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# **State-owned Enterprise Reforms in the TPP Negotiation: Is it a win-win for Vietnam?**

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State-owned Enterprise Reforms in the TPP Negotiation:  
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Abstract

The potential market distortions caused by state-owned enterprises (SOEs) have attracted significant attention from Trans-Pacific Partnership (TPP) members during the negotiations for this agreement in the 21<sup>st</sup> century. Particularly, in the TPP meetings, Vietnam, as the only *nonmarket economy* TPP negotiator, has been the focus of discussions concerning SOE issues and reforms to ensure a level playing field for all business sectors, both domestically and regionally. On one hand, SOE reforms can support TPP member governments in financial management and corporate governance more effectively and transparently. On the other hand, the reforms have also left a substantial burden on implementation by the Vietnamese government and the competitiveness of SOEs. The paper (1) examines the principles of SOE management in the TPP negotiation; (2) analyzes the equitization of SOEs in Vietnam in the light of nondiscrimination and on a commercial basis principle; and (3) evaluates the potential cost and benefit of its nonmarket economy status in TPP negotiation.

*Keywords:* SOEs, Equitization, Subsidy, Vietnam, TPP, WTO

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## 1. Introduction to Vietnamese state-owned enterprises

In many economies, state-owned enterprises (SOEs) are granted advantages in the form of government subsidies, cheap loans, and preferential regulatory treatment. These help them engage in dumping and excessive capital investment or anticompetitive business practices, disrupting the order of fair international competition.<sup>1</sup> The Appellate Body has considered these advantages “actionable” under the WTO rules, that is, *GATT 1994 Article III, XVII; the WTO agreement on Subsidies and Countervailing Measures (ASCM); WTO Service Agreement (GATS), and the Agreement on Government Procurement (GPA)*. Having acknowledged that the regulations are not uniform principles for controlling government subsidies to SOEs outright to level the playing field for the state sector versus the private one, 12 countries<sup>2</sup> have recently agreed to set new SOE rules under the Trans-Pacific Partnership (TPP) negotiations.<sup>3</sup> Nevertheless, even after the numerous Official and Ministerial Meetings during the last nine years, negotiations have progressed slowly and have shown no sign of reaching a conclusion by early 2015. Vietnam is the least-developed “non-market economy” negotiating country in the group. Thus, the potential market distortions caused by Vietnamese SOEs have been very controversial for other TPP members and the Vietnamese government. On one hand, SOE reforms can more transparently and effectively support the Vietnamese government in financial management and corporate governance; however, implementing the reforms is very difficult for the Vietnamese government.

Vietnamese SOEs are presented here at a general level. This paper examines the following points:

- The principles of SOEs in the TPP negotiations
- SOE equalization under nondiscrimination and commercial bases
- Potential costs and benefits of Vietnam’s nonmarket-economy status in the TPP negotiations

### 1.1 Vietnamese SOE regulations at a glance

After the war against France ended in 1954, an SOE sector was quickly established in Vietnam by both nationalizing the existing privately owned enterprises and building new SOEs.<sup>4</sup> At that time, the SOE sector was constructed by relying on the economic development model of the Soviet Union. For their operations, SOEs were under the direct

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<sup>1</sup> Tsuyoshi Kawase, *Trans-Pacific Partnership Negotiations and Rulemaking to Regulate State-owned Enterprises*, VoxEU.org, 2014, at <http://www.voxeu.org/article/trans-pacific-partnership-negotiations-and-rulemaking-regulate-state-owned-enterprises>. All URLs cited in this paper were last visited on July 24, 2015.

<sup>2</sup> Brunei, Chile, New Zealand, Singapore, United States, Australia, Peru, Vietnam, Malaysia, Canada, Mexico, and Japan.

<sup>3</sup> See more Ian F. Fergusson, Mark A. McMinimy and Brock R. William, *The Trans-Pacific Partnership (TPP): Negotiations and Issues for Congress*, Congressional Research Service (CRS), 2015, p. 4, retrieved from <http://photos.state.gov/libraries/vietnam/8621/pdf-forms/tpp-crsreport032015.pdf>.

<sup>4</sup> Vu Quoc Ngu, *The State Owned Enterprise Reform in Vietnam: Process and Achievements*, Visiting Reserchers Series No. 4, Institute of Southeast Asian Studies, 2002, p. 2, retrieve from <http://www.iseas.edu.sg/documents/publication/vr42002.pdf>.

control and management of line ministries of the central government or different departments of local governments. Their tasks were to receive and conduct 5-year plans formulated by the various government ministries and departments.

After the unification of North and South Vietnam in 1975, Vietnam developed an industrial SOE sector. Namely, the Government adopted Decree 25/CP dated January 21, 1981 to develop and enhance the efficiencies of the SOE sector. However, price was still centrally determined by the Government, and SOEs were granted with more subsidies that encouraged these enterprises to borrow heavily and worsen State budget deficits. As a result, the Government increased its printing of money in 1986, causing severe inflation.

In 1986, at the Sixth Communist Party Congress, the Communist Party of Vietnam decided, under the Doi Moi Program, to abolish the “bureaucratic centralized management” system and replace it with a market-oriented economy. That is, before 1986, Vietnamese policy and legislations did not recognize the free business principles of a market economy or the development of a private sector. The Doi Moi’s main aims were to restructure SOEs and to revive the private sector. Vietnam adopted Decision 217/HDBT in November 1987, the Law on Foreign Investment in 1987, and the Law on Private Enterprises and Companies in 1990, which established a legal basis for the establishment of limited liability and shareholding companies. Accordingly, SOEs were created with the autonomy to formulate and implement their own operating plans based on socio-economic development guidelines set by the Government.

However, aware of the problems caused by the guidelines, SOEs were again reorganized with the issuance of Decisions 90 and 91 in 1994. These two regulations created two categories of SOEs: General Corporation 90 and General Corporation 91. As a result, in 1994, the Government established 18 general corporations and 64 special corporations that operated in various strategic industries or specific geographical areas.<sup>5</sup>

In 1995, the Government first issued a law on SOEs. Accordingly, SOEs were categorized into independent enterprises, general corporations, and member enterprises of general corporations, which would operate in commercial and public interests. However, in these SOEs, a separation of the ownership of the State (i.e., state as owner) and management of enterprises toward capital empowered by the State (i.e., state as investor) was not clearly and sufficiently provided. Furthermore, the intersection of line ministers was still to be regulated, as there were no effective regulations on the establishment, reorganization, or liquidation of SOEs. Clearly, the law did not provide mechanisms of SOE equitization.

After becoming a full member of the Association of South East-Asian Nations (ASEAN) in 1995,<sup>6</sup> joining the Asia-Pacific Economic Cooperation (APEC) in 1998,<sup>7</sup> signing a

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<sup>5</sup> Fredrik Sjöholm, *State Owned Enterprises and Equitization in Vietnam*, EIS Working Papers Series, No. 227, 2006, p. 17, *retrived from* <http://swopec.hhs.se/eijswp/papers/eijswp0228.pdf>.

<sup>6</sup> Namely, this occurred on July 28, 1995. Accordingly, Vietnam signed the Protocol for the Accession of the Socialist Republic of Vietnam to the Agreement on the Common Effective Preferential Tariff Scheme (CEPT) for

bilateral trade agreement (BTA) with the United States in 2001,<sup>8</sup> and becoming a WTO Member in 2007,<sup>9</sup> Vietnam has implemented significant regulations to ensure an equitable environment for all economic sectors pursuant to a market-economy orientation. Particularly, the focus has been on improvements in the operation of SOEs and private sectors. For example, in Article 8, Annex C of the BTA US – Vietnam,<sup>10</sup> it is confirmed that *Vietnam is permitted to maintain a state enterprise, or grant to any enterprise exclusive or special privileges, to import and export the products (i.e., mineral or chemical fertilizers within 5 years from the date of entry into force of the BTA and white spirit, oil, mazut, diesel, books, brochures, motion-picture film ... for unlimited period of time) provided that the state enterprise shall act in manner consistent with the general principles of nondiscriminatory treatment and in accordance with commercial considerations, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale.*

Consequently, Vietnam replaced the Law on SOEs of 1995 by the Law on SOEs of 2003. Furthermore, under pressure of WTO accession and the necessity of equal treatment for all economic sectors, Vietnam revised these and enacted the Law on Investment of 2005 and the Law on Enterprises of 2005.<sup>11</sup>

Generally speaking, before enacting the Law on Enterprises of 2005, Vietnamese enterprises were categorized in different groups based on ownership criteria and were subject to different sets of laws. For example, SOEs were governed by the Law on SOEs; private enterprises were governed by the Law on Private Enterprises; and foreign-owned enterprises were governed by the Law on Foreign Investment. Nevertheless, after July 1, 2006, the date the Law on Enterprises 2005 became effective, all Vietnamese enterprises regardless of their ownership (private- or state-owned, domestic- or foreign-investor-owned) became governed by the single Law on Enterprises of 2005.<sup>12</sup>

## 1.2 SOE definition in Vietnam

As the name suggests, SOEs are entities controlled by the State rather than by private actors. Internationally, the OECD does not offer such a definition. The World Bank

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the ASEAN Free Trade Area (AFTA) on December 15, 1995. See more at <http://www.asean.org/communities/asean-economic-community/item/vietnam-in-asean-toward-cooperation-for-mutual-benefits>.

<sup>7</sup> The date of Vietnam's accession to APEC was November 15, 1998. See more at <http://www.apec.org/about-us/about-apec/member-economies.aspx>.

<sup>8</sup> See more at <http://www.usvtc.org/trade/bta/text/>.

<sup>9</sup> See more at [http://wto.org/english/thewto\\_e/countries\\_e/vietnam\\_e.htm](http://wto.org/english/thewto_e/countries_e/vietnam_e.htm).

<sup>10</sup> Vietnam and the U.S. signed a BTA on July 13, 2000. The BTA became effective on December 10, 2001.

<sup>11</sup> The Law on Enterprises of 2005, dated November 29, 2005, became effective on July 1, 2006. The law replaced the Law on Enterprises of 1999 and the Law on SOEs of 2003, excepting those provided in Article 166, Paragraph 2 of the Law on Enterprises of 2005; the provisions on organization management and operation of enterprises in the Law on Foreign Investment in Vietnam of 1996 and the Law on Amendment and Addition to a Numbers of Articles of the Law on Foreign Investment in Vietnam of 2000.

