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FROM A COMMANDING STATE TO A DEVELOPMENTAL STATE

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1. Introduction

During the past few decades, one of the most important consensuses in terms of ideology in Vietnam among policy makers, experts and practical activists has been the market economy's role in the economic and social life. Unlike the attitudes of hatred and condemnation in the past, based on the reality of 30 years of Doi Moi (Renovation), the current market economy has been officially recognized by the Communist Party of Vietnam (CPV) as the main driving force to promote the development of the economy and society.

However, the recognition of the Vietnamese market economy's role still seems to be reluctant. It has been accepted only after all of the tests of centrally planned economies or the recognition of a collective economy/state economy to play a decisive role failed. Because it is reluctant, in the near future, it is likely that the role of the Vietnamese market economy will again be condemned as it was in the past. Therefore, since the market mechanism has shown signs of being recognized in Vietnam in recent years, even if reluctantly, the responsibility of those who clearly understand its importance towards the nation's lasting prosperity is to promote the creation of formal institutions, acting not only as the barricades to protect it, but also as the support for its development chances. Only when the free market mechanism is chosen rationally but not randomly, will it be protected and given the opportunity to promote its own strengths, and if after a series of such rational actions, Vietnam's economy and society achieve the breakthrough developments, it will truly have the opportunity to be everlasting in Vietnam.

This report was written to provide the theoretical bases and practical experiences of many countries around the world to help Vietnam rationally choose such basic official institutions. These institutions will contribute to the formation of a so-called Developmental State, which will help the Vietnamese State to transform its functions in relation to the market, from directly controlling, by administrative orders, the economic activities to creating a suitable environment to foster the market and promote its full strength.

2. Theoretical framework of a Developmental State

To achieve this goal, we approach the state's role in the market economy based on the theoretical framework of the Developmental State model from Sen's combined perspective of the new institutional economics (NIE) theory and the capability approach theory (1991, 2001). Unlike

the approach of other theoretical backgrounds, the approaches of the new institutional economics and capability approach are considered as a softer version of the Developmental State.

Theoretically, this approach recognizes the market, state and civil society as mutually complementary parallel institutional systems. The State's role is to create institutions which are complementary to the shortcomings of the market and civil society institutions but do not replace, control or suppress their development. Especially for developing countries where the factor markets are underdeveloped, the state must act as an intermediary to coordinate the resources until the factor markets are formed. Because both the market and civil society institutions are constantly evolving over time, the state institutions must also be adaptably adjusted. This implies that the institutions or policies suitable for the development of East Asian countries in 1960-1980 could be no longer suitable for not only these countries upon entering into a new development stage, but also for new members such as Vietnam because the current context is quite different from the previous one.

Policy implications of the new institutional economics and capability approach to the developmental state for developing countries (including Vietnam) in the context of extensive globalization can be summarized through the following policy pillars:

i. *The private sector and market mechanism are the main driving force for development:* Development is the processes of learning and discovery, so only the private sector, through the market mechanism, has the full driving force to take on this position in the economy (Trubek, 2010). This philosophy was adopted by the East Asian countries immediately after the Second World War and has been confirmed by their success.

ii. *The rule of law acts as a foundation to maintain the social order and reduce uncertainty, thereby creating conditions for the private sector's development:* The market economy's development requires a state to comply with the laws and maintain the social order by the laws, thereby guaranteeing the freedom of business activities. The success of the earlier East Asian countries was mainly due to these countries maintaining the rule of law more effectively than that of other developing countries, as shown by *Fraser's Economic Freedom Index* rankings of these countries, which have always been among the world's highest (Powell, 2004). However, in the context of globalization, the legal system of a country, particularly in the developing countries, must not be rigid but must be regularly adjusted to match the development level and the new cognitive capacity. Nevertheless, the general adjustment trend is shifting away from state/discretionary legal system to the market/rule-based legal system (Pistor and Wellons, 1999; Trubek, 2010).

iii. *Institutionalizing the macroeconomic policy framework towards establishing a healthy and stable macroeconomic environment:* It is considered to be an important component of the

developmental state theory after the Asian economic and financial crisis in 1997-1998. Previously, the countries involved in the crisis abused the fiscal and credit policies in order to support the enterprise sector's development. Consequently, the state lost control of the macroeconomic balance, which resulted in the economic crisis. Since the year 2000 onwards, the establishment of a stable macroeconomic environment has become a top priority in the developmental state model. With this policy, the state's support for the economy and society is mainly focused on building effective economic institutions and general infrastructure and promoting the spread of knowledge, instead of offering direct financial incentives to enterprises (Wylde, 2012; Fosu, 2013a; Fosu, 2013b).

iv. *The system of property rights is sufficient, transparent and securely protected:* This is considered as a prerequisite for the private sector's development. Without such a system, the private sector would not dare to invest in long-term ventures in new and risky business areas, or expand their business across the country and all over the world. The East Asian countries that pursue the developmental state model recognize and protect private ownership. Even when pursuing the industrialization policies, the interests of the agricultural land owners are always respected and adequately compensated by the state when the land use purposes are shifted (Pistor and Wellons, 1999; Powell, 2004).

v. *The state not only interacts closely with the enterprise sector but also integrates into the civil society:* Civil society is a huge collection of groups and associations with contradictory interests. Civil society is also large source of knowledge to increase the human capital and social order and to redistribute income. However, the possibility exists that the civil society's interests will be suppressed if conflicts of interest among the social groups are not settled properly. Therefore, the state must broadly and deeply integrate into the civil society to quickly grasp the changes in the civil organizations, thereby attracting them to engage into the country's development process and to regulate the conflicts arising between organizations in this process (Evans, 2008).

