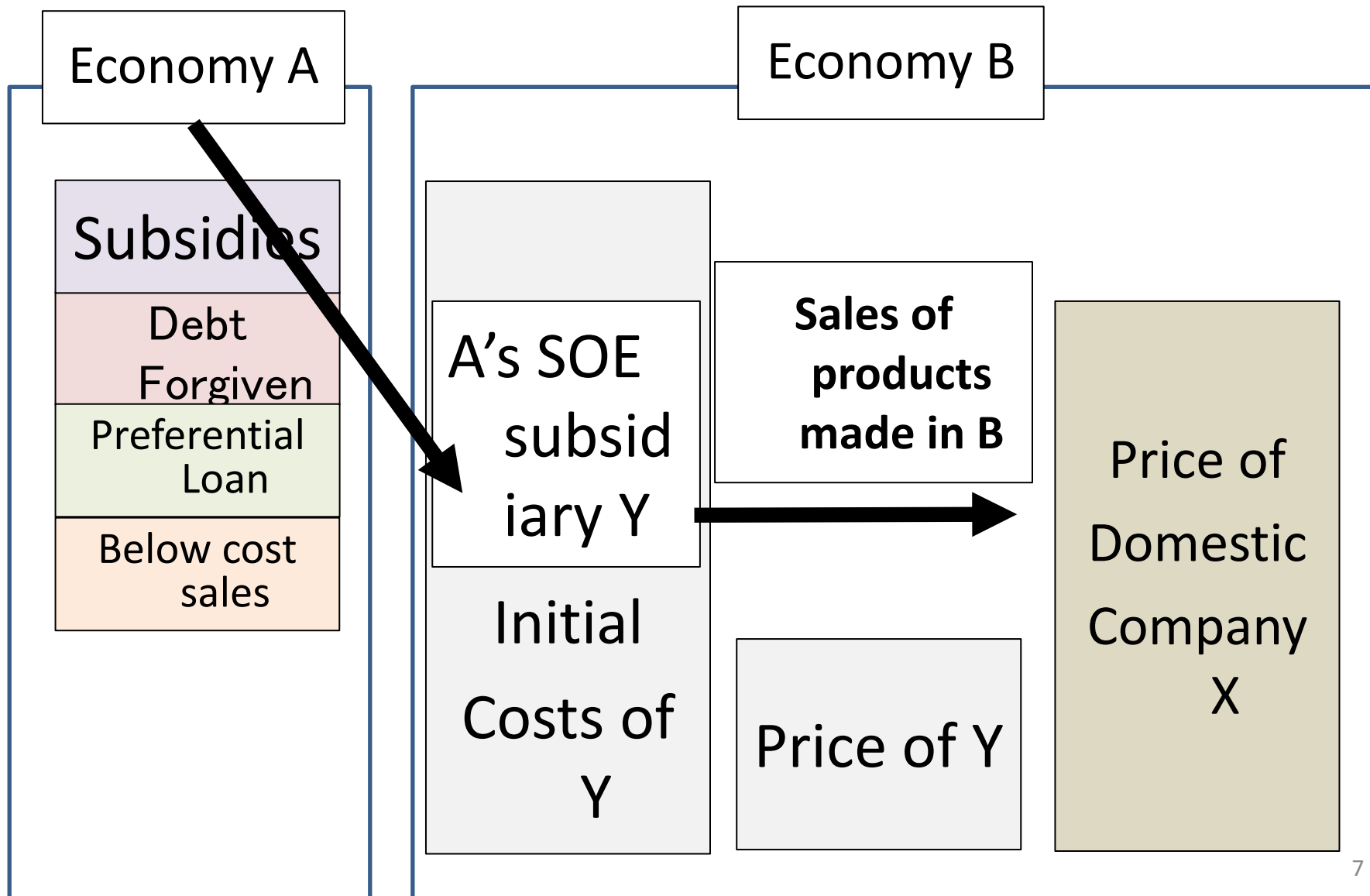
**Problems not only in trade in goods but also....**

# SOEs as Competitors who Receive Subsidies

(Investment)