<sup>12</sup> Article 38 states *This law provides for the establishment, management organization and operation of limited liability companies, shareholding companies, partnerships and private enterprises in all economic sectors (hereinafter referred to as enterprises); provides for corporate groups.*

defines SOEs as government-owned or government-controlled economic entities that generate the bulk of their revenues from selling goods and services.<sup>13</sup>

At the national level, according to Canada, an SOE is a corporation that is wholly owned, directly or indirectly, by the government.<sup>14</sup> It tends to operate under a private-sector model but has both commercial and public policy objectives, such as providing essential goods or services to Canadian consumers that would otherwise be unavailable or undersupplied (alcohol) and developing certain types of industries or regions. In contrast, the term *SOE* is not used in US law. However, a range of entities linked to the federal government exists with varying degrees of government ownership, control, and participation in governance and funding.<sup>15</sup> There are federal government enterprises, including federal government corporations as agencies of the federal government, established by Congress to perform a public purpose that provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures (e.g., Export–Import Bank, Federal Financing Bank, Amtrak, Overseas Private Investment Corporation, Pension Benefit Guarantee Corporation, and the US Postal Service). Furthermore, they can be government-sponsored enterprises (e.g., Federal National Mortgage Association – Fannie Mae and Federal Home Loan Mortgage Corporation – Freddie Mac) and federally funded R&D centers (e.g., Los Alamos National Laboratory).<sup>16</sup> In some cases, government ownership is no less than 50% of the charter capital of agencies.

In Vietnam, SOEs have three official definitions in Vietnamese regulations. Namely, according to *the first Law on SOEs of 1995*, an SOE is an *economic organization of which the State invests capital, establishes, and administratively manages its commercial activities or public activities for the purpose of carrying out its socio-economic objectives directed by the State*.<sup>17</sup> Accordingly, the SOE is then completely owned by the State. That is, there is no SOE even where the State owns a majority (but not 100%) of its charter capital and/or maintains significant control over SOE management.<sup>18</sup> Comparing this definition to those committed to in the BTA, *state enterprise means a company owned, or controlled through ownership interests, by Vietnam*,<sup>19</sup> it is clear that the BTA definition of SOEs does not cover the situation of state majority control. To that extent, the

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<sup>13</sup> Mary Shirley, *Bureaucrats in Business: the Economics & Politics of Government Ownership*, DEC Note, No. 5, The World Bank, 1995, retrieved from <http://documents.worldbank.org/curated/en/1996/03/442657/bureaucrats-business-economics-politics-government-ownership>.

<sup>14</sup> Subsection 83(1) of Financial Administration Act, R.S., 1985, c. F-11.

<sup>15</sup> *State Owned Enterprises and the Principle of Competitive Neutrality*, OECD, 2009, p. 226, retrieved from <http://www.oecd.org/daf/competition/46734249.pdf>.

<sup>16</sup> *Id.* pp. 227–231.

<sup>17</sup> Article 1 of the Law on SOEs of 1995.

<sup>18</sup> PGS. TS. Le Hong Hanh, “Luật doanh nghiệp nhà nước năm 2003 và những bước tiến trong cải cách doanh nghiệp nhà nước,” *Tap chi Nha nuoc va phap luat*, 8/2004, p. 34 (“The Law on Enterprises of 2003 and Improvement of SOE Reform,” *Journal of State and Law*, Issue 8/2004, in Vietnamese).

<sup>19</sup> Chapter IV of the BTA, Development of Investment Relations.

definition of state enterprises in the BTA was broader than that provided in the Law on SOEs of 1995.

**Second**, the Law on SOEs of 2003 developed the SOE definition in a more-comprehensive manner. It abolished the definition of the Law of SOEs of 1995. Rather, it elaborated that an *SOE is an economic organization in which the State owns the entire charter capital or holds the controlling shareholding or controlling capital contribution, and which is organized in the form of a state company, shareholding company, or limited liability company.*<sup>20</sup> Thus, the second definition increased the scope of the definition of SOEs and mitigated the shortages of the first definition as it recognized the part ownership of the State.

**Furthermore, the third prevailing definition** of SOEs provided in the Law on Enterprises of 2005 is as follows: *SOE means an enterprise in which the State owns more than fifty (50) percent of the charter capital.*<sup>21</sup> Here, the term “enterprise” refers to an *economic organization having its own name, having assets and stable transaction office, and having business registration in accordance with law for the purpose of conducting business operation.*<sup>22</sup> It is a popular business model that is diverse in scale<sup>23</sup> (i.e., small and medium enterprises (SMEs)<sup>24</sup> and large enterprises<sup>25</sup>) and ownership forms (private and state).

<sup>20</sup> The Law on SOEs, Law No. 14-2003-QH11, Article 1, dated December 25, 2001 and effective July 1, 2004.

<sup>21</sup> The Law on Enterprises of 2005, Article 4, Paragraph 22, dated November 29, 2005 and effective July 1, 2006.

<sup>22</sup> The Law on Enterprises of 2005, Article 4, Paragraph 1, dated November 29, 2005 and effective July 1, 2006.

<sup>23</sup> Normally, it is based on the number of employees and capital scale. The criteria also occasionally change.

<sup>24</sup> Classifications between SMEs and large enterprises vary. According to Article 3 of Decree 90/2001 dated November 23, 2001, *SMEs are those independent business and production establishment that have resisted their business under the current legislation, have the registered capital of less than VND 10 billion (equivalent to JPY 5 million) or the average number of annual employees of less than 300.* Accordingly, the classification of SMEs was not based only on form of ownership but also on industry. However, the criteria were replaced by Decree No. 56/2009/ND-CP dated June 30, 2009 concerning support for the development of SMEs. Namely, it revised the definition of SMEs as *those registered their business in accordance with Vietnamese regulations, categorized as three levels: super-small, small, and medium subject to the regulatory capital or the number of employees.*

<i>Scale Industries</i>	<i>Extra-small enterprises</i>	<i>Small enterprises</i>		<i>Medium enterprises</i>	
	<i>Employees</i>	<i>Total Capital</i>	<i>Employees</i>	<i>Total Capital</i>	<i>Employees</i>
<i>Agriculture and fisheries</i>	<i>Less than 10 persons</i>	<i>Less than VND 20 billion</i>	<i>From 10 to 200 persons</i>	<i>From VND 20 to 100 billion</i>	<i>From above 200 to 300 persons</i>
<i>Industry and construction</i>	<i>Less than 10 persons</i>	<i>Less than VND 20 billion</i>	<i>From 10 to 200 persons</i>	<i>From VND 20 to 100 billion</i>	<i>From above 200 to 300 persons</i>
<i>Commerce and services</i>	<i>Less than 10 persons</i>	<i>Less than VND 10 billion</i>	<i>From 10 to 50 persons</i>	<i>From VND 10 to 50 billion</i>	<i>From above 50 to 100 persons</i>

Compared to the definition of SOEs in the Law on SOEs of 2003, the Law on Enterprises of 2005 used a qualitative, percentage-based assessment for the level of state control in enterprise management. This may be better in the sense of transparent management, and it is convenient and consistent with Vietnamese commitments to international bilateral and multilateral trade agreements. For example, the 2001 US–Vietnam BTA states, *three years after entry into force of this Agreement, U.S nationals and companies shall be allowed to enter into joint ventures with Vietnamese counterparts to engage in trading activities in all products (subject to some restrictions) of which equity contributed by US companies shall not exceed 49% of such joint ventures’ legal capacity. Three years thereafter, this limitation on US ownership shall be 51% and seven years after entry into force of this BTA, US companies shall be allowed to established 100% US-owned companies to engage in trading activities in all products (subject to some restrictions).*<sup>26</sup> In the WTO working party report on Vietnam’s accession, Vietnam informed that *it had undertaken a programme of equitization, that is, transformation of 100% of SOEs into joint-stock (shareholding companies) or limited liability companies subject to the Law on Enterprises, to help restructure, upgrade and enhance the efficiency of SOEs.*<sup>27</sup> Namely, SOEs were classified in three groups: (1) *enterprises which would retain 100% SOEs and would not be equitized* (e.g., those essential to ensure national security and public order, implementing the Government’s poverty eradication policy and guarantee the provisions of goods and services that would not be viable for private enterprises, such as national power transmission systems, production of cigarettes, flight control, navigation direction, manufacture of weapons, printing of currency, construction lotteries, and publishing houses),<sup>28</sup> (2) enterprises in which the State retains a majority of shares (i.e., greater than 50% but less than 100%), and (3) enterprises in which the State would dispose of all its shares or retain a majority stake (in this case, enterprises can no longer be considered SOEs as prescribed in the Law on Enterprises of 2005).

However, in contrast to the former law, the SOE definition in the Law on Enterprises of 2005 did not reconfirm the legal status of SOEs, whether they still have limited liability, or whether they can be a shareholding company. To find the appropriate answer, it is necessary to further explore other articles and regulations. First, the Law on Enterprises of 2005 provides that *an SOE, which registered its business license under the law on*

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<sup>25</sup> Decree 59/2011, dated July 18, 2011, provides that *large-sized enterprises with a state capital amount of over VND 500 billion and conducting business operations in insurance, banking, post and telecommunication, aviation, coal mining, petroleum exploitation and mining other precious and rare materials, and others are subject to Prime Minister report on the selection of strategic investors, modes of sale and quantity of shares to be sold to these strategic investors.* However, this capital capacity criterion is applied only to SOEs.

<sup>26</sup> Article 2, Paragraph 7.D of Chapter I, Trade in Goods, of the BTA US – VN 2001.

<sup>27</sup> *Accession of Viet Nam: Report of the Working Party on the Accession of Viet Nam*, para. 87, WT/ACC/VNM/48, October 27, 2006 (VN Accession Report).

<sup>28</sup> *Id.* Table 4. It is promulgated in Decision 38/2007 dated March 20, 2007 and replaced by Decision 14/2011 dated March 4, 2011 on the enactment of criteria and categorized SOEs. Of these, Vietnam Airlines shall not be equitized. However, in 2014, via Decision 37/2014 dated June 18, 2014 replacing Decision 14/2011 dated March 4, 2011, the list of SOEs that are eligible for equitization was shortened. Namely, Vietnam Airlines was equitized for the first time through Decision 1611/2014/QD-TTg dated September 10, 2014 and the circulated IPO on November 14, 2014.

*SOEs 2003, shall be changed into either a shareholding company or a limited liability company (including one member and/or two or more members) not later than July 1, 2010* (conversion of an SOE to a limited liability or shareholding company in Article 166 of the Law on Enterprises of 2005).<sup>29</sup> Furthermore, the provisions were expanded through Decree 25/2010/ND-CP on conversing a state company<sup>30</sup> into a one-member limited liability company;<sup>31</sup> Decree 59/2011/ND-CP on conversing a 100% SOE into a shareholding company;<sup>32</sup> and Decree 189/2013/ND-CP on revising and implementing some articles of Decree 59/2011/ND-CP. Thus, as shown, the SOE terminology is maintained in Vietnamese enterprises regulations and was not dissolved.<sup>33</sup> However, as an issue of law, SOEs are no longer perceived as a category of enterprises subject to the Law on Enterprises of 2005.

