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The Vietnamese Foreign Investment Framework: An Assessment

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March 1997**

**A thesis submitted to the Faculty of Graduate Studies and Research in
partial fulfillment of the requirements of the degree of Master of Laws, LL.M.**

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Ce mémoire est dédié à mon frère Richard

ABSTRACT

This thesis examines the legislative framework governing foreign investment in Vietnam. More specifically, it focuses on the regulatory control exerted over foreign entities in the country. At the fulcrum of Vietnam's transition from a centrally-planned to a market-oriented economy, its foreign investment legislation is designed to attract the outside capital necessary to rebuild its infrastructure. Simultaneously, it must also allow the authorities to effectively screen the entry of foreign investment and supervise the operations of foreign enterprises. The various control mechanisms in the Vietnamese legislative framework are far too extensive and, as such, not only create an impediment to a greater flow of foreign direct investment in the country, but also account for a more difficult business environment. Amidst efforts to reconcile the tenets of market economy with communist ideology, the handling of foreign interests in Vietnam remains highly conditioned by various ideological, political, historical and cultural factors. This thesis concludes with a review of the underlying issues affecting the investment climate: the Vietnamese notion of private rights, the political risk at play for foreign investors and the country's legal development with regards to the principle of the rule of law.

RÉSUMÉ

Ce mémoire fait l'étude du cadre législatif régissant les investissements étrangers au Vietnam en se penchant particulièrement sur la question du contrôle dont font l'objet les entreprises étrangères établies dans ce pays. Pierre angulaire de la transition que le Vietnam effectue actuellement d'une économie dirigée vers une économie de marché, sa législation sur l'investissement étranger (LIE) a en effet pour but d'attirer les capitaux devant servir à la rénovation de ses infrastructures. Parallèlement, la LIE a aussi pour objectif de permettre aux dirigeants vietnamiens de contrôler étroitement l'établissement et les activités des firmes étrangères dans leur pays. Or, ce contrôle s'avère d'une telle ampleur qu'il constitue non seulement une entrave à l'afflux des investissements directs étrangers, mais nuit également aux opérations commerciales en général. De fait, la valse-hésitation des autorités vietnamiennes entre le contrôle et la promotion des investissements étrangers reflète bien leur difficulté de concilier les principes de base de l'économie de marché avec les points de doctrine communiste. Dans la même veine, il importe de souligner l'incidence de la politique, de l'idéologie, de l'histoire et de la culture sur le traitement réservé aux investisseurs étrangers. Partant, nous passerons en revue les éléments sous-jacents au contexte de l'investissement au Vietnam: la portée des droits privés, le risque politique et l'état de la primauté du droit au pays.

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*** The author wishes to underscore that she is sole responsible for the opinions expressed in this thesis. Unless otherwise specified, all prices quoted are in US dollars.**

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As Lenin taught, we are not afraid of capitalist enterprises, but of not being able to supervise and control them

Communist Party General Secretary
Do Muoi on the need for greater control
over foreign enterprises in Vietnam¹

Introduction

Ten years ago, the Socialist Republic of Vietnam embarked upon a journey leading it to the uncharted territory of market economy. In December 1986, during the Sixth Communist Party Congress, Vietnamese leaders adopted a program of renovation - *doi moi* - in order to call a halt to the economic stagnation stifling their country. At the time, eleven years after the end of its devastating thirty-year war against France and the United States, Vietnam found itself practically isolated from the world community. Its continued presence in Cambodia combined to the American embargo and the lack of funding from international financial institutions exerted an extremely heavy toll on its reconstruction effort. Meanwhile, the winds of change had already started to blow on Eastern Europe. The Soviet Union, Vietnam's main source of economic aid as well as its most important trading partner, was then facing problems of its own and could no longer afford to continue lending support to its communist ally. With the country's infrastructure in a shambles and the authorities simply losing control over the economy, the time for sweeping reforms had come. Vietnam had indeed no other choice but to open up to the rest of the world.

On December 29, 1987, just one year after the inception of *doi moi*, the National Assembly adopted the *Foreign Investment Law* (FIL).² At the fulcrum of the reform

¹ "In Other Words" (February 1, 1996) Far E. Econ. Rev. 11.