- 1) Outbound investment of SOEs causes vigorous **national security review of FDI**
- 2) **Amendment of the U.S. Model BIT (until 2009)**, Advisory Committee on International Economic Policy (ACIEP): consider how to address the **concern about investment with anticompetitive state assistance such as states' or SOCBs' loan at interest rate lower than market rate**. Final Report include two recommendations, one of which proposes to include special rule.
- 3) **U.S-China Economic and Security Review Commission Annual Report (2014)**: Alert that U.S. domestic companies would be confronted with **competitive difficulty because having inside U.S. market companies who received preferential loan or assistance from Chinese Gov. (See next slide)**

# Adverse Effect of Domestic Sales of Investment Subsidised by Foreign Economies





### 3. Negotiating History of TPP Chapter on SOEs

Feb. 2011 US Domestic Group (Coalition for Service Industries & Chamber of Commerce) proposal to **ensure a level playing field** btw. SOEs and private companies and prohibit preferential assistance.

Oct. 2011 US Government Proposal in TPP Lima Round: **Ensuring Competitive Neutrality** with private companies; transparency of SOEs.

Receiving **strong resistance from Malaysia and Viet Nam** whose economies are significantly controlled by SOEs and emerging as one of the most difficult negotiations which **delayed the TPP negotiation as a whole until the end of 2013.**

### 3. Negotiating History of TPP Chapter on SOEs

- U.S. intent: Write **the template to be applied to China**
- Feb 2014, **agreed upon exemption** for assistance to **SOEs supplying services in home market.**
  - July & Sep. 2014, Malaysia, Brunei & Viet Nam submitted **long lists of SOEs to be carved out**
  - Development above In 2014 suggests the U.S. had adopted more flexible approach like “**compromise the content but keep the framework**” which gave up the application to all the SOEs, given the strong resistance from Malaysia and Vietnam.
  - Looks like **proxy war on behalf of China**

## 4. Main Contents of CPTPP Chapter on SOEs

- 1) Shall **ensure** SOE act in accordance with **commercial considerations** and based on **non-discriminatory basis** in its purchase or sale of a good or services (**'NDCC'**).
- 2) **Prohibit** causing adverse effects to another Party through **non-commercial assistance ('NCA')** to SOEs (except for a service supplied by a SOE within its home market; **domestic service exemption**).
- 3) **Transparency**: Publish the list of all the SOEs and upon request, share the info about government ownership and non-commercial assistance
- 4) Ensuring **the right to establish or maintain SOEs**
- 5) Subject to **State-to-state Dispute Settlement** in Ch.28
- 6) Each economy **carves out specific activities by specific SOEs in Annex IV on Non-conforming measures.**

## 4. Main Contents of CPTPP Chapter on SOEs

### 1) Definition of SOEs

Article 17.1: Definitions “state-owned enterprise means an enterprise that is principally engaged in commercial activities in which a Party:

- (a) **directly owns more than 50 per cent** of the share capital;
- (b) **controls, through ownership interests, the exercise of more than 50 per cent** of the voting rights; or
- (c) holds **the power to appoint a majority of members** of the board of directors or any other equivalent management body.”

One of the potential impacts: **Ch. on SOEs** mainly defines SOEs as **majority share owned** by the government (Art.17.1), and prohibits SOEs to provide non-commercial assistance to SOEs (Art.17.6.2). **Partially overriding *US – AD/CVD from China (DS379)***, returning to Panel’s ownership test.

## 4. Main Contents of CPTPP Chapter on SOEs

### 2) Non-Commercial Assistance (Arts.17.6 and 17.7)

Need for Adjustment **Tools to ensure Competitive Neutrality** given prevalent assistance by some economies to SOEs etc.

While for trade in goods, tools are already full-equipped, **lacking tools for trade in service and investment**