The Law on Enterprises of 2005 will be replaced by the Law on Enterprises of 2014 on July 1, 2015. The Law on Enterprises of 2014 officially added one new chapter titled *SOEs* comprising 22 articles on SOE structures, management, the appointment of executives, and their rights and obligations (e.g., disclosure of SOE information). Concerning the application scope,<sup>34</sup> the chapter did not mention the definition of SOEs. Using the phrase *less than 100% of charter capital* in the chapter on SOEs for common limited-enterprise chapters and providing no distinction between private-owned and/or foreign-owned v. state-owned enterprises, the chapter on SOEs in the Law on Enterprises of 2014 covers only the enterprises for which the State owned 100% of charter capital. To that extent, the number of SOEs is reduced.<sup>35</sup> Then, the equitized Vietcombank, Vietinbank, and Seaprodex, of which the State owned more than 50% of charter capital,

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<sup>29</sup> Article 166 of the Law on Enterprises of 2005 *Conversion of SOE*

1. *[Conversion of SOE] shall be implemented in accordance with the annual schedule of conversion but not later than 4 years from the date on which this Law becomes effective, SOEs which were established in accordance with the 2003 Law on SOE must be converted into a limited liability company or shareholding company in accordance with this Law.*

*The Government shall make regulations and provide guidelines on order and procedures for conversion.*

2. *During the period of conversion, the provision of the 2003 Law on SOEs shall remain applicable to SOEs unless otherwise stipulated by this Law.*

<sup>30</sup> One of three types of SOEs: (1) State company, (2) limited liability company, and (3) shareholding company.

<sup>31</sup> March 2010 effective May 2010. It replaced Decree 95/2006/ND-CP on State to onemember limited liability dated August 2006.

<sup>32</sup> July 2011 effective September 2011.

<sup>33</sup> Dinh Dung Sy, “Chuyen doi Doanh nghiep Nha nuoc thanh cong ty theo Luat doanh nghiep 2005 co phai la ‘binh moi ruou cu’?” *Nghien cuu lap phap*, so 16, 2011, p. 52 (“Is Converting SOEs to Companies under the Law of Enterprises of 2005 Just a ‘New Bottle for Old Wine’?” *Legislations Research*, No. 16, in Vietnamese)..

<sup>34</sup> Article 88 The regulatory application of SOE

1. *SOEs shall be organized and managed in according with this Chapter, the corresponding regulations in Section 2 Chapter III (limited liability corporations with one member), and other related regulations of the Law. Where there is a discrepancy between the regulations of Chapter IV (SOEs) and Chapter III (limited liability corporations) and other related regulations of the law, the regulations in this chapter shall be applied.*

2. *The organization and management of SOEs where the State owned less than 100% of charter capital shall be performed in accordance with the corresponding regulations in Section 1 Chapter III and Chapter V of the law.*

<sup>35</sup> See more at <http://www.moj.gov.vn/ct/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=5835>.

are not considered SOEs.<sup>36</sup> This explanation has not yet been officially approved by the competent authorities. To my understanding, the newly established approach has two meanings: (1) The chapter on SOEs in the Law of Enterprises of 2014 regulates enterprises where the state owns 100% of charter capital and (2) the assumption that enterprises where the state owns less than 100% of charter capital are not SOEs has not been sufficiently persuasive, as the language of the Law on Enterprises of 2014 is not explicit. Hence, the omission must mean something. Because of pressure by the other TPP negotiators on the dominance of SOEs in the Vietnamese economy and the absence of concrete definitions of SOEs in the TPP,<sup>37</sup> the recently blurred provisions of the Law on Enterprise of 2014 are a wise choice for the government in terms of implementation.

### 1.3 Classification of SOEs

In Vietnam, the prevailing legal status of an SOE is only (1) a one-member limited company of which Vietnam owns more than 50% of the charter capital; (2) a limited-liability company with two or more members of which Vietnam owns more than 50% of the charter capital; (3) a shareholding company of which Vietnam owns more than 50% of the charter capital; or (4) a group of corporations of which Vietnam owns more than 50% of the charter capital.

**First, a *limited-liability company with two or more members*** is an enterprise, which shall not be allowed to issue shares, and has between 2 and 50 members contributing capital to the capital charter, sharing benefits and losses corresponding to the capital contribution, and responsible for the company's obligations within the committed capital contribution.<sup>38</sup> For this type, there are (1) a Members' Council, which is the highest authority thereof, (2) a chairman of the Members' Council, and (3) a Director or General Director.<sup>39</sup> The chairman of the Members' Council shall be appointed by the Members' Council and not by either the local or central government. Furthermore, the director of the company is that who has the most authority in addressing its daily business activities. It is clearly confirmed that the legal representative of the company can be the chairman of the Members' Council or the director or general director. Normally, the chairman is the legal representative. However, to some extent, the Chairman can be simultaneously a Director or General Director of the company (who is a capital contributor owning more than 10% of charter capital and not the spouse, father, adoptive father, mother, adoptive

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<sup>36</sup> See more at <http://nld.com.vn/kinh-te/xin-loi-anh-khong-con-la-doanh-nghiep-nha-nuoc-20141229084228192.htm>.

<sup>37</sup> "TPP Countries Face Vietnamese Demand for Extensive SOE Exceptions," *Inside U.S. Trade*, September 12, 2014, p. 2.

<sup>38</sup> Article 38 of the Law on Enterprises. See also Article 45 of the Law on Enterprises, which provides as following:

(a) A member may be an organization or an individual; the number of members shall not exceed fifty (50).

(b) A member shall be liable for the debts and other property obligations of the enterprise to the extent of the amount of capital that it has undertaken to contribute to the enterprise.

(c) The share of capital contribution of each member may only be assigned in accordance with redemption of share of capital contribution; assignment of shares of capital contribution and other situation.

<sup>39</sup> Article 46 of the Law on Enterprises.

mother, child, adopted child, or sibling of the manager),<sup>40</sup> where the company charter is thus provided.

***Second, under law, a one-member limited-liability company*** is an enterprise owned by one organization or individual (called the company owner) and the company owner shall be liable for all debts and other property obligations of the company to the extent of the amount of the charter capital of the company.<sup>41</sup> One-member limited liability companies can be owned by the State, namely State Capital Investment Corporations (SCICs).<sup>42</sup> Concerning SOE equitization, SCICs are newly established state organizations that are responsible for the control of equitized firms where the state retains an ownership share.

On one hand, one-member limited companies share many common features with two or more-member limited-liability ones. Namely, they are legal entities under the Law on Enterprises of 2005. The assets of the two companies are independent from the assets of the company owner; that is, the State. To that extent, the one-member and two or more-member limited liability companies are independent from the owner companies. These two company types are not capable of issuing shares, sharing benefits and losses corresponding to capital contribution, and are responsible for company obligations within the committed capital contribution. Moreover, its legal representative can be (1) the Chairman of the Members' Council, who is subject to the nomination of the company owner and not by the Members' Council (like the case of two or more-person limited companies); (2) the Company Chairman; (3) a Director; (4) the General Director. Therefore, after converting into either a one-member or a two- or more-member limited-liability company, an SOE is not allowed to issue shares.

Each type of company has unique features. First, the one-member limited-liability company has only one member. The term *member* means *an organization*, which shall be a *legal entity* and not an *individual*. Normally, one-member limited-liability companies refer to either SOEs or enterprises owned by one foreign investor who were subject to the Law on Foreign Investment in Vietnam (which expired before July 1, 2006, the date the Law on Investment of 2005 became effective).<sup>43</sup> Here, one-member SOEs that converted from state companies to one-member limited-liability companies are considered part of the "State" in terms of one organization. Another main difference between the one- and two or more-member limited-liability companies is that the former type is not allowed to decrease its own charter capital,<sup>44</sup> whereas the latter can decrease its charter capital by returning part of the contributed capital to their respective contributed capital shares in the charter capital; redeeming capital contribution shares; and reducing the charter capital corresponding to the reduced value of assets of the two or more-member limited-liability

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<sup>40</sup> Article 49, 57 of the Law on Enterprises.

<sup>41</sup> Article 63 of the 2003 Law on Enterprises.

<sup>42</sup> Operations began January 2006. See more at <http://www.scic.vn/english/>.

<sup>43</sup> Decree 102/2010/ND-CP, dated October 1, 2010, details a number of articles of the Law on Enterprises of 2005.

<sup>44</sup> Article 76 of the Law on Enterprises.

company.<sup>45</sup> There are various reasons for reducing the contributed capital of the one-member limited-liability company. Regardless, when the company owner wants to draw back its own contributed capital, it is required to transfer its contributed capital to other organizations or individuals. To this extent, the one-member limited liability company converts to a two- or more-member limited-liability company. After a state company converts to a one-member limited-liability company, the state company is still allowed to convert into a limited-liability company with two or more members. Moreover, the one-member limited-liability company cannot reduce the contributed state capital.

**Third, a shareholding company** has legal entity status of limited liability.<sup>46</sup> It uses the term *shares* in its name as it can issue shares to mobile capital (substantially different from the two types of limited-liability companies), and its charter capital is divided into many equal shares, including standard and preferred, which can be freely assigned. Therefore, in order to mobilize capital, renovate technology, and facilitate capital resources, state companies, that is, SOEs, equitize. Namely, they convert the existing charter capital into many equal shares, selling either parts or the entirety of the existing state capital, and issue additional shares (e.g., Vinamilk, Vietcombank, Mekong Delta Housing Development, and Bao Minh Insurance).<sup>47</sup> Thus, the state company converts itself into a shareholding company.

**Fourth, corporation groups** are collections of companies that have close relations with each other on a long-term basis in terms of economic interest, technology, marketing, and other business services.<sup>48</sup> Its form can be (1) a parent company and subsidiary companies; (2) an economic group and (3) other forms.<sup>49</sup> The corporation group's legal status, whether a limited liability or shareholding company, has not been explicitly provided. Its constituent corporations/companies are practically either limited-liability companies or shareholding companies. For the definitions of the three forms, the Law on Enterprises only defines *economic group*.<sup>50</sup> The corporation group can be an economic group. However, economic groups are still not clearly defined.

**Compared to Vietnamese commitments to the WTO**, there is no requirement addressing the legal status of Vietnamese SOEs. Rather, the commitments set some general principles of Vietnamese SOEs and state trading enterprises. The list of goods subject to state trading enterprises including cigarettes, oil, newspapers, journals and periodicals, records, tapes, and aircraft.<sup>51</sup> State trading enterprises in Vietnam include Petrovietnam, Petrolimex, Petec, Petechim, and Saigon Petro for crude oil; PetroMekong, Vinapco, Marinesupply, Petroleum Processing and Trading Company, Military Petroleum

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<sup>45</sup> Article 60.3, 76 of the Law on Enterprises.

<sup>46</sup> Article 77 of the Law on Enterprises.

<sup>47</sup> Decree 59/2011/ND-CP on Converting a 100% SOE into Shareholding Company.

<sup>48</sup> Article 146 of the Law on Enterprises.

<sup>49</sup> Article 149 of the Law on Enterprises.

<sup>50</sup> That is, an economic group means a corporate group of a large size. The Government shall provide guidelines on criteria, organization management, and operation of economic groups.