² Since then, the *Foreign Investment Law* has been amended twice, first on June 30, 1990 and thereafter on December 23, 1992. A revised version of the FIL was approved by the National Assembly on November 12, 1996 and promulgated in a decree issued by President Le Duc Anh on November 23, 1996. At the time of writing, the implementing regulations to the revised law were not yet available. Our study

program, the FIL was designed to create favorable conditions to attract the outside capital necessary to rebuild the national economy. Ever since the introduction of its renovation program, Vietnam has made great strides in developing a market-oriented legal system. Thus, the National Assembly officially acknowledged the country's shift toward a market economy in the new constitution it approved on April 15, 1992. In addition, important pieces of legislation have been enacted over the years, including laws on land, bankruptcy, labor, and domestic investment, to name but a few. Vietnam notably reached a legal milestone with the coming into effect of its Civil Code on July 1st, 1996. As part of the National Assembly's law building program, a host of other laws and ordinances are expected to be adopted in the near future. These comprise, *inter alia*, the much-awaited commercial law, as well as new laws on taxation; the current *Law on Companies* is also to be amended.³ Although admittedly still to be perfected, Vietnam's legislative framework has undergone nothing short of a metamorphosis over the past ten years.

Vietnam has also made steady progress in increasing its status as a trade partner. Thus, the 1993 partial relaxation of the U.S. trade embargo made way for its actual lifting on February 3, 1994. In a quick succession of events, the reestablishment of diplomatic relations between the United States and Vietnam was announced on July 11, 1995, followed, less than a month later, by the opening of the American embassy in Hanoi on August 5, 1995. As its relations with the United States were definitely taking a turn for the better, Vietnam was also committed to becoming an active participant in regional and global trade. On July 28, 1995, Vietnam was granted full membership of ASEAN, thus taking a giant leap in integrating into the region's economy. With the same end in view, Vietnam has submitted its application to another regional trade association, the Asia-Pacific Economic Co-operation (APEC) forum; it is also currently seeking accession to the WTO, the last step before achieving international economic integration.

is thus based on the *Foreign Investment Law* as it stood on December 23, 1992, but also includes references to provisions of the revised law. The reader will note that the enactment of the new FIL has brought only modest changes to Vietnam's foreign investment framework and does not affect the analysis conducted in this thesis. The FBIS translation of the *1996 Foreign Investment Law* is available on the Internet at <http://coombs.anu.edu.au/~vern/avsl.html> [hereinafter 1996 FIL].

³ Baker & McKenzie, "Vietnam - Legislation" (1996) 4:4 *Indochina Law Quarterly* 55 at 55-56.

Yet, for all the remarkable changes it has experienced in recent years, Vietnam has always remained true to its original socialist orientation. Its continued adherence to the principles of socialism is in fact a crucial aspect of its renovation policy. Far from causing it to stray from its founding doctrine, its shift toward a market-oriented economy is designed to help it attain socialism.⁴ For their part, Vietnamese leaders are intent on liberalizing their country's economy without giving up political control. While political stability is usually considered an important element of a favorable investment climate,⁵ it also cloaks negative aspects in Vietnam because of communism's ideological distrust of private entities which translates into a higher level of control over foreign enterprises. The Vietnamese legislative framework for foreign investment is thus required to fulfill a dual (and sometimes contradictory) role: firstly, it must serve to develop and promote a market economy by inducing an ever-growing flow of foreign direct investment in the country and, secondly, it must simultaneously allow the authorities to closely monitor both the entry and operations of foreign enterprises.