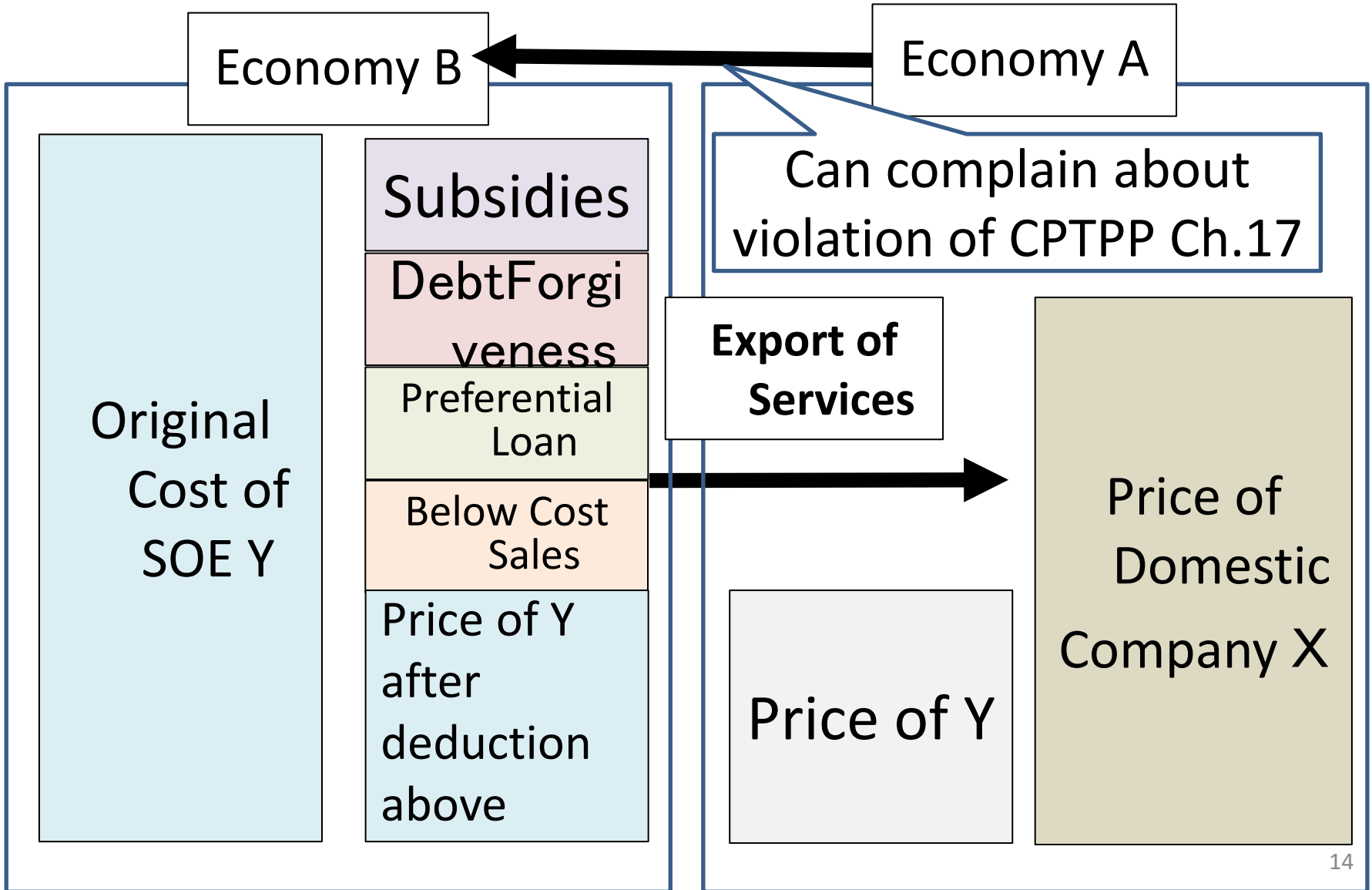
Markets/ Sectors	Assisting Market	Importing Market	Third Market	World Market
Trade in Goods	✓ (Red, Yellow)	✓ (CVD)	✓ (Red, Yellow)	✓ (Red, Yellow)
Trade in Service/ Investment	△ (National T) △ (FET, National Treatment)	—	—	—