<sup>51</sup> *VN Accession Report*, *supra* note 27, Table 8(c).

and Gas Corporation, and Dong Thap Petroleum Import–Export Company for refined petrol and gasoline; Airimex for aircraft; Fafilm Vietnam for video tapes; Xunhasaba for newspapers and journals; and Vinataba for cigarettes.<sup>52</sup>

The Law on Enterprises of 2005 required all SOEs to be converted into limited-liability and shareholding companies in the four years between July 1, 2006 to June 30, 2010. Thus, before June 30, 2010, Vietnamese SOEs were legal entities in accordance with the Law on SOEs of 2003 and the Law on Enterprises of 2005. Then, SOEs were considered one of the following: (1) a State Corporation where the State owns more than 50% of the charter capital;<sup>53</sup> (2) a State Shareholding Company of which the State owned more than 50% of the charter capital; (3) a one-member State limited-liability company of which the State owned more than 50% of its charter capital; (4) a State limited-liability company with two or more members of which the State owned more than 50% of the charter capital. In principle, converted SOEs are supposed to not be treated more favorably than private limited-liability and shareholding companies.

In practice, the problems relating to and/or resulting from the conversion of SOEs are not simple. The procedural conversion relates to the names of SOEs, as they relate significantly to the rights and obligations of the State. Therefore, the features of the State in the State Corporation as *the owner* and that of the State in the converted enterprise as *the investor* were different. Specifically, in the State Corporation, the true owner was its administrative organs (line Ministries,<sup>54</sup> People’s Committees), whereas in the converted enterprises, the owner could be either State organs of which the State owned more than 50% or the contributed capital by member(s). The administration of Ministries and Committees is vague on these issues, and these administrative management interests on SOEs have not been to the benefit of SOEs.<sup>55</sup> Therefore, there possibility exists that administrative authorities have intervened in business activities of converted enterprises. If current regulations do not eliminate such administrative intervention, we can only conclude that this is a case of *new bottle for old wine or no ownership nature change but the name*.<sup>56</sup>

SOEs in WTO jurisprudence have been frequently perceived as public organs/public bodies/government authorities. In *US – Antidumping and countervailing*

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<sup>52</sup> *Id.* Table 5.

<sup>53</sup> They are categorized into Independent State Corporations and General State Corporations, of which there were three types: General State Corporations in which the State made investment and establishment decisions, and General Corporations that were invested in and established by corporations and SCICs, respectively.

<sup>54</sup> An SOE is under the administrative governance of the Ministry of Finance, which is typically responsible for the capital and its utilization, Ministry of Social Affairs for employment issues, and different line ministries for management.

<sup>55</sup> PGS. TS Le Hong Hanh, “Co phan hoa Doanh nghiep Nha nuoc – Mot so khia canh ly luan can duoc nhan thuc dung,” *Tap chi Luat hoc*, 1/2003, p. 14 (“SOE Equitization – Theoretical Issues Need to Be Appropriately Considered,” *Jurist Journal*, Issue 1/2003, in Vietnamese).

<sup>56</sup> Dinh, *supra* note 33, pp. 54–55.

*duties from China*,<sup>57</sup> the Panel decided that Chinese SOEs are public bodies by virtue of government ownership control, and the AB reserved that Chinese SOEs are not public bodies as the latter are vested or entrusted with authority to perform government functions. SOEs can cover a wide variety of enterprises, insurance, textile, and banking as well. Moreover, under Chinese and Vietnamese banking regulations, State-owned commercial banks (SOCB) carry out loan businesses based on the need of the national economy and social development and under the guidance of State industrial policy. Together, the Government appoints the banks' management. To this extent, SOCBs are under government ownership control and perform government functions. That is, an SOCB is a public body. Therefore, other WTO members as well as the WTO dispute settlement bodies might conclude that the Vietnamese SOE is a public body/government authority.

**Generally speaking**, the Vietnamese Law on Enterprises of 2005 did not define and categorize SOE in the criteria of its functions, that is, public, social, and business functions, as it did throughout the 1990s. Rather, SOEs are defined as enterprises where the State owns more than 50% charter capital.

## **2. Principles of SOE management in TPP negotiation**

### **2.1 TPP introduction**

In March 2006, Brunei Darussalam, Chile, New Zealand, and Singapore introduced a four-way free-trade agreement (FTA) named the Trans-Pacific Strategic Economic Partnership Agreement (P4). The P4 is an agreement for a high level of liberalization of goods and services, and it became effective May 2006 in New Zealand and Singapore, November 2006 in Chile, and July 2009 in Brunei Darussalam. However, the P4 did not attract significant attention, as the market power of the P4 members was insignificant. Following the entry of the US into the P4 negotiations in 2009, Australia, Peru, Vietnam, and Malaysia joined in 2010. At the APEC leaders' meeting in 2012, Canada, Mexico, and Japan sought entry to the TPP. The participation of Mexico and Canada was approved in late 2012, and Japan was admitted in April 2013.

Tentatively, 24 chapters are expected for the establishment of the 21<sup>st</sup>-century TPP agreement, such as investment; government procurement; labor; environment; intellectual property; nontariff barriers (Sanitary and Phytosanitary Agreement which governing sanitary and phytosanitary measures grounded in science and subject to a transparent regulatory process); services (with the exception of new types of services, everything is covered unless a country takes a specific exception, such as social networking services), rules of origin (that include accumulation). This is critical, as it allows businesses to create regional supply chains and take advantages of efficiencies established by regional

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<sup>57</sup> Panel Report, *US — Anti-Dumping and Countervailing Duties (China)*, WT/DS379/R, October 22, 2010; Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, March 11, 2011.

supply chains. To that extent, businesspeople can stay in one place and participate in regional supply chains, and thus, there is no need to move offshore to take advantage of Asia-Pacific supply chains).

In general, in meetings held in Singapore through the end of 2014, TPP members have not yet agreed on several areas concerning commercial benefits. Furthermore, the negotiation strategies of TPP members are conflicting. For example, Australia and New Zealand are concerned with agriculture, whereas textile, clothing, and footwear are subject to debate in Malaysia and Vietnam. Australia remains reluctant to accept the jurisdiction of investor-state dispute settlements (ISDS) because of political sensitivity. Meanwhile, the US has insisted that the TPP should include an ISDS clause for investment safety or the US Congress will not ratify the TPP. Recently, Japan has indicated that it will not include ISDS in the TPP.

## 2.2 TPP principles concerning SOEs

### 2.2.1 SOEs in the TPP: the development of state trading enterprises of Article XVII GATT 1994

To some extent, SOEs are required to reach certain social goals that are not automatically realized in a free-market context. However, most of the biggest enterprises worldwide today are SOEs operating under a commercial basis in transportation (Amtrak in the US); automobiles (General Motors in the US); postal service (Japan Post, the largest SOE holding company on the planet, which includes Japan Post Service, Japan Post Network, Japan Post Bank, and Japan Post Insurance, which will be 100% privatized by 2017, and Canada Post, which has a statutory monopoly over the collection, transmission, and delivery of letter mail within Canada). There are various reasons for such developments, from the appropriated strategies of the SOEs to the support from their government. Practically, SOEs have enjoyed privileges and immunities that are not available to their privately owned competitors, such as financially preferential treatments,<sup>58</sup> financing guarantees,<sup>59</sup> taxation exemptions, preferences in public procurement, and informational advantages. SOEs might receive many commercial benefits that provide them with better and advantageous situations in the market, and therefore, SOEs can practically distort and/or threaten to distort market practices.<sup>60</sup>

This section examines (1) whether SOEs have been addressed under the WTO era and (2) the rationales and tendencies of administering SOEs in the TPP.

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<sup>58</sup> Subsidies were granted to British Steel Corporation (BSC) before privatization in 1988. *See more at* [http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds138\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds138_e.htm).

<sup>59</sup> Loan guarantees were provided by the Canadian government for aircraft. *See more at* [http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds70\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds70_e.htm).

<sup>60</sup> *Competitive Neutrality*, *supra* note 15, p. 25.

*Concerning the first issue*, the WTO offers fairly weak discipline on the regulatory preferences for SOEs.<sup>61</sup> First, article XVII GATT 1994 long recognized the existence of state trading enterprises as legitimate trading partners. Accordingly, state trading enterprises are any enterprise, regardless of whether it is private or state owned, subject to some exclusive or special privileges in export and/or import trading. Among others, it is required that state trading enterprises (1) *shall act in a manner consistent with the general principles of nondiscriminatory treatment under the GATT* and (2) *shall make purchases solely in accordance with commercial consideration relating to factors such as price, quality, availability, and marketability*. Though SOEs are granted some trade privileges compared to companies, SOEs are essentially state trading enterprises. Therefore, Article XVII GATT 1994 did not directly refer to and systematically address SOE issues.

When the SOE is granted financial preferences, free input provisions, and/or input provisions at lower prices than the prevailing market price, there are three groups of articles and commitments that can be used to challenge SOE practices. **First**, the SOE can be subject to the principle of *commercial basis* and *nondiscriminatory principles* as prescribed in Article XVII of GATT 1994. **Second**, under the coverage of Article VI and XVI of GATT 1994 and Article 1, 27.13 and 29 of the Agreement on Subsidy and Countervailing Measures (SCM Agreement), SOEs are potentially perceived as beneficiaries that can be subsidized.<sup>62</sup> However, the subsidies for SOEs actionable under GATT and the SCM Agreement are those not applicable to trade in services and investment. There are no multilateral rules regulating financial contributions to SOEs that are related to the trade in services or investment.<sup>63</sup> In the case of Japan Post, the Japanese government granted favorable and preferential treatment for the SOE despite that Japan committed to provide national treatment for foreign insurance firms and banks and did not exempt its post service from service commitments under the principle of the *National treatment* of Article XVII of GATS.<sup>64</sup> Thus, Japanese obligations were inconsistent under Article XVII of GATS. Japanese SOEs in terms of Japanese state trading enterprises are subject to the application of Article XVII of GATT. However, it is relatively difficult to prove that the Japanese government has violated its obligation under Article XVII of GATT 1994 (*under commercial basis and nondiscrimination principle*). **Third, concerning Vietnamese commitments**, Paragraph 15 of the Working Party Report of Vietnam to the WTO provided that in calculating the amount of Vietnamese subsidies, including but not limited to those available to Vietnamese SOEs, WTO importing

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<sup>61</sup> Junji Nakagawa, *Regulatory Harmonization through FTAs and BITs: Regulation of State Owned Enterprises*, Working Paper No. 2012/55, Society of International Economic Law (SIEL), Third Biennial Global Conference, July 12 - 14, 2012, p. 10, retrieved from <http://dx.doi.org/10.2139/ssrn.2103237>.

<sup>62</sup> With an exception for subsidies granted by a developing countries in connection with the privatization program. With an exception for export subsidies used by transition-economy Members to facilitate its transformation from a planned to a market economy during the seven-year grace period.

<sup>63</sup> Trade Policy Bureau, Ministry of Economy, Trade and Industry (METI), *Report on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA, BIT*, 2012, p. 326.