vi. *The state participates actively in promoting the competition process and development of entrepreneurship by rewarding the winners in the form of increasing the capability, renovation and human capital:* The state not only recognizes competition as a driving force for development, but also intervenes actively in the competition process, for example, by rewarding the enterprises with export performance (picking-winner policy) as the East Asian countries did previously. However, due to the limited possibility of financial support, the current developmental states can only support the potential enterprises by assisting these enterprises to

become the links in the renovation system of the country, whereby they can receive indirect support of human capital from the public system (Aoki, 2001).

vii. *The state participates actively in building the necessary inclusive institutions and rules for the market and civil society:* Creating the laws in a society is considerably influenced by the interest groups. To ensure that the fruits of economic development are fairly distributed, a developmental state must actively create laws and promote the development of civil society to be inclusive. Previously, the East Asian countries (for example, Japan and Taiwan) focused on building the social welfare programs that made it very early to redistribute income. However, this approach is no longer suitable in the globalization context and inconsistent with the other pillars of the developmental state (pillars ii and iii above). Therefore, the developmental states changed their law-making method by encouraging broad participation of affected parties and civil society in the processes of drafting legal documents (Kwon , 2007; Evans, 2008)

In the *Report on the Development of Vietnam's Market Economy 2014*, we assessed the development level of Vietnam's market economy from the whole economy to the key fields and markets such as the legal system, state governance, financial and monetary system, enterprise system, international trade and the factor markets, including the land market, capital market and labor market. Overall, we recognized that the development level of Vietnam's market economy still remains low on average in the world, although Vietnam has made great progress in transforming from a centrally planned economy into a market economy. One of the main reasons is that the Vietnamese State is still an commanding state relying on administrative orders, but it has not been completely transformed into the developmental state as other East Asian countries were. Being a commanding state, which was reflected in our findings in the last report as the State's administrative structure is still large and bloated, the legal system is weak (court's justice level is low, more time is required to resolve contract disputes; property rights, especially intellectual property, are often violated and the bureaucracy's corruption level is considerable); the State still intervenes deeply in the financial system, capital market, and land market, the business environment is less competitive, there are still many barriers for enterprises to enter the market, and the enterprise establishment and preparation of import and export procedures are quite costly and time-consuming (Dinh Tuan Minh and Pham The Anh, 2015, p. 540).

In addition, we have made many specific recommendations so that Vietnam will be able to successfully build a complete market economy. These recommendations aim to build a developmental state for Vietnam, and, as mentioned above, the developmental state is a state model that helps developing countries build a complete market economy. However, our previous report covered a large amount of contents because its nature was to review and assess. To overcome this

drawback, this report focuses on analyzing and offering solutions to the key issues, creating institutional importation barricades and ensuring the success of Vietnam's project of building a developmental state. Based on the review and assessment of the previous report, we recognize four groups of issues that Vietnam should resolve to successfully build a developmental state. The next four sections of this report will address these matters.

3. Build a dominant-party system that is market and civil society friendly

The first group of key issues that will be discussed is related to Vietnam's political system. We realize that all of these issues such as the bloated and inefficient state apparatus, unappreciated rule of law, weak law enforcement ability, or the state that is not yet really "close" to the people, etc., ultimately result from Vietnam's current political system model.

To solve these issues, we believe that Vietnam's current political model should be shifted more strongly into a market and civil society friendly dominant-party system. The political system that we recommend Vietnam pursue arises from the reality of Vietnam's one ruling-party political model and the successful experiences of the East Asian countries that have pursued the developmental state model.

To clarify this message, we have applied the three main theoretical frameworks to analyze the one-party dominant systems, building a criteria system for the developmental state with one dominant party, and then evaluate and make recommendations for reforming the political institutions in Vietnam. These are the framework for institutional analysis and innovation proposed by Fukuyama (2011 and 2014) and North (1990), the theory on transforming a socialist state into a market economy by Aoki (1996), and the theoretical framework on building an efficient dominant-party system, learnt from typical cases, especially in East Asian countries such as Japan, Korea, Taiwan and Singapore, and the theories of the dominant-party state by a number of scholars, including Trantidis (2012), Bogaards (2004) and Carothers (2002).

As we have pointed out, Vietnam's current political system is faced with six issues: (i) the State's administrative apparatus cannot attract the technocrat team members, (ii) the state intervenes too deeply into market activities, (iii) the judiciary lacks independence and cannot control the abuse of power by the state agencies, (iv) no law governs the activities of the Communist Party of Vietnam, (v) there is a lack of cross-accountability mechanisms among the state's power branches, and (vi) the political system's accountability toward society is weak. Experiences of other countries show that in the case of a lack of external political pressure, the CPV itself will have difficulty with

resolving these issues in order to build a developmental state successfully as a support for the market economy's complete development. If the problems above are not solved, Vietnam's political system may be shifted to one of several political models against the desire to build a developmental state, such as the authoritarian political model, a populist-oriented dominant-party model direction, or a crony-capitalist dominant-party model.