We intend to demonstrate that the control exercised over foreign firms in Vietnam is far too extensive and greatly contributes to a more difficult business environment. The maze of approvals, licenses and permits foreign investors must secure to set up their businesses and carry on their operations in Vietnam not only account for a bureaucratic nightmare, but also exacerbate the problem of corruption in the country. Although we do not purport to deny that the monitoring of the entry and operations of foreign enterprises is, for any country, an attribute of sovereignty, we nonetheless submit that an overly high level of control can be detrimental to foreign investment and, ultimately, to the host country itself. Indeed, one must not forget that foreign investment is primarily based on

⁴ "(...) In light of Marxism-Leninism and Ho Chi Minh thought, and in compliance with the platform for national construction in the period of transition to socialism, (...). Preamble to the *1992 Constitution of the Socialist Republic of Vietnam*, reprinted at "Socialist Republic of Vietnam" in A.P. Blaustein & G.H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1992) [hereinafter *1992 Constitution*]. "The state develops the multisectoral commodity economy in accordance with the market mechanism based on state management and socialist orientations. (...)" *Ibid.*, art. 15.

⁵ It does not seem, however, to be a *sine qua non* condition to economic growth, as past political upheavals in Thailand have not prevented the country's economy from booming. "Thai anxiety" *The Economist* (30 November 1996) 18.

mutual benefit. Thus, while Vietnam needs both foreign capital and expertise to develop its infrastructure, foreign investors are undeniably attracted by the country's comparative advantages, namely its vast natural resources and its inexpensive work force.

There is no question that a receptive investment environment plays a primordial role in foreign investors' locational decisions. Vietnam is not oblivious to that reality and has taken measures to improve its foreign investment framework. The creation of the Ministry of Planning and Investment (MPI) was meant *inter alia* to alleviate the problem of long delays during the application review process. However, not only is the MPI hardly a one-stop shop approval agency, but foreign investors remain confronted to onerous post-approval licensing procedures once their projects have been approved, as cogently evidenced by Vietnam's disappointingly low rate of project implementation. Moreover, certain aspects of the Vietnamese foreign investment framework, such as the unanimous vote requirement on important decisions made by the board of management of joint ventures, constitute serious impediments to project financing. Through state-owned enterprises as joint venture partners, this requirement gives Vietnamese authorities a veto power over the important matters affecting the operation and organization of joint venture enterprises. Worse still, Vietnam's land tenure system is considered to be its biggest disincentive to foreign investment. Based on the principle of collective ownership, the land legislation is designed to assert government control over land use, but thus makes secured lending, to all intents and purposes, impracticable in the country. Vietnamese authorities' urge to control foreign enterprises has indeed translated into an investment framework riddled with anti-market undercurrents.

Our assessment of Vietnam's investment framework will also explore some of the ideological, political, cultural and historical causes underlying its treatment of foreign investment. Thus, as Vietnamese leaders are attempting the *tour de force* of reconciling the tenets of market economy with communist ideology, their political agenda is frequently slowing the pace of reforms. Furthermore, in a country where the common good takes precedence over the good of the individual, private rights find themselves in a position of

secondary importance. While a healthy private sector constitutes the linchpin in a successful market economy and is essential to a favorable investment climate, cultural values and ideological principles still concur to create a policy environment favoring the state sector in Vietnam. The same factors also come into play, for instance, in shaping the Vietnamese notion of administrative review. In this case, the principle of democratic centralism, at the basis of the country's political structure, further contributes to prevent the effective review of administrative decisions.⁶

The first chapter of this thesis examines the circumstances surrounding Vietnam's shift toward market economy. Its first part is a background review of the history, geography, and political organization of the country. Its second part is devoted to the 1986 program of renovation, launching pad for an era of unprecedented changes. Its third part introduces the reader to the *1992 Constitution* and the foreign investment legislation. Finally, its last part focuses on Vietnam's reintegration in the world community after years of ostracism. The second chapter consists in an analysis of Vietnam's foreign investment framework, beginning with a review of the three forms of investment under the *Foreign Investment Law*. Other ways to do business in Vietnam (BOT contracts, representative offices, and branches), as well as the country's special investment areas, are also discussed. The last chapter examines Vietnam's ambivalence between promotion and control of foreign investment and the underlying issues affecting the investment environment in the country. In the first part, we study the investment review process and post-approval licensing procedures. Legal requirements aimed at policing the operations of foreign enterprises are also analyzed. The second part highlights a promotional aspect of Vietnam's foreign investment framework, its investment guarantees. The review of these incentives is followed by a discussion of Vietnam's number one disincentive to foreign investment, its land legislation. Finally, the last part concentrates on the country's stance on private rights, the political risk to doing business in Vietnam, and the country's foreign investment framework with regards to the principle of the rule of law.