<sup>64</sup> Gary Clyde Hufbauer and Julia Muir, *Japan Post: Retreat or Advance?*, Policy Brief No. PB12-2, Peterson Institute for International Economics, 2012, retrieved from <http://www.iie.com/publications/pb/pb12-2.pdf>.

members are allowed to use the *so-called nonmarket economy methodology* or the *out-country benchmark*. The discipline has employed many constraints for the activities and the financial conditions of Vietnamese SOEs. Specifically, the application of prevailing figures and data of another WTO member in determining the amount of subsidies that are supposed to be granted by the Vietnamese Government would no longer consider the sensitive features and fruitful exceptions provided in Article 29.13 of GATT 1994, as the subordinated WTO member has a market economy. Therefore, the methodology would be deactivated or ineffective with the exception of WTO Agreements to which Vietnam can be more favorable. To that extent, Vietnamese governmental reforms on SOEs are in a more difficult position.

***Second, with respect to the rationale of SOEs in the TPP***, SOE capital is wholly or partly owned by the government, which can make them powerful commercial competitors. On the one hand, SOEs distort international trade and impede international competition because of the lack of transparency in their administrative governance. The government, as the shareholder of SOEs, has a legitimate right to influence SOEs by appointing board of directors; those are senior government or military officials and do not possess relevant business skills as well as administration experience.<sup>65</sup> As a result, SOEs are granted more preferential treatments, including but not limited to subsidies from their governments for SOE business activities (e.g., subsidized lending, access to below-market cost for SOE inputs, and access to essential public goods such as postal services, railways, and health services), favorable export credits, tax treatments (as SOEs may be required to pursue objectives other than profit maximization),<sup>66</sup> exemption from competition laws and bankruptcy law, and judicial enforcement of intellectual property. Moreover, SOEs can access controlled networks or distribution channels on a preferential or exclusive basis, which results from preferential access to information. To create competitive neutrality and maintain a level playing field between SOEs and private companies when engaged in commercial competition, the U.S., among other TPP negotiators, proposed SOEs disciplines seeking to address concerns expressed by U.S. companies about competitive disadvantages relative to state-backed foreign competitors.<sup>67</sup> And, the TPP negotiators tentatively decided to faster reform of the SOE sector.<sup>68</sup>

Even though no public text of an agreement is available at this time, TPP agreement is said to ensure that SOEs do not nullify or impair market access in the party's home

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<sup>65</sup> Maria Vagliasindi, *The Effectiveness of Board of Directors of State Owned Enterprises in Developing Countries*, Policy Research Working Paper No. 4579, The World Bank, 2008, p. 3, retrieved from <https://openknowledge.worldbank.org/bitstream/handle/10986/6508/wps4579.pdf>.

<sup>66</sup> *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, OECD, 2012, p. 30, retrieved from <http://www.oecd.org/daf/ca/50250955.pdf>.

<sup>67</sup> *Proposed Trans-Pacific Partnership*, Congressional Research Service (CRS), 2015, p. 2.

<sup>68</sup> "TPP Countries Signal New Proposals to Counter U.S. SOE, IPR Demands," *Inside U.S. Trade*, December 12, 2012, p. 7.

market, the market of other TPP country, or in third-country markets.<sup>69</sup> Therefore, to this extent, the TPP addresses SOEs, whereas the WTO does not.

Needless to say, every TPP member has SOEs, with higher concentrations of SOEs in Malaysia, Singapore, and Vietnam. During the TPP negotiations, all TPP members reserved specific fields for SOEs, such as energy in Mexico and transportation in the US (Amtrak received over 44 billion in direct federal subsidies).<sup>70</sup> Vietnam, as a nonmarket economy, proposed a long list of reserved exceptions for subsidies.<sup>71</sup> In reality, Vietnam has not committed to cut all subsidies. Rather, Vietnam is required to cut subsidies that cause adverse effects on commerce and investment between TPP negotiating members. To this extent, the obligation to reduce subsidies does not depend on the financial contribution and specificity test but on adverse effects, which are not easy to prove.

On the other hand, SOEs reform and maintenance, have raised serious issues for the TPP negotiators as SOEs are given additional developmental objectives, such as ensuring employment, creating necessary infrastructure for economic development, pursuing cultural preservation.<sup>72</sup> The corporatization of SOEs by strengthening SOEs' autonomy and separating their accounts to those of board of directors and line ministries are evidenced of a complex process.<sup>73</sup> Some problems still persist after corporatization, such as the one posed by pervasive soft budget constraints and government interference, so that further restructuring of SOEs may be necessary, *e.g.*, structuring of markets, the legal system and culture.<sup>74</sup>

And, international trade is facing the same difficulties. The covered business of SOEs in TPP negotiators are in both goods and services through foreign direct investment, commercial presence and services delivered cross-border. Meanwhile, WTO state trading enterprises in pursuant to Article XVII GATT 1994, which including but not limiting to SOEs, is limited in scope and ambition.<sup>75</sup> The WTO has refused to read Article XVII GATT 1994 as imposing a requirement for state trading enterprises to make purchases or sales in accordance with commercial considerations. For example, the Appellate Body explained in *Canada – Wheat* that until a complaining party proves that there has been a failure that to act in consistent with principles of non-discriminatory treatment, commercial considerations are not relevant.<sup>76</sup> Therefore, from a practical standpoint, framing these obligations as trade and investment obligations sets them in their proper

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<sup>69</sup> William Krist, *Negotiation for a Trans-Pacific Partnership Agreement*, Wilson Center, 2012, p. 19, retrieved from [http://www.wilsoncenter.org/sites/default/files/PAGE\\_TPP\\_REPORT.pdf](http://www.wilsoncenter.org/sites/default/files/PAGE_TPP_REPORT.pdf).

<sup>70</sup> *Competitive Neutrality*, *supra* note 15, p. 37.

<sup>71</sup> “TPP Countries Face Vietnamese Demand,” *supra* note 37, pp. 1–2.

<sup>72</sup> Vagliasindi, *supra* note 65, p. 13.

<sup>73</sup> Maria Vagliasindi, *Governance Arrangements for State Owned Enterprises*, The World Bank, 2008, p. 8.

<sup>74</sup> *Id.* p. 9.

<sup>75</sup> Coalition of Service Industries & U.S. Chamber of Commerce’s Global Regulatory Cooperation Project, *State-Owned Enterprises: Correcting a 21st Century Market Distortion*, p. 13, retrieved from <http://www.esf.be/new/wp-content/uploads/2011/09/Global-Services-Summit-2011-Paper-on-21st-Century-Trade-Issues.pdf>.

<sup>76</sup> Appellate Body Report, *Canada — Wheat*, para. 145, WT/DS276/AB/R, August 30, 2004.

economic and political context, as obstacles and distortions to trade and investment in the commercial marketplace.<sup>77</sup>

In practice, the implementation of SOEs in TPP negotiations mostly requires the TPP members to change their Constitutions. Indeed, as of the end of 19 multilateral rounds, TPP negotiation members have not yet reached a final version. Rather, SOEs have been accepted as the most difficult of the TPP negotiations.<sup>78</sup>

### 2.2.2 SOEs on a commercial basis – a case study of SOE equitization in Vietnam

Equitization of SOEs are, among others, the progress of ownership change; wholly or partly state-owned companies under mixed ownership (multi-owners) that are not necessarily privately owned as privatized companies are. According to some authors, equitization is equivalent to privatization, especially in the ex-Soviet Union.<sup>79</sup> In Vietnam, the Government explicitly confirmed in Decision 5 of the Communist Party Festival that the equitization of SOEs does not necessarily mean the transformation of privatization provided that equitization covers privatization,<sup>80</sup> as the purpose of equitization in Vietnam is to re-organize SOEs and improve the effectiveness and competitiveness of equitized SOEs. Equitization helps diversify the true SOE owners, including a *nonspecific* State owner. Equitized SOEs where the State still owned more than 50% of the shares were categorized as SOEs under the Law of Enterprises of 2005. Normally, under SOE equitization, the assets of equitized SOEs have not been transferred to only one private entity. Instead, equitized SOEs and their assets are then owned by domestic or foreign share purchasers and employees and the Ministry of Finance/SCICs.

In Vietnam, the SOE equitization process first commenced in 1992 through Decision 202-CT dated June 8, 1992 of the Minister's Council (now called *Prime Minister*) and followed by Decrees 28/1996 and 44/1998 of the Government. At that time, most SOEs operated using obsolete machinery and equipment and at either a loss or low profitability. They borrowed capital from other SOEs, that is, from the banking sector and other capital sources. The borrowing activities were perceived as a complex maze of cross-subsidization and indebtedness.<sup>81</sup> However, as of early 1998, there were only 18

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<sup>77</sup> Coalition of Service Industries & U.S. Chamber of Commerce, *supra* note 75, p. 9.

<sup>78</sup> "Malaysia Minister Outlines 'Serious Difficulties' with SOEs, Other TPP Issues," *Inside U.S. Trade*, September 6, 2013, pp. 1–2.

<sup>79</sup> See, for example, Ari Kokko and Fredrik Sjöholm, "Mot so vien canh cho vai tro cua Nha Nuoc tai Viet nam," *Tap chi Thai Binh Duong*, 13:2, 2000, pp. 257–277 ("Perspectives of the role of State-Owned Enterprises in Vietnam," *Pacific Journal*, Vol. 13:2, in Vietnamese); *UNDP Nha nuoc voi tu cach la nha dau tu: Co phan hoa, Tu nhan hoa va chuyen doi doanh nghiep nha nuoc tai Viet Nam*, 2006, p. 1 (*UNDP paper research, State as investors: Equitization, Privatization, and Reform of State-Owned Enterprises in Vietnam, in Vietnamese*).

<sup>80</sup> Decision 5 of The Communist Party Festival 9th dated September 24, 2001: *The aims of SOEs equitization are to create enterprises of which the owners are diversity, including the mass of employees, in order to utilize effectively the capital, assets of the State and mobilize the social capital into production development, business; enhance the real ownership of the employees, shareholders and improve the social management to the enterprises; ensure the interest harmonization of the State, enterprise and the employees. The SOEs equitization shall not become the SOEs privatization. See more Le, supra note 55, p. 14.*

<sup>81</sup> Sjöholm, *supra* note 5, p. 16.

SOEs that were equitized. The slow process was explained by administrative difficulties, among others. Actually, equitization was directed by the Management Board of SOE Equitization, which mostly included government officials, and simultaneously worked for both SOE equitization and their administrative authorities. In addition, some SOE managers received many privileges associated with managing the SOE and resisted changes that made them accountable to new owners with tougher demands.<sup>82</sup>

However, the recent prevailing conditions have been completely revised. On July 18, 2011, the Government promulgated Decree 59/2011/ND-CP (Decree 59), which replaced Decree 109/2007/ND-CP (Decree 109) dated June 26, 2006 on the conversion of SOEs into shareholding companies. Decree 59 eliminated many of the legal inconsistencies associated with the SOE equitization process in Vietnam.