Actually, the above issues and risks of Vietnam's political system generally lie within the CPV, which is nominally a proletariat dictatorial party leading the political system rather than a dominant party under its own right in the sense that it is still subject to competitive pressure from other political forces, even if its ability to maintain power in the near future is very high. While it is still nominally a dictatorial party, the CPV or a majority of its members still consider themselves to be in a higher position than others and do not want to tie themselves to the limits of the laws because they think that they have "absolute power". The Party will continue to intervene in and politicize the state apparatus and want to maintain direct control of economic activities because the State is the main tool for the Party to lead the country and the economy is the means to determine the people's consciousness and behavior. The Party still wants to apply different legal rules to the different sectors of society; that is, a senior party member is treated differently in a legal framework from an ordinary party member, the people in general and "hostile forces". Thus, if the judicial system is truly independent, the CPV will lose a tool to protect its interests and support group. And finally, the CPV will find it very difficult to abandon its "secret" operational means, like those used in the wartime, in order to force the State agencies, the Party itself and its socio-political organizations to publicize and increase the accountability for their activities before the people. If it did this, the privileges and benefits with which a majority of party members "look after their own interests" would be revealed, thus affecting the Party's prestige.

Therefore, it is the priority task to resolve the issues mentioned above in the building of a civil society and market friendly political system in Vietnam. Only after this issue is resolved, can the CPV thoroughly solve the issues regarding the relationships between the dominant party and the State, the State and the economy and between the dominant party and the judicial system, and improve accountability among the State's power branches and between the State and the civil society. The detailed recommendations of the solutions are as follows:

Recommendation 1 – *The CPV should transform from the theoretical thinking of a proletariat dictatorial state into the theoretical thinking of a dominant-party system.*

In recent years, "in general, it is most important for the political renovation that we [CPV] must transform from the theoretical thinking of a proletariat dictatorial state into the theoretical thinking of a political system... The transformation from the proletariat dictatorial theory into the political

system theory shows a strong renovation in the Party's theoretical thinking" (Nguyen Van Giang and Dinh Ngoc Giang, 2011, chapter 2). That is, the CPV voluntarily abandons its "absolute power", redefines itself as just a single component of the political system and operates within the constitutional and legal framework.

However, it is time for the CPV to clearly determine if the type of political system which it pursues is a dominant-party system rather than a one-party system. The statement that it continues to build a one-party system while actually operating as a dominant party will prevent the CPV from solving the above-mentioned issues and make it difficult to build a developmental state. Risks such as dictatorship, populism or crony capitalism can very easily happen, and then, all restraints in the society would accrue only to the ruling party, that is, the CPV.

Meanwhile, the strategy of building a dominant-party system will help the CPV receive criticism, even competition, in some fields from other political forces, and thereby, it will be able to improve its weaknesses and increase its ability to continuously remain in power for the foreseeable future. If the CPV succeeds in this, it will have a great opportunity to become the dominant party of the political system for the long term because it has made practical contributions to the formation of the developmental state.

Recommendation 2 - *The relationships among the dominant party, specifically the CPV, with the State and society should be legalized.*

Since 1992, the CPV has recognized that it must act within the constitutional and legal framework. However, the solutions given by the CPV merely include the raising of the awareness level of the party members and the executive committees, or activities on building and regulating the Party for compliance with the Constitution and laws. It can be realized that these solutions have not been successful in preventing the corruption of civil servants, mostly the party members, in Vietnam in recent years. In order to build a developmental state successfully, the dominant party's roles should be specifically legalized to prevent the Party's powers from being unmonitored, which could easily result in a recession within the Party as seen in the Eastern European countries and the former Soviet Union. Legalization of the Party's roles would also help to ensure a better enforcement of the Constitution and more proper and effective usage of the budget for nurturing the Party and the union system, from the central level to local level.

Recommendation 3 - *Vietnam's judicial system should be allowed to be truly independent from the dominant party and other power branches of the state.*

Japan's experiences show that the judicial system should function independently of other power organs of the state and be completely immune from any political intervention even if the state is led

by a dominant party for a long period of time. The judicial system must be directly responsible to the people for its fairness and equity. With such a judicial system, the dominant party will be under pressure to act within the constitutional and legal framework for the benefit of the people.

The CPV must reform the judicial system more boldly based on the experiences of Japan and Taiwan, and allow the judicial system to work independently of the political system. If this is done, the anti-corruption activities within the Party would be highly effective and formalized.

Recommendation 4 - *More individuals who are not in the dominant party should be allowed to hold positions in the state's administrative apparatus and become members of the National Assembly.*

The state apparatus always needs a large force of technocrats. To attract qualified people to join the state apparatus, their advancement in the state apparatus system should not depend on whether they are a party member or not. This policy was applied during the period of a dominant party in Japan and Taiwan (1949-1990), and China is currently applying it on a small scale. Specifically, Chen Zhu (2007 - 2013), the Minister of Health, and Wan Gang (2007 - present, 2015), the Minister of Science and Technology, were cabinet members who did not belong to the ruling party (the Communist Party of China).

Recommendation 5 - *It is necessary to streamline the state's administrative apparatus and reduce the state's intervention into the economy.*

The main characteristic of the traditional management model is the concentration of power in the state, in which the state takes complete control of the society's activities, and its relationships with the people are characterized more by the concept of bestowment than service. New perspectives on the state apparatus include power decentralization and outcome orientation, and the treatment of taxpayers as customers in order to effectively serve them. The state should not intervene excessively in the market activities, but it should plan to streamline the apparatus, and to marketize and socialize all public services that can be franchised to the private sector.