⁶ Decisions rendered by Vietnam's new administrative courts can always be overturned by the Prime Minister. *Country Report - Vietnam: 4th quarter 1996* (London: The Economist Intelligence Unit, 1996) at 22 [hereinafter *Country Report 4th quarter 1996*].

I.- Vietnam's Shift Toward A Market-Oriented Economy

A.- Background

1.- A History of Struggle

a) Early History: Chinese Rule

Vietnam's history has been marked by a constant fight against the forces of nature⁷ and a continual struggle in the face of foreign advances on its territory.⁸ Thus, China ruled over Vietnam as one of its provinces, Giao Chia, for over a thousand years from 111 B.C. to 939 A.D.⁹ Despite this long period of direct contact with Chinese rule,¹⁰ the degree of assimilation of Chinese culture by the Vietnamese is hard to evaluate.¹¹ Indeed, the Vietnamese people has always maintained a very strong nationalist sentiment, which sometimes gave rise to violent outbreaks against Chinese occupation.¹² This fear of territorial advances and domination by China has been at the heart of the complex relationship between the two countries and to this day continues to mar their relations, as demonstrated by their current dispute over the Spratly Islands.¹³

⁷ D.R. SarDesai, *Vietnam - The Struggle for National Identity* (Boulder, Colo.: Westview Press, 1992) at 10.

⁸ M.C. Williams, *Vietnam at the Crossroads* (London: The Royal Institute of International Affairs, 1992) at 5. "From the earliest times when it is possible to speak of a Vietnamese nation, Vietnamese have found themselves at odds with their neighbours, the Chinese, Cambodians and Thai." *Ibid.*

⁹ *Country Profile - Indochina: Vietnam Laos Cambodia* (London: The Economist Intelligence Unit, 1994-1995) at 6 [hereinafter *Country Profile*].

¹⁰ SarDesai, *supra* note 7 at 10-11. SarDesai observes that the Chinese were also present in Vietnam before this period of occupation, as Zhao Tuo, commander of the Kwantung and Kwangsi provinces, brought the Red Delta River under his jurisdiction in 207 B.C., establishing the independent kingdom of Nan Yueh (Nam Viet). In addition, in the first century A.D., a large number of Chinese scholars and officials fleeing the Chinese government took refuge in the Red River Delta. "They became agents of intensive propagation of Chinese culture through the introduction of Chinese classics, Confucian ethics, and Chinese ideographs. Until the adoption of the romanized *quoc-ngu* in the seventeenth century A.D., Vietnamese was the only language in the Southeast Asia that used the Chinese characters and was therefore not alphabetical." *Ibid.*

¹¹ *Ibid.* at 15. "As in the other Southeast Asian countries, in Vietnam probably only the court and the elite were able to appreciate and absorb these alien cultural importations, whether Indian or Chinese".

¹² *Ibid.* at 11.

¹³ See *infra* note 81 and accompanying text on the Spratly Islands dispute. Apart from several land disputes, suspicion between the two communist countries has also resulted in various ideological disagreements. See generally C. Vecchi & P.-K.T. Nguyen, "The Legal System of Vietnam" in *Modern Legal Systems Cyclopedia*, vol. 9A, part II (Buffalo, N.Y.: William S. Hein & Co. Law Publisher, 1990) 9A.70.2 at 9A.70.11ff [hereinafter "The Legal System of Vietnam"]. Specifically, when Vietnam was prompted by China to pick sides between the two communist powers in 1976, it chose the Soviet Union over its northern neighbor. SarDesai, *ibid.* at 117.