**First**, Decree 59 reduced the administrative burden on the information provision to and approval obligations by the Prime Minister of Vietnam. According to Decree 109, equitized shareholding companies were required to report their equitization plans to the Prime Minister,<sup>83</sup> whereas Decree 59 required that only SOEs with state capital exceeding VND 500 billion (approximately JPY 240 million) and operating businesses in specialized sectors (e.g., insurance, banking, communications, aviation, and rare mineral exploitation) are obliged to report to and obtain approval by the Prime Minister for decision criteria for the selection of strategic investors, modes of sale, and quantity of shares to be sold to these strategic investors.<sup>84</sup>

**Second**, SOE asset evaluation is the most complex step in SOE equitization, as all SOE assets need to be appropriately counted. For example, (1) tangible assets include but not limited to the quality and quantity of SOE products, regulatory prices, and market prices of the products at the time of equitization and (2) nontangible assets include land user rights, commercial advantages, trademarks, and distribution systems. In Decree 59/2011/ND-CP, the valuation of SOE equitization is determined by a third-party independent organization in enterprise evaluation (*i.e., domestic or foreign audit company, security company, or price appraisal enterprises where the total assets of the equitized enterprises are more than 10 billion VND*).<sup>85</sup> Furthermore, the results of SOE asset evaluation are subject to the approval by the state audit,<sup>86</sup> and the shares of equitized SOEs are consistently made available for purchase by foreign investors subject

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<sup>82</sup> *Id.* p. 17.

<sup>83</sup> Article 54 of Decree 109/2007, dated June 26, 2007, on the conversion of enterprises with 100% state capital to shareholding companies.

<sup>84</sup> Article 54 of Decree 109/2007, dated June 26, 2007, on the conversion of enterprises with 100% state capital to shareholding companies and Article 6, Paragraph 3 of Decree 59/2011 on the conversion of enterprises with 100% state capital to shareholding companies.

<sup>85</sup> Article 12, 22 Decree 59/2011/ND-CP dated July 18, 2011 on the conversion of enterprises with 100% state capital into shareholding companies.

<sup>86</sup> Article 27, Decree 59/2011/ND-CP, on the conversion of enterprises with 100% state capital into shareholding companies, and Decree 189/2013 ND-CP, on implementing and revising some articles of Decree 59/2011, dated July 18, 2011.

to some exceptions of Vietnamese commitments to the WTO: *foreign investor were allowed to participate in the equitization process by purchasing shares of SOEs in certain sectors which did not depend on whether their enterprises produced for the local market or for exportation and shall be acquired not exceed 30% of the company's registered capital.*<sup>87</sup>

**Third**, on land use rights evaluation, in Article 31 of Decree 59/2011/ND-CP on converting a 100% SOE into a shareholding company, which is modified by Article 31 of Decree 189/2013, which became effective on January 22, 2014,<sup>88</sup> land use rights are incorporated in SOE assets and are priced based on the price information announced by the Provincial-level People's Committee (in the locality in which the enterprise has the allocated land area) at the time of inclusion of the land price in the equitized enterprise value. More importantly, the Decree also provided a situation where there was a discrepancy between the promulgated price and the actual market price. Particularly, the Provincial-level People's Committee is eligible for making adjustments to ensure the most appropriated market price. This seems to be one of the most essential improvements of the Vietnamese government in the equitization of SOEs in the context of exemption and/or omission of land use rights and subsidies in terms of omission of revenue otherwise owed.

However, this regulation has not mentioned its retrospective legal effect, which is whether the price of land use rights can be recalculated for transactions that were established and completed before Decree 189 became effective. I stress here that in WTO law jurisprudence, the financial benefits resulting in the exemption and/or privileges of land use rights have been frequently perceived as a subsidy calculated without time limitations. Another is the criteria of land use rights competitive advantages, that is, *the location of land site, whether land site in planning area, and other pending planning area.*<sup>89</sup>

**Finally**, the procedures of SOE equitization have become more transparent and effective as the purchase and sale of shares are conducted through public auction.

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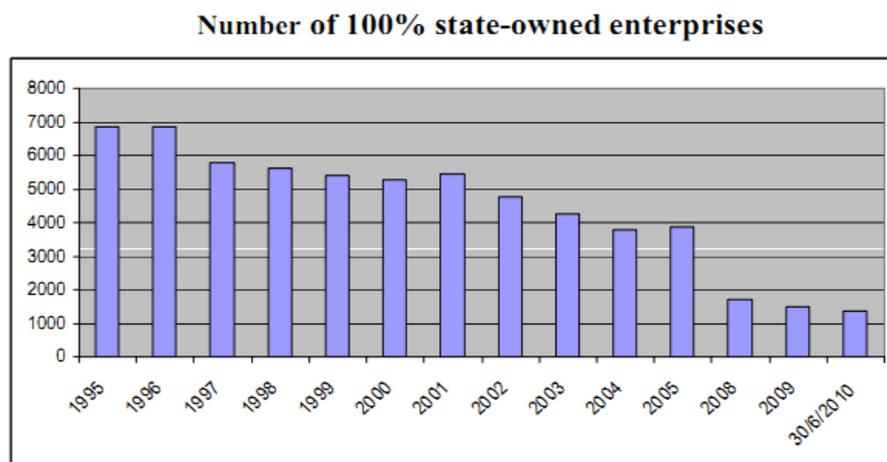
<sup>87</sup> Whereas, according to Article 4 of Decree No. 187/2004/ND-CP, domestic investors, including economic and social organizations, are allowed to purchase shares without limitation. However, the provision has changed significantly in Article 6, Paragraphs 2, 4, and 5 of Decree 109/2007 dated June 26, 2007 and Decree 59/2011 dated July 18, 2011 (replacing Decree 109/2007): *domestic investors may purchase shares of equitized enterprises in unlimited quantity except where an enterprise is concurrently equitized and listed on a stock exchange, the maximum and minimum of shares which may be ordered for purchase set out in the plan on initial offering of shares must not discriminate against investors of all economic sectors.*

<sup>88</sup> Actually, it was not clearly provided in the Decree: *the Decree shall enter into force after 15 days, commencing from the date published in the Official Gazette.* However, in practice, we indeed have the technique to search for this information: exploring <http://luatvietnam.vn/default.aspx?tabid=684&q=189/2013&i=identity> and typing the name of the document within Public Newspapers/Official Gazette and checking its validity. We found that the document was published in the Official Gazette on December 7, 2013. Thus, the effective date of this commercial-basis regulation was January 22, 2014.

<sup>89</sup> Bui Van Dung and Nguyen Thi Luyen, "Mot so han che trong Co phan hoa Doanh nghiep Nha nuoc va giai phap khac phuc," *HKLP*, so 33, 3/2008 ("The Shortcomings of SOE Equitization and Its Solution," *HKLP*, No. 33, in *Vietnamese*).

Moreover, the equitization process is subject to third-party independent and professional organs and not composed of government officials and/or members of the Executive Management Board of the equitized SOEs. In Vietnam, at one point, the evaluation of the undue administration for equitization was conducted in secret. Therefore, assets of SOEs are valued much lower than the prevailing market price so that the SOE equitization authority can take financial interest, that is, *buying shares with deliberately lower price and selling the shares with higher price for the commission and information rights*. To this extent, the Vietnamese government also suffered losses. Auctions can actually minimize the devaluation of SOE assets. When the equitized enterprise authority overvalued its assets for accomplishment and/or reputation, the auction can help the buyers of shares take advantage of publicity and transparency to avoid economic losses.

During the last 25 years, Vietnamese SOE equitization regulations have changed significantly. For example, it is clearly provided that *conversion of an SOE of which the State owned 100% of charter capital to a shareholding company shall be conducted publicly, transparently on the market principle*. This reduced the problem of closed-door equitization within the equitized SOE.<sup>90</sup> Consequently, the number of SOEs in Vietnam has significantly decreased, from nearly 7,000 SOEs in 1995 to just over 1,000 SOEs in 2010.



According to the Steering Committee for Enterprise Renovation and Development, the state sector remains relatively large, accounting for 33% of GDP in 2011. In 2012, there were about 1,309 wholly-owned SOEs, of which 692 enterprises were maintained, 573 enterprises were equitized with the state holding more than 50% of shares, 13 enterprises were dissolved, and 31 enterprises were transformed into limited-liability companies.<sup>91</sup> In the SOE Restructuring Meeting in February 2014, Prime Minister Nguyen Tan Dung

<sup>90</sup> Article 1, Paragraph 3 of Decree 59/2011/ND-CP dated July 18, 2011, on the conversion of enterprises with 100% state capital into shareholding companies.

<sup>91</sup> *Trade Policy Review of Vietnam: Report by the Secretariat*, para. 1.17, WT/TPR/S/287, August 13, 2013.

stressed that *SOE equitization is the only way to improve the effectiveness of SOEs, to facilitate the sources for national economy. Its phases shall be in no case postponed any longer.* Under Notice 334/TB-VPCP, Vietnam will equitize 532 SOEs by December 31, 2015. The equitization shall be conducted in the manner of comprehensiveness, due process, disclosure, transparency, effectiveness, and under commercial principles. Especially, where an SOE has obtained equitization approval by the competent authorities and delays and/or does not perform SOE equitization in due time, its CEO might be disciplined.<sup>92</sup> Quickly equitizing SOEs is consistent with the economic development policy of the Government that mainly concentrates on SOE reform, not only because of TPP negotiation results. Furthermore, the 2015 deadline is rapidly approaching, and the number of SOEs that remain to be equitized is large. Therefore, the selling shares of SOEs might face many challenges because of limited investors and the competitiveness of the shares of these SOEs. In the first four months of 2014, more than 70% of SOEs that equitized shares did not sell out their first IPO because of a lack of interested buyer and a lack of benefits of purchasing such shares. For example, Trancinwa sold less than 1% of the equitized shares of its charter capital; Hanoi Construction General Corporation Hancorp sold almost no equitized shares; Vietnam Motor General Corporation Vinamotor sold only 3% of its equitized shares; and Cienco 6 sold only 4% of its equitized shares.<sup>93</sup> Therefore, the equitized SOE may devalue its assets to attract investors/ buyers.

The following State Corporations are active as of 2014: Vietnam National Textile & Garment Group (Vinatex),<sup>94</sup> Vietnam Electricity Group (EVN),<sup>95</sup> Petrovietnam Vietnam Oil and Gas Group (PVN),<sup>96</sup> Vietnam national Coal – Mineral Industries Holding Corporation Limited (Vinacomin),<sup>97</sup> Vietnam Rubber Group (Rubber Group),<sup>98</sup> Vietnam Posts and Telecommunication Group (VNPT),<sup>99</sup> Vietnam National Petroleum Group (Petrolimex),<sup>100</sup> Vietnam National Chemical Group (Vinachem),<sup>101</sup> and Shipping Industry Corporation (SBIC). Moreover, existing General Corporations include (1) Vietnam National Tobacco Corporation (Vinataba),<sup>102</sup> Vietnam Steel,<sup>103</sup> Vietnam

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<sup>92</sup> <http://www.tapchitaichinh.vn/Nghien-cuu-dieu-tra/Tai-co-cau-doanh-nghiep-nha-nuoc-Het-duong-lui/54741.tctc>.