It is time for Vietnam's state apparatus to be rearranged in the direction that the State manages and controls production and business activities by law instead of by directly participating in them. Where the market fails to provide a number of goods and public services, the State should not be directly involved in providing such types of goods and services, but it should act as a buyer of such goods and services for distribution to the people. To execute this policy, the management mechanism by any ministry towards the state enterprises must be removed immediately. The State management agencies and the state enterprises must be independent of agencies representing the owners of the state enterprises.

Recommendation 6 - *It is necessary to mobilize and facilitate the further participation of the civil society in building the nation and improve the accountability of the state apparatus.*

Civil society is considered to be one of the three pillars for the development of Vietnam, including the socialist-oriented market economy, and the development of the civil society and socialist democracy in Vietnam (Decree No. 53/2008/NĐ-CP 2008). However, the constraints on guidelines and policies still obstruct the natural development of civil society in Vietnam.

It is time for the State to hand over more powers to the civil society. An effective government will know how to facilitate the community to solve problems and perform its own tasks rather than directly carrying this out instead of the community. In addition, more empowerment of the civil society will also help the state apparatus work more efficiently due to the state's obligation to execute its accountability being higher. To make this become a reality, the government should concretize the Constitution's provisions on ensuring individual rights and build the referendum law, information transparency and the law on associations promptly.

4. Build and reform an institutional system for macroeconomic stability in Vietnam

The second group of key issues that Vietnam has encountered in the course of building the developmental state is related to the macroeconomic environment. The global economic crisis in 2008-2009 and Vietnam's economic instability in 2008-2011 made the Government of Vietnam always place the macroeconomic stability at the top priority in the policy orientation in the following years. Based on the experiences of many countries before and after the global Great Recession, we believe that it is time for Vietnam to build an institutional framework (or institutionalization) for macroeconomic stability instead of considering the macroeconomic stability as an annual priority of policy options. The macroeconomic stability must be regarded as an indispensable component, which a developmental state must provide to its people.

We found that, in recent years, Vietnam has adopted a variety of institutions for macroeconomic stability such as the government's debt principles, or the safety thresholds of public debt and foreign debt, the stipulations on foreign exchange loans, the regulations on information sharing between the Ministry of Finance and the State Bank of Vietnam (SBV). However, compared with international standards and practices, Vietnam's institutional system for macroeconomic stability still has many remaining shortcomings. In particular, the budget and fiscal disciplines are enforced too loosely due to the lack of enforcement sanctions; fiscal safety thresholds are not updated in a timely manner in the context of numerous economic changes; the

monetary policies sometimes take on too many targets and lack transparency and close coordination with fiscal policies; and the financial regulation and monitoring tools are weak or missing, which will potentially result in the collapse of many financial organizations. We believe that this is the reason why Vietnam has been faced with the multiple risks and challenges that are destabilizing to the macroeconomy, such as a persistent budget deficit and soaring public debt as the state budget revenues are uncertain and even under the danger of decline in the integration process; low efficient use of resources that makes domestic inflation persistently unstable and highly dependent on prices in the world market; a monetary policy that is not really transparent and tends to rely heavily on the Government's fiscal expansion; the financial system which is potentially risky with a high non-performing loan ratio and vulnerability to external shocks, etc. This necessitates that Vietnam must develop and complete its own adequate and comprehensive institutional system for managing and monitoring the macroeconomic stability that is capable of preventing and coping with internal and external shocks effectively.

Relying on the theories and practical experience of the world, we systematize the institutions for the macroeconomic stability that are applied worldwide. By evaluating the advantages and disadvantages of this system and combining it with the characteristics of the domestic economy, this study will propose some suggestions/orientations on building and reforming the institutional system (relating to or directly affecting) for Vietnam's macroeconomic stability.

Basically, we think that Vietnam must build and complete four groups of institutions for macroeconomic stability, including: (i) fiscal institution; (ii) monetary institution; (iii) financial supervisory institution and; (iv) an institution for coordinating among policies. Each of the institutions can have its own goals and tools, but in general, these groups must ultimately aim to ensure the economic stability and growth in the long term and have the ability to cope with short-term shocks from inside and outside the economy.

Regarding the fiscal institution, Vietnam must standardize and consolidate the fiscal rules/norms in accordance with international practices. Additionally, the fiscal policy should be designed to be countercyclical instead of procyclical. That is, in the period of strong growth, the budget should be designed to have a surplus, or at least the deficit should be reduced. In particular, these rules must be set in an institutional framework with strict enforcement. If a violation occurs, a specific time limit should be set for adjustment to the permitted threshold and stipulation. However, these institutions should also have the required flexibility to respond to the economic and financial shocks from inside and outside as in the case of severe economic and financial crises or calamities. Moreover, Vietnam must also improve the capacity and effectiveness in monitoring from outside (the National Assembly) and inside (the Ministry of Finance). The reports on the budget and public

debt must be updated regularly and submitted to the specialized committees of the National Assembly.

Regarding the monetary institution, we believe that the monetary policy must establish the maintenance and stabilization of moderate inflation as the ultimate goal. To do this, the independence between the SBV and the Government must be improved. In addition to full autonomy in selecting tools and intervention levels based on the monetary policies, the SBV must be independent of the Government's loan and budget activities. Besides this, the interest rates should be regarded as a policy tool to achieve the goals. However, the interest rate management rules or policy-making process must be transparent and consistent.