# Filling the existing gaps by CPTPP Ch. on SOEs

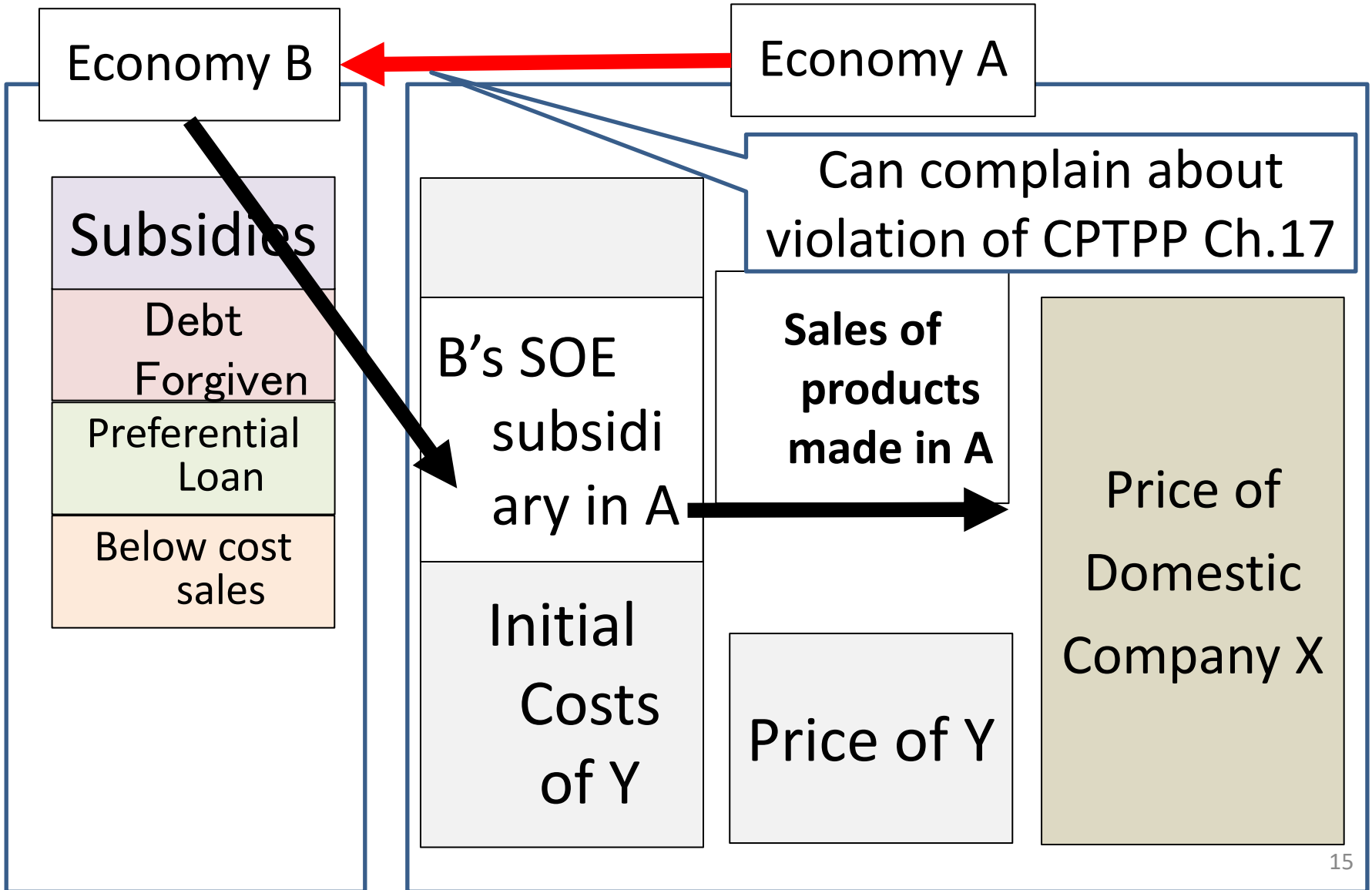
Market/ Sectors	Assisting Market E.g. Viet Nam	Importing Market E.g., Japan	Third Market E.g. Japan v. Viet Nam in Australia	World Market (Non-TPP)
Trade in Goods	✓ (Red, Yellow) + 17.7.1a, 1c(i)	✓ (CVD)	✓ (Red, Yellow) + 17.7.1b(i), 1c(i)	✓ (Red, Yellow) + 17.7.1 b(ii), c(ii)
Trade in Services	△ (NT) ⇒ Domestic Service Exemption (17.6.4)	— ⇒ 17.7.1d, e ✖1	— ⇒ 17.7.1d, 1e	— ⇒ No rule (Annex 17C, renegotiation)
Supply of Goods by Investment	△ (FET, NT) ⇒ 17.7.1a	— ⇒ 17.6.3 ✖2	— ⇒ 17.7.1b(i), c(i)	— ⇒ No rule