<sup>93</sup> <https://www.vndirect.com.vn/portal/tin-trong-nuoc/IPO-Trancinwa-Luong-mua-chi-dat-gan-1-luong-chao-ban-789649.shtml>; <http://www.tapchitaichinh.vn/Trao-doi-Binh-luan/Day-nhanh-tien-trinh-co-phan-hoa-doanh-nghiep-nha-nuoc-Quy-tam-se-thanh-hien-thuc/54137.tctc>.

<sup>94</sup> <http://www.vinatex.com/Portal/Page.aspx?PageID=44>.

<sup>95</sup> <http://www.evn.com.vn/Home/Detail/tabid/84/ItemId/10507/View/2/CateId/141/language/vi-VN/Default.aspx>. It includes many General Corporations: Hanoi Electricity General Corporation; Northern Electricity General Corporation; Southern Electricity General Corporation; Central Electricity General Corporation; and HCMC Electricity General Corporation.

<sup>96</sup> [http://english.pvn.vn/?portal=news&page=detail&category\\_id=8&id=1056](http://english.pvn.vn/?portal=news&page=detail&category_id=8&id=1056).

<sup>97</sup> <http://www.vinacomin.vn/en/about.html>.

<sup>98</sup> <http://www.rubbergroup.vn/en/>.

<sup>99</sup> <http://www.vnpt.vn/Default.aspx?tabid=212&IntroId=264&temidclicked=264>.

<sup>100</sup> <http://www.petrolimex.com.vn/en-us/default.aspx>.

<sup>101</sup> [http://www.vinachem.com.vn/Desktop.aspx/Company-Profile/About-Vinachem/About\\_Vinachem/](http://www.vinachem.com.vn/Desktop.aspx/Company-Profile/About-Vinachem/About_Vinachem/).

<sup>102</sup> <http://www.vinataba.com.vn/vinataba/?module=viewnews&id=302>.

<sup>103</sup> <http://www.vnsteel.vn>.

Airlines,<sup>104</sup> Vietnam Paper Corporation (Vinapaco),<sup>105</sup> Vietnam National Coffee Corporation (Vinacafe),<sup>106</sup> Vietnam Railway,<sup>107</sup> Vietnam Cement Industry Corporation<sup>108</sup>, Vietnam National Shipping Lines,<sup>109</sup> Vinafood 1,<sup>110</sup> Vinafood 2,<sup>111</sup> and SCIC.<sup>112</sup>

In practice, many large SOEs have been equitized, such as Vinaconex,<sup>113</sup> Vietcombank,<sup>114</sup> Vietnam Insurance General Corporation (Baoviet),<sup>115</sup> Bank of Investment and Development (BIDV),<sup>116</sup> Hanoi Beverages General Corporation Company (Habeco),<sup>117</sup> and Saigon Beverages General Corporation Company (Sabeco).<sup>118</sup> The most well-known SOE equitization was that of Vietnam Airlines Companies Limited, the biggest Vietnamese airline accounting for 51.8% of the aviation market share as of November 2014.<sup>119</sup> In practice, with a universal scale and operation network, evaluating its assets and debts has been relatively difficult. However, 100% of its first shares, which account for 25% of its charter capital, have sold out very quickly. Of these, 1.475% of its charter capital has been sold to company employees; 0.05% to the labor union, 20% to strategic investors; and 3.475% was put up for public auction.<sup>120</sup> According to Mr. Nguyen Hong Truong, Deputy Minister of Ministry of Transportation, *Vietnam Airlines is national brand influencing much on the aviation activities as well as the national security. Thus, Vietnam Airlines shall equitize for 10% of its charter capital in the near future. However, the biggest shares of which the State owned shall be in no case less than 65% of its charter capital as the State exercises veto right at that minimum percentage.*<sup>121</sup>

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<sup>104</sup> <http://www.vietnamairlines.com>.

<sup>105</sup> [http://vinapaco.com.vn/?page=chi-tiet-tin&category\\_name=gioi-thieu-tct&name\\_id=gioi-thieu-tct](http://vinapaco.com.vn/?page=chi-tiet-tin&category_name=gioi-thieu-tct&name_id=gioi-thieu-tct).

<sup>106</sup> <http://www.vinacafe.com.vn/en/abouts/detail/introduction-vietnam-national-coffee-corporation-vinacafe-236/>.

<sup>107</sup> <http://www.vr.com.vn/trang-chu.html>.

<sup>108</sup> <http://www.vicem.vn/view/gioi-thieu/process-of-foundation-and-development/26.aspx>.

<sup>109</sup> [http://www.vinalines.com.vn/?mod=news&view\\_news\\_name=history-of-developments](http://www.vinalines.com.vn/?mod=news&view_news_name=history-of-developments).

<sup>110</sup> <http://www.vinafood1.com.vn/news/default.aspx>.

<sup>111</sup> <http://www.vinafood2.com.vn/CMS/Pages/XemGioiThieu.aspx>.

<sup>112</sup> <http://www.scic.vn/english/>. It was incorporated on June 20, 2005, which was seen as a bold measure of the Government during the height of the economic and SOE reforms. Its objectives represent state capital interests in enterprises and investments in key sectors and essential industries with a view to strengthening the domain role of the state sector while respecting market rules.

<sup>113</sup> <http://www.vinaconex.com.vn/>.

<sup>114</sup> <http://www.vietcombank.com.vn/Default.aspx?&lang=vi>. Vietcombank was equitized in accordance with the Prime Minister's Decision No. 230/2005/QĐ-Ttg dated September 21, 2005. Up to 10% of the shares were sold in 2006 and up to 49% were sold during the period from 2007 to 2010. Thus, the State was still the majority owner. The process was conducted on the same schedule as the case of equitization of the Mekong Delta Housing Development Bank.

<sup>115</sup> <http://www.baoviet.com.vn/About-Baoviet/>.

<sup>116</sup> <http://bidv.com.vn/default.aspx?lang=en-US>.

<sup>117</sup> <http://habeco.com.vn/>.

<sup>118</sup> <http://sabeco.com.vn/>.

<sup>119</sup> Decision 1611/QĐ-CP, dated September 10, 2014.

<sup>120</sup> <http://vneconomy.vn/doanh-nhan/chinh-thuc-duyet-phuong-an-co-phan-hoa-vietnam-airlines-20140911050756293.html>.

<sup>121</sup> <http://vneconomy.vn/chung-khoan/co-phan-hoa-vietnam-airlines-nha-nuoc-nam-75-von-20140629095022595.html>.

In short, the Vietnamese government has made considerable progress in SOE renovation. Although the process of SOE equitization has not been completed, some other essential large SOEs have not yet been equitized, such as Vietnam Steel Corporation and Vietnam Mobile Telecom Service (Mobifone). From the start of TPP negotiations, the commitment to WTO accession in anti-dumping and subsidy proceedings (i.e., the so-called nonmarket economy commitment) and the current economic situations of Vietnam have left other TPP negotiators, especially the US, with substantial concerns that Vietnamese SOEs would receive favors in subsidies and financial incentive programs compared to domestic and foreign economic sectors such that the SOEs not be on the same playing field as the domestic and foreign ones.

According to Deputy Minister Tran Quoc Khanh, Chief of the TPP negotiation delegation of Vietnam, the existing provisions of the WTO and coming articles in the TPP Agreement will be sufficiently efficient to address SOE issues in a manner consistent with the market-economy orientation. There is no need for special mechanisms for SOEs as per the suggestions of the US.<sup>122</sup> However, the Government, in turn, has confirmed that SOEs would not be excluded from TPP content as the US would have pushed other TPP negotiators to agree to, directly and/or indirectly. To this extent, the Vietnamese government approach in the negotiation is that it is *not necessary and, if the special and separate rules to SOEs, the regulations as such shall be in no case of reverse-discrimination to Vietnamese SOEs*, in which *reverse-discrimination* refers to situations where the SOEs have been put in more difficult and less-favorable conditions than domestic and foreign enterprises just because of the state ownership criterion. For example, in the case of Vietnam, there are some products that are produced and traded by SOEs (e.g., tobacco and textile), whereas these are under the business coverage of private enterprises for other TPP negotiators. That is, Vietnam should not commit to cut all its subsidies on these products, whereas other TPP countries are allowed to maintain the subsidy. This would place the Vietnam SOEs under less-favorable conditions. In other words, Vietnamese SOEs would be under *reverse discrimination*. Thus, the Vietnamese government confirmed the open negotiating philosophy on SOEs that other TPP negotiators had accepted no reverse discrimination for SOEs and, as such, Vietnam will not hesitate and thus object to SOE issues. Other TPP negotiators have agreed on this point, and Vietnam has considered the SOE negotiation.

### **2.2.3 Nondiscrimination principles in SOE administration in purchasing shares in SOE equitization**

The sale of SOEs to foreign owners should be provided on a nondiscriminatory basis. However, foreign owners have only been entitled to a maximum of 30% of the shares of the equitized SOE, whereas Vietnamese can buy an unlimited number of

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<sup>122</sup> It is evident that discrimination may be provided to SOEs. However, presenting such evidence has not been easy. Therefore, in order to mitigate discrimination, a special mechanism for SOE administration is required. *See more at <http://tuanvietnam.vietnamnet.vn/2012-07-13-tpp-co-phan-biet-doi-xu-voi-doanh-nghiep-nha-nuoc->*.

shares.<sup>123</sup> This principle has been consistently provided in Vietnamese SOE equitization regulations since 2004 by Decree 187/2004 (after the conclusion of the US – Vietnam BTA and before accession to the WTO), replaced by Decree 109/2007 and again replaced by Decree 59/2011. The key problem is whether Vietnam treats foreign investors discriminately and inconsistently with its international commitments provided in the BTA and the WTO. The answer concerning investment including but not limited to SOE equitization in the role of share purchase not subject to the application of trade in service GATS of which the principle of nondiscrimination shall be interpreted differently from that of trade in goods is not clear, as they depend on the areas, percentage, and levels committed by Vietnam. Thus, two scenarios exist.

*First*, if the Vietnamese government has explicitly committed in its WTO accession reports that in a specific service, foreign owners are allowed to purchase up to 100% (nonlimited trade liberalization), the domestic regulatory percentage is perceived as a violation of the nondiscrimination of trade in service rule.

*Second*, if the government had formerly imposed a certain percentage, that is, *no more than 30% of charter capital of a commercial joint stock bank or 49% of the charter capital in a publicly listed company*, the reverse is true. That is, the domestic regulatory imposition of a certain percentage by the Vietnamese government, either centrally or locally, does not necessarily mean that Vietnam violates its WTO commitments on nondiscrimination on trade in services. As of 2014, there has been no violated complaint to Vietnam in services as well as in SOE equitization to the WTO. This reflects the regulatory improvements by the Vietnam government in a manner consistent with its multilateral commitments.

