

THE ROLE OF STATE-OWNED ENTERPRISES IN INTERNATIONAL INVESTMENT LAW REGIME

Khalilova M.E. (Republic of Uzbekistan)

Khaliova Mekhriniso Erkinovna – PhD Candidate in Law, Master of law (LLM) from the University of Bremen (Germany), temporarily unemployed, BUKHARA, REPUBLIC OF UZBEKISTAN

Abstract: *in response to the COVID-19 crisis, governments have taken a wide range of measures to support the business sector. Despite the rise of international investment treaties and the adoption of liberalizing measures by national governments, many states are taking a more cautious and restrictive approach in regulating international investments. In some cases, rescue packages include the acquisition of equity stakes in companies in financial distress, potentially increasing the number and presence of State-owned enterprises (SOEs) in the economy. Especially, in post-socialist countries, SOEs still play an important role in the economy; however, their activities are concentrated in domestic markets. The aim of this article is to present natures of SOEs and analyze the regulatory measures taken by some countries.*

Keywords: *state-owned enterprises (SOE), international investment law regime, SOE investments, regulatory measures.*

РОЛЬ ГОСУДАРСТВЕННЫХ ПРЕДПРИЯТИЙ В РЕЖИМЕ МЕЖДУНАРОДНОГО ИНВЕСТИЦИОННОГО ПРАВА

Халилова М.Э. (Республика Узбекистан)

*Халилова Мехринисо Эркиновна - докторант в области права, магистр права (LLM) Бременского университета (Германия), временно безработная,
г. Бухара, Республика Узбекистан*

Аннотация: *в ответ на кризис COVID-19 правительства приняли широкий спектр мер по поддержке делового сектора. Несмотря на рост числа международных инвестиционных договоров и принятие мер по либерализации национальными правительствами стран мира, многие государства придерживаются более осторожного и ограничительного подхода к регулированию международных инвестиций. В некоторых случаях пакеты мер по спасению включают приобретение долей в компаниях, испытывающих финансовые затруднения, что потенциально увеличивает количество и присутствие государственных предприятий (ГП) в экономике. ГП по-прежнему играют важную роль в экономике, особенно в постсоциалистических странах; однако их деятельность сосредоточена на внутренних рынках. Цель этой статьи - представить*

сущность госпредприятий и проанализировать меры регулирования, принятые некоторыми странами.

Ключевые слова: *государственные предприятия (ГП), режим международного инвестиционного права, инвестиции ГП, меры регулирования.*

According to data and statistics, published by UNCTAD World Investment Report 2021, except for a few cases in emerging Asian economies (China, Hong Kong (China) and Singapore) all equity injections took place in developed economies, and in particular in Europe. In emerging economies, capital injections occurred on already State-owned carriers (Singapore Airlines, Cathay Pacific, China Eastern and Southern airlines). Across developed countries two different approaches were followed, with programs in the United States and New Zealand privileging equity backed loans and convertibles, while European countries chose to buy equity stakes in several cases.

The COVID-19 crisis slowed down ongoing privatization programs owing to elevated uncertainty and lower market demand.

For example, programs in Brazil and Viet Nam suffered setbacks. Brazil launched its privatization program at the end of 2018 with the expectation to reduce the number of SOEs from 134 to 12. During 2020 only two privatizations were completed: the sale of the insurance company La Caixa (subsidiary of La Caixa Federal) and of two subsidiaries of Petrobras. Viet Nam approved the privatization of 174 SOEs between 2016 and 2020. The pandemic significantly delayed plans for several companies, including MobiFone, Agribank, Northern Food, Vinacomin and Vietnam National Chemical Group. Overall, the number of SO-MNEs in 2020 increased by 7 per cent with respect to 2019, to about 1,600. In addition to the companies included following COVID-19- related bailout programs, several more were nationalized for reasons not related to the pandemic. About two thirds of the new SO-MNEs are included because of minority participations by public pension funds or sovereign wealth funds. The remaining new SO-MNEs are companies for which information about their governance structure became available only now. With the exception of a few from Africa, these are all in transition economies (Belarus and Ukraine) and are typically smaller companies with a single affiliate in a neighboring country (e.g. the Russian Federation). Often these companies are a legacy of highly integrated markets and are not active in international capital markets [1]. Here it should also be mentioned that the COVID-19 crisis influenced negatively on the economies of transition countries of Central Asia, including Uzbekistan. In Uzbekistan, inflows declined by 26 per cent to \$1.7 billion, despite the relatively good macroeconomic situation, with GDP expanding by 1.6 per cent in 2020, and the country's efforts to attract new FDI. The Laws of the Republic of Uzbekistan "On Investments and Investment Activity" of 2019 [2] and "On Special Economic Zones" adopted in February 2020 [3], for example, facilitated new investment projects in the energy sector, as well as in the

telecommunication industry [4]. In May 2020, the Government announced that 70 companies and consortia from 30 countries had submitted proposals for green-energy projects. In addition, the Volkswagen Group (Germany) launched an investment project in the SEZ of Jizzakh. However, because of the country's being doubly landlocked – i.e. surrounded only by other landlocked countries – border closures and other restrictive measures adopted by domestic and neighbouring-country authorities affected the economy and delayed investment projects.

Unlike private-owned firms that focus on profit-maximising, SOEs are considered to be driven by both political and economic motivations where the state-owned nature plays a significant role [5]. Due to their political nature, i.e., their close ties to the government, SOEs as foreign investors are being considered to be serious “global competitors”[6] to private entities by policymakers and lawyers. Moreover, there are some concerns over foreign SOEs, raised by Western countries in relation to national security, corporate governance and transparency [7]. Western countries' concerns over foreign SOEs lead these countries to take regulatory measures. At the domestic level, some countries such as Canada and the US have tightened their screenings of FDI for foreign SOEs. At the international level, the US has proposed the use of bilateral, regional and multilateral trade and investment policy tools in responding to the important challenges of ‘state capitalism’ to the US and global economy. Despite the fact that regulatory gaps and uncertainties still exist in WTO law, it has already provided several disciplines on anti-competitive activities of state enterprises. Moreover, an increasing number of bilateral and regional treaties have covered SOEs or attempted to include SOE disciplines. Particularly, the newly concluded TPP includes an entire chapter on SOEs in support of a level playing field between SOEs and private investors, which may have implications for future BIT and FTA negotiations.

It is worth stressing here that a rapid growth of SOEs is an undeniable fact [8] and the main issue of the international investment regulation is not whether an investor on the basis of state ownership should be included or excluded from the treaty protection, but whether the host state has provided right protections for investors and are allowed to take regulatory measures for public policy objectives. Through making investments in third States, SOEs can become foreign investors too. As a result, they may act commercially as non-State actors, or SOEs may act under the umbrella of the constituent State. In other words, where they act as the alter ego of a State, they should therefore be deprived of all the treaty-based benefits that are otherwise available to nationals.

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