b) Traditional Vietnam: the Dynasties

At the end of its thousand-year occupation by China, Vietnam remained almost completely free from foreign domination until French colonization in the nineteenth century,¹⁴ but was not immediately unified under the rule of a single monarch.¹⁵ In fact, it was not until the Ly dynasty (1009-1225) that what is known as traditional Vietnam began to emerge.¹⁶ Under the Tran dynasty (1225-1400), Vietnam's population and territory further expanded while intrusions from the north were successfully fended off.¹⁷ However, taking advantage of the political strife that ensued the coming to power of the Ho dynasty (1400-1407), the Ming rulers of China invaded Vietnam once again in 1407.¹⁸ During their second rule in Vietnam, the Chinese launched a fierce campaign of sinicization as a means of demoralizing the Vietnamese people.¹⁹ Needless to say, this blatant attempt to annihilate Vietnamese cultural traits had the effect of reinforcing the long-standing animosity against China and paved the way for a Vietnamese reprisal. Thus, a resistance movement headed by Le Loi, was already in place by 1418 and eventually provoked the fall of the Chinese rule ten years later.²⁰ More than at any other time, China's influence on Vietnamese society was probably most felt during the Le Dynasty (1428-1788)²¹ when Vietnam adopted the Chinese administrative framework and the Confucian-style civil service examination.²² However, despite this strong adherence to the Chinese government

¹⁴ SarDesai, *ibid.* at 19. Chinese rule was reestablished for a brief period from 1407 to 1428. *Ibid.*

¹⁵ N.L. Jamieson, *Understanding Vietnam* (Berkeley: University of California Press, 1993) at 8-9.

¹⁶ *Ibid.* at 9.

¹⁷ *Ibid.* at 9-10.

¹⁸ SarDesai, *supra* note 7 at 24.

¹⁹ "Vietnamese ways of life and religious practices were banned, and the people, particularly the higher echelons, were compelled to wear Chinese costumes, women to wear Chinese dress, men to wear long hair. The Vietnamese language was not allowed to be taught in schools. Literature extant in Vietnamese was confiscated and carried to China." *Ibid.*

²⁰ *Ibid.* at 25.

²¹ "Thus during the Le dynasty (1428-1788), Chinese systems and concepts were more systematically adopted, aiding the Vietnamese greatly in their thrust to the south. It gave them the political apparatus and the tax base to crush the Hindu kingdom of Champa in central Vietnam in 1470-71 and then to start their equally relentless push south against the Khmer or Cambodians." Williams, *supra* note 8 at 6. "Under Le Thanh Tong, all the traditional Chinese cultural traits, such as language, the art of writing, the spatial arts, as well as Mahayana Buddhism, were adopted." SarDesai, *ibid.* at 25-26. See also J.K. Whitmore, "Social Organization and Confucian Thought in Vietnam" (1984) 15 *Journal of Southeast Asian Studies* 296 at 298-299.

²² SarDesai, *ibid.* at 26. "The central administration was patterned on the Chinese model, with six ministries - finance, rites, justice, personnel, army, and public works." SarDesai notes that even after the

model, Vietnam strove to remain true to its traditions in the fields of law, religion, and literature.²³ Of particular interest is the legal sphere. In 1483, Vietnam introduced the Hong Duc Code (the Le Code),²⁴ which remained part of Vietnam's governing legislation for over 300 years and is still considered to be "the most important legal document in Vietnamese history."²⁵ The Le Code was indeed an ambitious realization, insofar as its 722 articles²⁶ encompassed all the laws, rules and regulations issued by past Vietnamese emperors.²⁷ The Code reflected some of the customs and practices already in place in Vietnam and played a role in later legal developments.²⁸ Although the Le Code was eventually superseded by the Gia Long Code (1802-1945) of the Nguyen dynasty,²⁹ its influence on the development of Vietnamese law is beyond question.³⁰

c) Modern History

After Gia Long's accession to the throne in early 19th century, the Nguyen dynasty was unable to prevent the expansion of French colonialism in the region.³¹ Under French

Chinese abandoned the civil service examination in 1905, Vietnam continued to apply this system for several years. *Ibid.*

²³ M. Beresford, *Vietnam - Politics, Economics and Society* (London: Pinter Publishers, 1988) at 4.