Similar to the fiscal policy, the monetary policy's goals and operating rules must be announced together with the escape clauses. In some necessary cases, the actual inflation rate may be allowed to deviate from the permissible limit and the monetary policy can deviate from the announced rules. In addition, the managed floating exchange rate regime starts with the central rate adjustment in response to market signals, and then gradually abandons the use of the central rate announcement to adapt better to the integration process and cope better with external shocks. Basically, the daily commercial rate should be entirely set by the transactions under the demand for and supply of foreign currency in the market. However, the SBV can take intervention measures such as buying and selling foreign currency on the interbank market and/or measures to control the sources of capital flowing into and out of Vietnam in order to soften the fluctuations in the exchange rate.

In addition, Vietnam should have specific regulations intended to enhance the SBV's transparency and accountability in order to improve the effectiveness of the policies and the state governance/banking sector in line with international practices. Transparency of monetary policy should not only publicize the goals, but also select the policy tools, bases and methods for making policy decisions. Also, the Law on the Central Bank should be studied and enacted to replace the Law on the State Bank of Vietnam.

Regarding the financial supervisory institution, we believe that this task can be assigned to the SBV or the National Financial Supervisory Commission of Vietnam. To prevent risks to the financial system, the financial-countercyclical supervisory tools should be utilized. For example, regulations on the capital adequacy ratio, liquidity ratio, the proportion of deposits, etc. should be properly applied to prevent the phenomenon of asset price bubbles or extremely high risk-taking behavior in the financial market. Therefore, we believe that Vietnam should develop a system of indicators to ensure financial stability and safety. These indicators must be tight on the one hand, aiming to satisfy the Basel III standard for the commercial banking system. On the other hand, they should also be flexible enough so as not to stifle the financial market's dynamism and creativity. In

particular, they must be built in a flexible manner, corresponding to the financial market's cyclical volatility to prevent a crisis from occurring.

Moreover, it is necessary to complete the statistical information system and forecasting tasks. In addition, the institutions related to deposit insurance should be amended with regard to the scope and extent of insurance in line with new conditions, which will enhance the trust and prevent the risk of disruption in the event that a shock occurs.

Finally, the fiscal policy, monetary policy and financial supervisory policy should be closely consistent with each other. In principle, under normal conditions, the fiscal and monetary policies should be executed in a countercyclical direction to each other in order to ensure the stable aggregate demand. In addition, the fiscal and monetary policies should focus only on regulating the aggregate demand so as to achieve the inflationary and growth goals, and the stabilization of the financial system to prevent a crisis in this system should be assigned to the supervisory policies. Ultimately, this combination makes the policies achieve their own goals as well as general goals at the lowest cost.

5. Build a healthy and fair competitive environment

The third group of key issues that Vietnam faces upon building the developmental state is related to the healthy and fair competitive environment for the business entities. The theories and practical experiences of the previously developing countries show that if a state pursuing a developmental model can create and protect a fair competitive environment, it will be successful in the socio-economic development. And vice versa, if it cannot maintain a fair competitive environment, it will degenerate into a collusive state such as dictatorship, populism or crony capitalism, and inhibit the development of the country.

Vietnam is located in the region of East Asia, where the developmental state model has proved its success. After a period of transformation from the centrally planned economy into the market economy model, the Party and State have recognized the need to establish the competition policy framework. For nearly a decade, the Competition Law 2005 and legal documents related to other business environments have played an important role in establishing such a framework. However, this system of legal documents seems more or less outdated, and especially, the Competition Law has had no modification since its promulgation. The enforcement of competition legislation has also encountered many administrative obstacles, resulting in a very small number of violations of competition legislation being investigated and punished. Another issue is that the promulgation and

enforcement of the legal documents related to the business environment have almost no particular coherence with the Competition Law, nor any orientation or obvious review from the perspective of competition. Meanwhile, with a specialized legal nature, these legal documents have impacts on the competition, but prevail against the competition legislation when they are not yet consistent with the basic principles of competition. Such inadequacies related to the competitive environment are a significant obstacle to the construction of a developmental state in Vietnam.

To correctly determine the inadequacies that Vietnam is facing in establishing and maintaining an fair competitive environment in the developmental state model, we have built a theoretical framework relying on (i) the ASEAN Regional Guidelines on Competition Policy and the UNCTAD Model Law on Competition to review the competition legislation, and (ii) OECD's Competition Assessment Toolkit (showing the modern trends and high standards of competitive environments) and CUTS (criteria consistent with developing countries). With this theoretical framework, we will review the laws and enforcement of the competition law in Vietnam on the basis of comparison with the international practices and Vietnam's specific context. At the same time, we also assess the status of the system of policies and laws that affect the competitive environment of the enterprises in order to determine the unreasonable effects on the competition as well as the mechanism's inadequacies in controlling the provisions related to the competition. Basing on these reviews and assessments, we offer a comprehensive picture of the competitive environment in Vietnam, thereby identifying the inadequacies which are obstructing the operation of competitive activities in Vietnam.

Overall, after nearly three decades of economic renovation policy, Vietnam has gradually built and completed the system of competition legislation in particular and competition policies in general, and thereby created the legal framework and general and specific competitive environments for business activities. So far, the system of competition legislation and competition policies in Vietnam have been evaluated to be relatively complete, respecting the freedom of business, without discrimination and complying with the international practices in the related areas, which contributes to the creation of a healthy competitive environment for enterprises that can better serve the interest of Vietnamese consumers.

However, competitive practices in Vietnam still have many remaining issues and problems and do not work smoothly. Also, the rights and interests of enterprises and consumers are still being violated in many cases by the anti-competitive and unfair-competitive acts of business entities, and even from the administrative acts and from the State's legal regulations and rules.