### **2.3 SOE: a national ICSID, BIT, or public body in an SCM Agreement?**

The draft of the investment chapter of the TPP shows that its dispute settlement mechanism shall be open to SOE investment disputes arising from and related to the investment activities between (1) the TPP government and (2) nationals and/or companies of other TPP members regardless of whether the company is an SOE or a privately owned enterprise of other TPP members. Interestingly, it provided jurisdiction to the arbitration tribunal under ICSID 1965 and its Additional Facility.

In principle, the ICSID Convention provides two possibilities under which the ICSID arbitration tribunal can have jurisdiction over investor–state investment disputes: (1) where a national of another Contracting State brought claims against a Contracting State,<sup>124</sup> and (2) where the parties to the dispute consent in writing to submit to the ICSID

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<sup>123</sup> Article 4, Paragraph 1 of Decree 187/2004/ND—CP dated November 16, 2004 on the conversion of a State Company to a shareholding company; Article 6, Paragraph 1(a) of Decree 109/2007 dated June 26, 2007 on the conversion of an enterprise with 100% state capital to a shareholding company; and Article 6, Paragraph 1(b) of Decree 59/2011 on the conversion of an enterprise with 100% state capital to a shareholding company. The first two Decrees are now ineffective and were replaced by Decree 59/2011.

<sup>124</sup> Article 25(1) of the ICSID Convention states, *The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a*

center, which is often expressed in Bilateral Investment Treaties (BITs). For example, the US–Vietnam BTA states, *in the event of an investment dispute,*<sup>125</sup> *the parties to the dispute should attempt to resolve the dispute through consultation and negotiation. If either party has not submitted to consultation and negotiation, and that ninety days have elapsed from the date on which the disputes arose, the national or company concerned may submit the dispute for settlement by binding arbitration of the Convention on the Settlement of Investment Disputes between States and Nationals of other states (ICSID 1965) if both Parties are members of ICSID convention or to ICSID 1965 under the Additional Facility of the Center.* Generally, BITs require investment disputes between a State Party (either Vietnam or the US government) and an *investor* of another State Party (Vietnamese and US nationals or companies).

Concerning the term *investors*, Vietnamese regulations normally refer to one of the following: (1) domestic investors including Vietnamese individuals and organizations established and operated under Vietnamese law (this includes SOEs regardless of whether they are limited liability or shareholding companies) and (2) foreign investors comprising foreign organizations and individuals.<sup>126</sup>

The BTA do not distinguish between state-owned and privately owned enterprises. Therefore, a claim raised by or against for a SOE of Vietnam and the US and other TPP trading partners for which a member of the ICSID in the coming years would not fall outside the scope of the ICSID.

However, the problem is then whether SOEs can be classified as nationals of Contracting States. The SOEs might be either (1) SOEs operating for social purposes that are directed and/or empowered government functions, which act as an agent for the government or undertake an essential governmental function (i.e., public body;<sup>127</sup> see the US anti-dumping and anti-subsidy Chinese-exported product DS 379), or (2) SOEs operating on a commercial basis that are commercial in substance and nature.

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*Contracting State designated to the Center by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.*

<sup>125</sup> According to Paragraph 10 of Article 1 of the BTA, it is a *dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by the Chapter 4.* Of which, company means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or other organization and individuals means a natural person who is a national of a Party under its applicable law.

<sup>126</sup> Article 6 Paragraphs (1) and (2) of Decree 59/2011/ND-CP on converting a 100% SOE into a shareholding company.

<sup>127</sup> See also Mark Feldman, “The Standing of State-owned Entities under Investment Treaties,” *Yearbook on International Investment Law & Policy 2010–11*, Oxford University Press, 2011, p. 622.

### 3 Vietnamese SOE and nonmarket economy status in TPP negotiations

As mentioned previously, in Vietnam, all SOE budgets were theoretically granted by the Government before 1986. The Government was also the sole supplier and biggest customer of SOEs.<sup>128</sup> Normally, SOE managers followed the direction and requests of the centrally planned economy. Nevertheless, after the Doi Moi policy, the Government introduced a profit-based accounting system that allowed SOE managers more flexibility in making decisions on production and imposed a hard budget constraint on SOEs, that is, to consolidate the SOEs through mergers and acquisitions for equitization of SOEs.

The initial results of equitization were successful but slow. As of mid-1995, 11 general corporations/companies had been established in the power sector: coal, oil, gas, steel, cement, textiles, machinery, posts and telecommunications, paper, maritime, and air transport.<sup>129</sup>

Another concern for SOEs is public procurement, as it is particularly difficult for private enterprises. Normally, when choosing either (1) private or public and (2) foreign or domestic provision of goods and services, there are favors granted to SOEs because of their informative access advantages that can be used to win public procurement bidding, whether deliberate or not.<sup>130</sup> Notwithstanding, private enterprises are requested to present their detailed information on their long-term business plan and the corresponding financial ability that might make them unqualified. To our knowledge, private enterprises are normally SMEs, which experience capital shortages. SOEs, by contrast, have better access to bank credit as they might have long-standing relationships with state-owned commercial banks. In Vietnam, for example, Vietnam's state owned shipping company, Vinashin, was allocated capital in unclear terms and not subject to a sufficiently managed administrative system.

Favorable treatment for Vietnamese SOEs is also mostly owing to the SOEs ability to grant land-use rights certificates. In practice, most SOEs have large land holdings for commercial and industrial activities, and are easily able to muster the required capital.<sup>131</sup> In particular, the land market in Vietnam has not functioned effectively as there are two land-use *correct price* systems: regulatory schemes and practical ones. Accordingly, most land-use rights explicitly provided by Vietnamese land regulations are much lower than those in daily commercial transactions, and the rates vary substantially between area and transaction types. Therefore, when SOEs are equitized and SOE charter assets are valued, determining compensation for land-use rights in Vietnam is difficult. As Vietnam will be treated as a nonmarket economy in anti-dumping and anti-subsidy cases in the 12 years of December 1, 2007 to December 31, 2018, the Vietnamese Government is in a difficult position to prove the existence of a market economy in the country, wholly or partly. In the same token, Vietnamese

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<sup>128</sup> Truong Quang and Ha Kim Dung, "Human Resource Development in SOE in Vietnam," *Research and Practice in Human Resource Management*, Vol. 6:1, 1998, p. 3.

<sup>129</sup> *Id.* p. 5.

<sup>130</sup> Katariina Hakkala and Ari Kokko, *The State and Private Sector in Vietnam*, EIJ Working paper Series, No. 236, 2007, p. 14, retrieved from <http://swopec.hhs.se/eijswp/papers/eijswp0236.pdf>.

<sup>131</sup> *Id.* p. 17.

enterprises are also being unequally treated in anti-dumping and anti-subsidy cases by the US, the EU, and other countries (e.g., Japan).

The Vietnamese Government officially joined the TPP negotiations on November 13, 2010. Among other issues like intellectual property and textile, Vietnam faces many disadvantages concerning SOE-related issues. First, the definition of SOEs might cover those where less than 50% of the charter capital is owned by the state, that is, *20% or 30% of shares of the equitized SOEs or newly established SOEs shall be owned by the State*. The modified Constitution of Vietnam introduced in 2013 states that the *Vietnamese economy is market economy orientation with many ownership forms, many economic sectors; State economy takes the leading role*.<sup>132</sup> Here, the State economy and the SOE are two separate definitions, of which the former is much larger than the latter. Most of the State economy refers to SCICs and not only SOEs provided that SOEs might be a constituent portion of SCICs. Thus, the provision that will remain unchanged has been called problematic toward the recognition of the existence of a market economy in Vietnam and the TPP negotiations on SOE-related issues. Practically, the US still maintains the opinion that Vietnam has not yet become a market economy. For example, the US has said that the market economy treatment for Vietnamese exports in anti-dumping and anti-subsidy rules fall under the coverage of another set of rules in the US that may not be covered by a future TPP agreement. With a new approach considering the percentage of ownership of the SOE in future TPP agreements, the current definition of SOEs provided in the Law on Enterprises of 2005 and its implemented regulations will be changed accordingly. This is practically troublesome for Vietnamese legislation and will require a long implementation period.

#### 4 Conclusion

The process of SOE reform in Vietnam that first started in the 1980s by changing from administrative management principles of a centrally planned economy to a market economy orientation has resulted in many achievements. The number of SOEs that have been equitized is impressive. However, the SOE sector is seen as less competitive and effective compared to private enterprises, as SOE equitization tends to be conducted in small-size SOEs and not in large ones, such as utilities. Consequently, the State's participation in the economy has not decreased to an extent consistent with the desires of the Vietnamese government and other WTO members and TPP negotiation partners.

Practically, unlike the GATT/WTO, SOE regulations have been relatively weak, and those of the TPP negotiation are extremely tough and controversial not only to Vietnam but also to other developed partners such as Singapore, Japan, and to a more limited degree, Canada. In turn, the Vietnamese Government has been consistently seeking to determine how to best address SOE maintenance and has provided appropriate considerations to the protection of SOEs from being treated unfavorably against both Vietnamese private sectors and other counterpart TPP negotiating member SOEs (reverse

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<sup>132</sup> Article 51 of the Constitution of 2013.

discrimination to Vietnamese SOEs). Most market economy orientated reforms on SOEs can be explored using the land-use rights evaluations in Decree 189/2013/ND-CP, which were not yet effective as of January 25, 2014.

In general, SOEs have been significant for their economy, regardless of whether the economy is developed or developing. Furthermore, under the TPP, there is no requirement of eliminating SOEs for multilateral and regional economic development. Therefore, it is not reasonable for Vietnam to completely equitize its SOEs. That is, the SOE reforms in Vietnam have not necessarily been conducted with the objective of eliminating SOEs. Vietnam has maintained some industries and sectors where the State must hold 100% of charter capital, such as the manufacture and supply of explosives and toxic chemicals; the manufacture and repair of weapons; the manufacture of cigarettes; flight operations, national and urban rail transportation, and maritime safety services; radio and television; lotteries; and printing of money.<sup>133</sup> However, in the context of (1) nonmarket economy commitments to the WTO anti-dumping and anti-subsidy laws before December 31, 2018 and (2) the fact that many large Vietnamese SOEs produced a mass of essential products that are, partly or significantly, related to dumping and/or subsidized export products, and (3) the US strategic statement that the market economy status of Vietnam in anti-dumping and anti-subsidies is a set of national laws outside the scope of the TPP negotiations, SOE reforms on a commercial basis and the nondiscriminatory principle are more significant than ever before.

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<sup>133</sup> See Decision 14/2011/QD-TTg, dated March 4, 2011, on the list of industries and sectors where the State must hold 100% of the charter capital.