²⁴ SarDesai, *supra* note 7 at 27. For a more detailed study of the Le Code, see L.Q. Nguyen, "Traditional Vietnamese Law - The Lê Code - and Modern United States Law: A Comparative Analysis" (1989) 13 *Hastings Int'l & Comp. L.R.* 141 [hereinafter "Traditional Vietnamese Law - The Lê Code"] and T.V. Tai, "Vietnam's Code of the Lê Dynasty (1428-1788)" (1982) 30 *Am. J. Comp. L.* 523 [hereinafter "Vietnam's Code of the Lê Dynasty (1428-1788)"].

²⁵ "Traditional Vietnamese Law - The Lê Code", *ibid.* at 142.

²⁶ "Vietnam's Code of the Lê Dynasty (1428-1788)", *supra* note 24 at 525. Tai also praises the Code as follows: "(...) the Penal Code of the preceding Lê Dynasty (1428-1788) intertwined Chinese influence and Vietnamese genius, and the brilliant combination resulted in a monument to East Asian Law." *Ibid.*

²⁷ SarDesai, *supra* note 7 at 27.

²⁸ "Traditional Vietnamese Law - The Lê Code", *supra* note 24 at 142. Some of the principles enacted in the Code can be found in Western legal systems today: statutory rape, spousal immunity, the prohibition against *ex post facto* law, a statute of limitations, incapacity of minors, adverse possession, easement, the right of an accused to a warrant before arrest, release on bail, speedy and public trials, and the right to confront witnesses. *Ibid.* See also "The Legal System of Vietnam", *supra* note 13 at 9A.70.7-9A.70.8 where Le Van Ho is quoted as describing the Le Code as a compilation of "the truly Vietnamese Laws".

²⁹ "Vietnam's Code of the Lê Dynasty (1428-1788)", *supra* note 24 at 525. The Le Code was such an accurate reflection of Vietnamese society that many of its provisions continued to be followed even when contradicting the subsequently enacted Gia Long Code. The latter, in the words of French legal scholar Camille Briffaut, "was an anachronism and an error of legislation; its civil law provisions were never applied by the Vietnamese people." *Ibid.* at 551-552.

³⁰ Whitmore, *supra* note 21 at 299. The influence of the Le Code has extended through the nineteenth and the twentieth centuries during colonial rule and after independence.

³¹ *Country Profile*, *supra* note 9 at 6.

rule, the country was more than ever divided, with nationalist and revolutionary groups emerging in opposition to the colonial power.³² The colonial regime in place was devoted to fulfilling France's commercial aspirations in the region at the expense of local interests and was very little tolerant of opposition to its policies.³³ This climate of repression created an ideal breeding ground for opposition groups. Thus, while the *Viet Nam Quoc Dan Dang* (Vietnamese Nationalist Party or VNQDD), a non-Marxist organization founded in 1927, was dedicated to the promotion of nationalism and democracy and sought to put an end to French rule in Vietnam,³⁴ communist forces rallied popular support with a platform based on anti-colonialism, patriotism and peasant revolution.³⁵ In 1930, Ho Chi Minh met with the leaders of the Indochinese Communist Party and two other communist parties, Annamese Communism (*An Nam Cong San*) and the League of Indochinese Communists (*Dong Duong Cong San Lien Doan*) in Hong Kong and convinced them to unite as a single Vietnamese Communist Party (*Dang Cong San Viet Nam*).³⁶ In 1940, together with other Vietnamese revolutionary groups, the ICP established the League for the Independence of Vietnam (*Viet Minh*).³⁷

³² "The Legal System of Vietnam", *supra* note 13 at 9A.70.9. France took great pains to keep Vietnam divided by isolating the various regions from one another, thereby intensifying cultural differences within the country. Some of the characteristics of the regions developed during French rule have persisted to this day. "If Hanoi was the administrative center for French rule in Vietnam, the southern city of Saigon was the country's commercial center. It was in Saigon and its environs that commercial development took place." Williams, *supra* note 8 at 8.

³³ *Country Profile*, *supra* note 9 at 7.

³⁴ SarDesai, *supra* note 7 at 48. For a review of the origins of the VNQDD, see H.-T.H. Tai, *Radicalism and the Origins of the Vietnamese Revolution* (Cambridge, Mass.: Harvard University Press, 1992) at 182-186.