Detailed analysis of competition legislation in Vietnam shows that part of the cause of this situation is the competition legislation's constraints, particularly (i) the provisions of competition

legislation are not really suitable, thereby creating the legal loopholes from which many anti-competitive acts that cause damage to consumers are not tried in court; and (ii) the independence and professionalism of the institutions for enforcing the competition legislation are not guaranteed, so the efficiency of these institutions is limited.

From the system of competition policies, several regulations with detrimental and anti-competitive effects exist in the specialized laws that are said to stem from the lack of a controlling mechanism from the perspective of competition of the competition bodies toward the draft legal documents written by the various bodies.

The general solution to improve this situation is that Vietnam should amend the Competition Law, improve the institutions for handling the violations of competition legislation and strengthen the Vietnam Competition Authority's active role in reviewing the draft legal documents from the perspective of competition. The following are some specific recommendations.

Recommendations for amending the competition legislation

Within the legal framework for assuring the health and fairness of the competition, the problems of the competition legislation are mainly concentrated in the regulations that are improper, contradictory or inconsistent or incomprehensive, affecting the application effectiveness and competitive environment protectability of Vietnam's competition legislation. Solutions for overcoming the current inadequacies in the Competition Law are as follows:

- *To adjust the forms of the competition restriction agreements:* The Competition Law or Decree guiding the Competition Law should be amended to supplement the provisions on clarifying the forms of *the competition restriction agreements*, so that they can be in the forms of written, verbal, and electronic messages or actions (actions are by default or individual, but similar in nature, focused and resonant).
- *To expand the subjects of the competition restriction agreements:* The Competition Act should be amended to supplement the following entities into the subjects of application of the competition restriction agreements in the Competition Law: (i) the multi-professional associations (or by simply not classifying the enterprise associations so that all enterprise associations are the subjects of the competition legislation); and (ii) the branches, subsidiaries, associated companies and all other entities that are controlled directly or indirectly by enterprises and associations which are the subjects of the Competition Law.
- *To adjust the types of implicitly-prohibited competition restriction acts:* The group of implicitly-prohibited competition restriction acts (Article 9.1 of the Competition Law and corresponding provisions in the guiding Decree) should be amended in line with the

implicitly-prohibited acts based on the common practices around the world (including price-fixing agreements and market and customer allocation agreements). Similarly, the group of implicitly-prohibited economic concentration acts (Article 18 of the Competition Law and corresponding provisions in the guiding Decree) should also be amended in line with the common practices around the world, specifically, eliminate or reduce the implicitly-prohibited economic concentration acts; thus, all economic concentration acts can be prohibited only on the basis of considering their impacts under the specific context of the market.

- *To adjust the methods of determining the competition restriction acts:* The competition restriction acts should be determined under the act definition (with the act constituents), by which direct acts are described only as an example but not as a closed list of competition restriction acts. For the acts listed as examples, they must be adjusted to ensure that no situations overlap in scope between two different types of acts (competition restriction and economic concentration).

For provisions on unfair competition acts, with advantages of the explicit and concentrated list of unfair competition acts in the Competition Law under the current context, the provisions on unfair competition acts should probably be retained in the Competition Law. However, the inadequacies of duplication/overlapping of regulations between the Competition Law and other laws, in theory and practical application in the long term, will result in inequality among business entities as well as problems in the application of the laws. Therefore, this situation should be overcome through the following measures:

- Remove provisions on unfair competition in the Law on Intellectual Property (to focus all of the contents of the unfair competition in the Competition Law);
- Separate multi-level marketing acts (and regulations) from the Competition Law (to supplement them to the Commercial Law) and retain only the illicit acts of multi-level marketing in the Competition Law;
- Review the provisions on unfair competition acts in the Competition Law to ensure that the provisions on act description (act constituents) in this Law are suitable/consistent with the provisions on act description in the specialized law and exact in the connotation (competition legislation only provides for the acts from the perspective of unfair competition causing damage);
- Define clearly the scope of application between the Competition Law and specialized law to the same acts to ensure that an act is handled only under one legal system, towards: Any act

to compete that aims to cause damage to the State, enterprises and consumers shall be handled in accordance with the Competition Law; other acts which are not subject to these cases will be handled under the specialized law;

- Provide expressly for disputes resulting from unfair competition acts in the Competition Law. In addition to the ability to handle them by the administrative complaints in the competition bodies under the Competition Law, other methods of proceeding can be used in accordance with the legal provisions (Court, commercial arbitration, etc.).

With regard to the regulations on the acts of state bodies that affect competition, despite there being only one regulation, but from the perspective of practical significance, it is a very remarkable regulation. If it is thoroughly applied, this regulation can be a basis to promote a healthy and fair competitive environment under the specific context of Vietnam. Thus, it is necessary to take certain measures to enhance the effectiveness of this regulation in the law and competition reality in Vietnam. At least, the following measures should be taken:

- Review and supplement the list of acts of state bodies affecting the competition prohibited by the competition legislation;
- Revise the “scanning” clause, to “Other acts that harm the competitiveness of enterprises and/or cause damage to consumers”;
- Strengthen the enforcement of this legal regulation (including the dissemination, propagation and violation handling).

Proposals on improving the institutions for handling violations of competition legislation

From the practical settlement of violations of competition legislation, we can see that the existing institutions do not seem to improve their effectiveness in handling violations and protecting legitimate interests of enterprises and consumers. The following solutions are proposed to improve the effectiveness in handling violations of competition legislation, thereby strengthening the effective protection of the competitive environment, enterprises and consumers.