Note: 17.6.x or 17.7.x above means number of relevant provision in TPP Ch.17.  
NT: National Treatment; FET: Fair and Equitable Treatment

# ❌ 1 Function of CPTPP Ch. on SOEs (Case of Trade in Services)



# ❌2 Function of CPTPP Ch. on SOEs (Sales of Investment injuring Domestic Industry)





## 5 Breakthroughs and Limitations

### 1) Breakthroughs: Non-commercial assistance (NCA)

- **Concerns that, If we open our markets, their SOEs would take all, may have already (or potentially) delayed liberalization negotiation** in services and investment if competitive neutrality rules lack **(Creating disincentive to liberalize)**
- CPTPP Ch. on SOEs: **Create brand-new adjustment tools to ensure competitive neutrality** also in areas of services and investment
- Given SOEs' **expanding presence in global market, covering not only home market but also third markets,**
- **Epoch-making & pioneering development in International Economic Law**

## 5 Breakthroughs and Limitations

### 2) Limitation: NCA

- **Insufficient coverage of assistance** from the viewpoint of Australian model of competitive neutrality principles, due to the design based on the WTO Yellow Subsidies Rules which **requires “financial contribution” (or assistance in CPTPP’s case)**, focusing on “Tax Neutrality” and “Debt Neutrality and Outright Subsidies” but to some extent supplemented with **“Regulatory Neutrality”** (Art.17.5.2)

CPTPP NCA Rules on SOEs vs. Subsidies Rule Covering both goods/service in EV/EJFTA (See Next Slide)

- **Beneficiary/Recipient Scope limited to SOEs**
- **High Burden of Proof on adverse effects** like WTO Yellow Subsidies

# 5 Breakthroughs and Limitations

## 2) Limitations: NCA (cont.)

Table CPTPP NCA Rules vs. EU-Japan EPA Subsidies Rules

	Recipients	Subsidies	Markets	Rules
TPP NCAs Rules	SOEs only	Any type of subsidies	Home/Third but domestic service exemption	Need to prove <b>adverse effects</b> as Yellow Subs.
EU-Japan EPA Subsidies Rules	All enterprises	Certain Types of Subsidies	Home/Third market both?	Prohibited <i>per se</i>

# 5 Breakthroughs and Limitations

## 2) Limitations: NCA (cont.)

- **Insufficient coverage of economy activities: Subsidized Investment /Acquisition not covered by CPTPP**