- *Strengthen the independence of the institutions in resolving the competition cases under the competition legislation.* To achieve this purpose, we propose:
 - o To separate the competition authority from the Ministry of Industry and Trade in order to form an independent unit that is directly under the management of the Government Office (both to prevent the lack of objectivity in handling cases related to enterprises under the Ministry of Industry and Trade, and to ensure the effective management of all Ministries and branches);

- To change the structure of the Competition Council from including representatives of the Ministries and branches (which may affect the objectivity of the decisions on handling cases related to enterprises of such Ministries or their branches) to the gathering of assigned, appointed or independent members to perform the relevant tasks.
- *Strengthen the deterrence measures that are applied to handle the administrative violations.* To achieve this goal, we propose:
 - To increase the levels of fines imposed for violations of the competition legislation;
 - To provide for the minimum level of fines imposed for violations of competition legislation (to avoid the current level of fines which are calculated only by the rate of turnover, resulting in the cases in which loss-making enterprises are not fined despite their violations)
 - To widely publicize through the mass media information about violations of law that are handled by the competition authority.
- *Strengthen the competition authority's operational efficiency in handling violations of competition legislation.* To achieve this goal, we propose:
 - To strengthen the resources (human and material) of the competition authority to actively carry out the pre-litigation investigations as well as the litigation;
 - To set targets for the number of cases to be investigated in the pre-litigation;
 - To add the monitoring and promotion of handling violations of competition legislation of the state bodies (that carry out the prohibited acts as stipulated in Article 6 of the Competition Law) into the activity program.
- *Consolidate the legal basis for handling the competition cases.* To achieve this goal, Vietnam should amend the competition legislation to cover the full range of competition restriction acts or unfair competition acts, thereby creating the legal basis for the competition authority to handle the concerned violations.
- *Strengthen the use of the court institutions in resolving the disputes involving claims for damages due to violations of competition legislation.* This solution mainly involves campaigns so that organizations and individuals are aware of and use the courts as an effective way to claim for damages caused by violations of competition legislation.

Proposals on building a fair competition policy

From a preliminary review of the current competition policy system in Vietnam, it can be seen that in all the processes of the business activities, from entering the market to operating in the market as well as traded products, there still exist many regulations which either directly affect or distort the competition among the entities, or lack transparency in the enforcement procedures, indirectly creating illegal competition opportunities for a certain number of entities to commit against others.

In this difficult context, it can be proposed that there should be further amendments to the Law on the Promulgation of Legislative Documents at least within the next few years (because this Law has just been passed in May 2015 and it has not even come into effect yet). Thus, the most feasible solution is still to establish an enforceable mechanism to enhance the competition authority's initiative and professionalism in reviewing and commenting on the draft legislative documents that affect competition in the specialized fields. The "filtration" of suggestions made by associations and enterprises should only be used as an additional way to supervise the competitiveness in the drafts, but cannot replace the competition authority's responsibilities toward this issue. The following are some specific proposed solutions.

- To allow the Vietnam Competition Authority to be informed and to give its comments from the perspective of competition on all draft business-related documents written by the Ministry of Industry and Trade or by other Ministries and submitted to the Ministry of Industry and Trade for consultation. Basically, it is an internal mechanism of the Ministry of Industry and Trade, so this can absolutely be done without any specific legal provisions allowing the Authority to do this.

- To allow the Vietnam Competition Authority to participate in the process of controlling the draft documents in which other bodies are controlling the aspects close to the competition. Specifically, the Vietnam Competition Authority should be permitted to participate in the process of controlling the business conditions in the draft documents that the Ministry of Planning and Investment is currently in charge of, in accordance with the new provisions of the Investment Law 2014. The Vietnam Competition Authority should also be given the authority to join with the Administrative Procedures Control Agency of the Ministry of Justice in controlling the administrative procedures in the draft documents to make sure that all administrative procedures are transparent.¹

¹ In fact, the Administrative Procedures Control Agency of the Ministry of Justice still invites the ministries and branches, organizations representing enterprises to participate in its controlling process. Therefore, the

- *The Vietnam Competition Authority should develop a set of consistent review criteria for the draft legal documents in the fields of specialized business from the perspective of competition.* These criteria should be taken into consideration and include: Do they unreasonably hinder the market entry of the entities? Do they create unreasonable advantages to one entity against others? Do they restrict or eliminate unreasonable competition in the relevant market? On which bases is it reasonable to accept an intervention into the competition in the market? This set of review criteria will be a tool for the Vietnam Competition Authority's usage in its control the activities in the above-mentioned mechanisms.

Basically, these solutions are feasible and if they are applied, they can completely result in positive results in controlling the draft legal documents on specialized business which contain provisions affecting the competition and are newly promulgated/amended and supplemented by the Ministries and branches. The remaining issues are the competition body's action proactivity and effectiveness in this regard.

6. Build an clear, complete and reliably protected system of property rights for public properties

The final group of key issues involves building an clear and complete system of property rights for public properties. As was mentioned in the *Report on the Development of Vietnam's Market Economy 2014*, the law on ownership regime in Vietnam has taken a long step, from only recognizing the collective ownership and ownership by all the people to the recognition of diverse forms of ownership and the setting up of a system of stipulations to establish and transfer property ownership (Dau Anh Tuan et al, 2015). However, currently, many types of property still do not have clear property rights, especially categories of property related to land, natural resources, public works, as well as properties that are exploited, managed and used by the system of state bodies, business units and economic groups, corporations and state enterprises. These are public properties that originated from the "ownership by all the people" and have great value and impact on many aspects of the socio-economic life. In recent years, there have been many cases related to public properties which upset public opinion, such as the replacement of urban plants in Hanoi in 2015, extraction of natural resources such as bauxite in the Central Highlands or petroleum, inefficient use of state properties invested in the state enterprises, transfer and sale of land use rights, land

Vietnam Competition Authority' s participation will basically not encounter any difficulty, and even be welcomed.

allocation, leasing and recovery, etc. The causes generally fall into two groups: (i) unclear responsibilities of entities executing public property rights, including those who dispose of, possess or manage and use the properties; and (ii) incomplete and unclear contents of public property rights.

In this chapter, we study the global principles and good practices in building a clear and complete system of public property rights. On that basis, we will review and assess this system's real conditions in Vietnam. We find that many types of public property have no entity that are executing the property rights with a high level of accountability, and some contents of property rights have not been established completely and clearly by the law, especially public properties invested in the production and business sector in the enterprises. Mechanisms for managing and monitoring the execution of public property rights are quite different from the market economy practices.

Inadequacies in the system of public property rights cause the public properties to not be allocated to the most effective area, which reduces their contributions and desired roles in the growth and development of the economy. This situation should be changed to promote the institutional reform of the market economy in Vietnam. This study shows that it is necessary to amend and supplement many legal procedures and renovate the methods and apparatus for executing the public property rights enforcement. The following are some specific recommendations.

Recommendation 1: Establish complete property rights for public properties to be transacted or allocated by the market mechanism.

It is necessary to immediately amend and supplement the Civil Code and laws relating to the property rights to be consistent with and conform to the Constitution 2013 and to provide the public properties with clear and complete property rights. This is a prerequisite for the public properties to be transacted or allocated under the market principles in order to overcome the disadvantages of the mechanism for national resource allocation by the unequal and ineffective administrative measure of “ask – give”.

Recommendation 2: Renovate and complete the mechanism for public property management under the market mechanism.

The mechanism for new public property management should determine the rights of possession and disposition of public properties specifically and in detail, thereby assigning the bodies, organizations and individuals inside and outside the state administrative apparatus to operate under the highest level of accountability in order to avoid overlap, duplication and lack of responsible focal point. For this mechanism and each specific public property (land, natural resources, state

capital invested in enterprises, etc.), the responsible and professional company or organization should be established to execute the professional management of public properties. The government and the state administrative apparatus should focus on executing the contents of public property management that other areas do not or have not expressed, such as promulgating relevant legal procedures, deciding the investment in the public asset formation and purchase, disposition of large-scale public properties, etc. Regarding the right to use public property only, it should be allocated under the market principles, equally and efficiently, and the monopolies of any form in the allocation of the right to use public property should be terminated.

Recommendation 3: Reform the management of public property rights to land towards shifting all land use and management rights to goods traded under the market mechanism.

The contents to be renewed include: Officially recognize land use rights as goods (property) traded on the market; land use planning should be linked to the socio-economic development planning and urban development planning; develop the national land registration system, information system and electronic system for registration and transfer of land use rights; expand the rights of foreigners related to land; establish the institutional requirements of public land for public bidding but not administrative allocation; develop a system to enforce the legal requirements for transparency of the planning and the planning procedures; build a mechanism for allocating the agricultural land use rights that relies on market principles; regularly reevaluate the land use rights values of the land parcels very close to the market price; and shift the mechanism for recovering the land use rights to the mechanism for repurchasing the land use rights in accordance with the market principles.

Recommendation 4: Thoroughly apply market principles in the management of public properties invested in the production and business sector in enterprises.

Specifically, all state properties invested in enterprises must be valued under the market price to calculate exactly and sufficiently the state capital value as well as the relevant costs of the enterprises in order to create the freedom of valuation and avoid the market deformation; urgently set up and operate specialized models for performing the ownership functions with the state enterprises separate from the function of state administrative management, etc.

For the management of public properties in the business and administrative bodies, properly and fully follow the existing laws; research and proceed to set up a model of a responsible, professional and independent public property management body.

For all types of public property, build a database system which is focused, consistent, accurate, and updated, and one which publicizes and is able to answer the question of which public property

Vietnam has, who manages it, who uses it, how much the market value (or market conversion value) is, how efficient it is, etc. These are important bases for decisions on allocating and restructuring the public properties for Vietnam's economy in each period.

Recommendation 5: Change the organizational model for executing the property rights of the state enterprises towards being concentrated and unified into a few focal points.

According to the new provisions of the Law on Enterprises 2014, the term 'state enterprise' means an enterprise of which 100% of the charter capital is owned by the State and is organized under the form of a one-member limited liability company. For good governance of this type of enterprise, the execution and the function of the state owner to be concentrated and unified and a responsible focal point is required. On the other hand, the principles on equal treatment among different types of enterprises require separating the execution of ownership rights from other functions of state management bodies and focusing resources on carrying out the state management functions well while improving the efficiency of the state-owner function. Both of the requirements above set out the need for professionalizing the owner body's apparatus. The owner body must have a specialized apparatus with skills and tools to perform the owner function and must be separate from executing the policy-planning functions and market management and monitoring functions. It is the best that the Government should set up a specialized body for executing the owner function to release the state management ministries from the management function of the state owner.