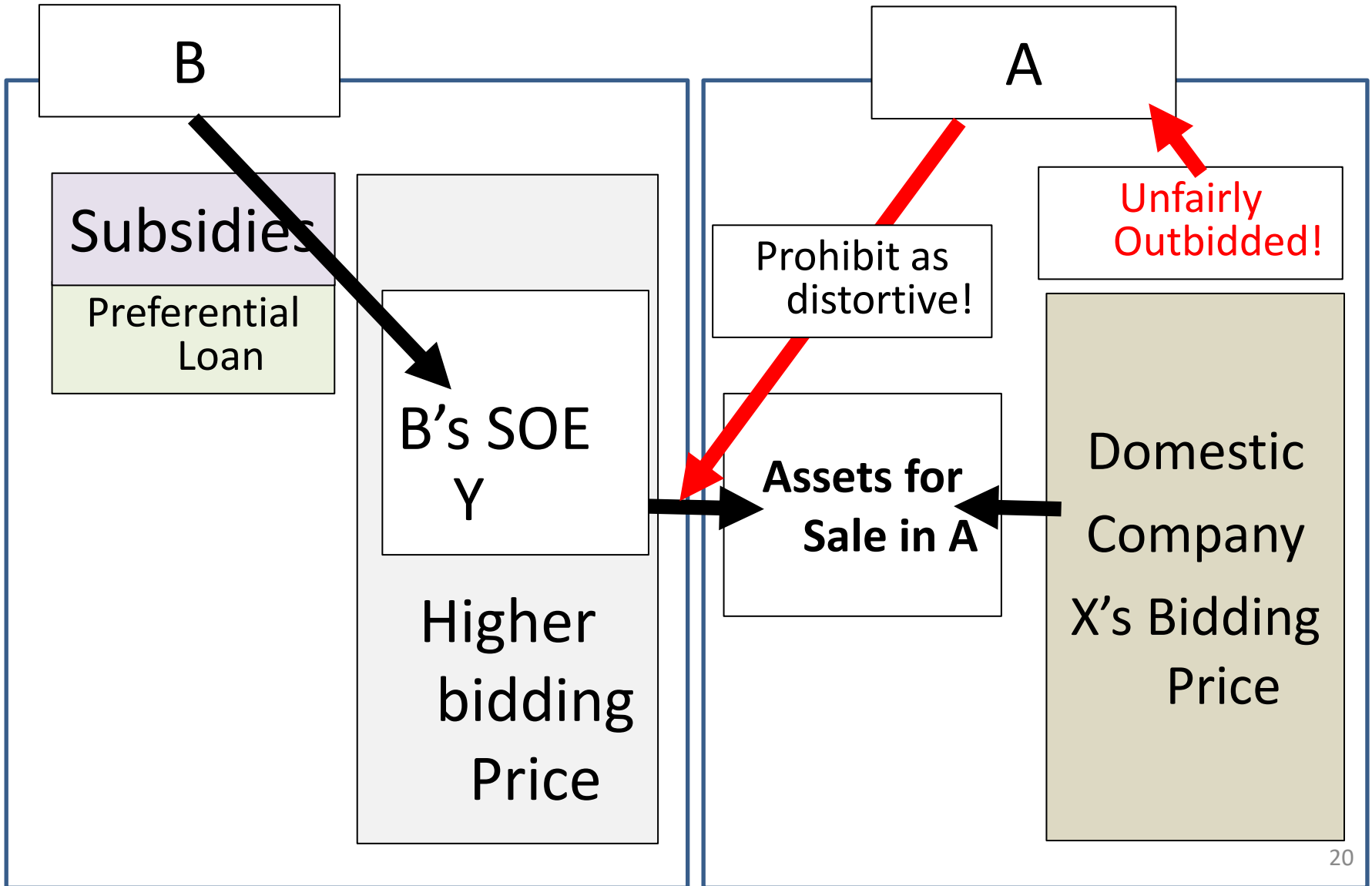
**(See next slide)**

Cf. Recent development in *EU White Paper on levelling the playing field as regards foreign subsidies*, Jun 17 2020  
(Module 2 *ex ante* notification and redressive measures incl. commitment and prohibition)

## 3) Limitations on NDCC/NCA as a whole

- Long Carve-out in Annex IV of Non-conforming measures *e.g.*, Viet Nam, Malaysia
- Domestic Service Exemption
- And many other exemptions...

# Adverse Effect of Investment/Acquisition Subsidised by Foreign Economies



## 6. Implications for Newly Entering Economies & Business

### For Newly Entering Economies

- 1) **Can maintain SOEs** (the right to establish or maintain SOEs) even if joins TPP/CPTPP;
- 2) Can avoid the application by privatization?
  - **Mainly defined by “majority share** owned by the government” (Art.17.1), **but** the definition includes *de facto* control: “holding the power to appoint a majority of members of the board of directors”
  - Actually broader than it looks at a glance, **privatization is not a perfect way out.**
- 3) **If still uncomfortable with existing exemptions, can negotiate carve out (Annex IV: Non-conforming measures), however, not easy to carve out spill-over effects** beyond the markets of economies who are SOEs’ owners.

## 6. Implications for Newly Entering Economies & Business

### For Business

- 1) **Give more attention to what you face in competition** with SOEs and lack of competitive neutrality, because **Governments themselves cannot know** what is happening in the market.
- 2) **Check whether some remedies are already offered.** For that purpose, **understand more about already existing rules** on SOEs which can ensure Competitive Neutrality;
- 3) If no remedy is available for what you face, **claim for a new rule.** Such voice can make rules more full-equipped  
Cf. EU White Paper on levelling the playing field as regards foreign subsidies, Jun 17 2020

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Thank you for your attention!