³⁵ *Country Profile*, *supra* note 9 at 7. "The colonial order both coopted and displaced the scholar-gentry class, either way undermining its authority, and blocked the growth of an indigenous bourgeoisie. In these circumstances the only effective challenge to French colonial rule was communist-led." *Ibid.*

³⁶ Beresford, *supra* note 23 at 13. The name of the new party "was quickly and significantly changed to the Indochina Communist Party (ICP), although there were hardly any Communists then in Laos and Cambodia." SarDesai, *supra* note 7 at 52.

³⁷ "The Legal System of Vietnam", *supra* note 13 at 9A.70.9. The goal of the *Viet Minh* was to bring all Vietnamese, regardless of their political affiliation, to form a common front for national independence. SarDesai, *ibid.* at 54.

As the Second World War was raging in Europe, the Japanese installed emperor Bao Dai on the Vietnamese throne on March 9, 1945.³⁸ Later in August, the *Viet Minh* took over Hanoi and proclaimed the provisional Democratic Republic of Vietnam (DRV) on September 2, 1945 with Ho Chi Minh as its president.³⁹ By that time, France had already repositioned itself in Cochin China.⁴⁰ In March 1946, French authorities recognized the DRV as a legitimate entity within the French Union and the Indochinese Federation.⁴¹ In 1949, France proclaimed the Independent State of Vietnam within the French Union and once again emperor Bao Dai was installed as leader of Vietnam, this time by the French authorities.⁴² Both sides continued to claim the whole of Vietnam amidst fierce fighting. At the closing of the Geneva Conference on July 21, 1954, Vietnam stood divided at the seventeenth parallel, the *Viet Minh* forces in the north and France in the south.⁴³

Meanwhile, the United States had been providing France with military assistance since May 1950, which prompted communist rulers in the north to regard the South Vietnamese government as "an American puppet regime".⁴⁴ However, it is only after the South Vietnamese President's assassination in November 1963 that the United States' involvement in Vietnam really deepened.⁴⁵ The thirty-year war ended on April 30, 1975 as Saigon fell to the North Vietnamese.⁴⁶ On July 2, 1976, the nation was reunified under the

³⁸ T.T. Thien, *The Foreign Politics of The Communist Party of Vietnam* (New York: Taylor & Francis, 1989) at 7.

³⁹ "The Legal System of Vietnam", *supra* note 13 at 9A.70.9.

⁴⁰ *Ibid.*

⁴¹ Beresford, *supra* note 23 at 24.

⁴² "The Legal System of Vietnam", *supra* note 13 at 9A.70.9.

⁴³ Williams, *supra* note 8 at 12. At the time of the division, the *Viet Minh* forces were estimated to control three quarters of Vietnam. *Ibid.* The country was to remain divided until July 1956, at which time elections on national reunification would be held. However, the proposed elections never took place, as the president of South Vietnam refused to hold them. *Ibid.* at 12-13.

⁴⁴ Williams, *ibid.* at 11, 13. By 1953, the United States was funding 80% of the war. *Ibid.* at 11. "In the view of the party leadership in Hanoi, the United States had simply replaced France as the imperialist enemy." *Ibid.* at 13.

⁴⁵ *Country Profile*, *supra* note 9 at 8. "The number of US troops in Vietnam increased from 25,000 in early 1965 to 500,000 three years later." President Johnson ordered air raids on North Vietnam after a U.S. ship was attacked by North Vietnamese forces in August 1964 (the Tonkin incident). At that point the conflict turned into an American war. *Ibid.*

⁴⁶ Beresford, *supra* note 23 at 49.

name of the Socialist Republic of Vietnam.⁴⁷ Just three years after reunification, the new republic invaded Cambodia⁴⁸ where its troops remained until 1989.⁴⁹ International and economic factors most certainly played a role in Vietnam's disengagement in Cambodia.⁵⁰ The agreements on the settlement of the Cambodia conflict⁵¹ were concluded in Paris on October 23, 1991. There is absolutely no doubt that Vietnam needed to demonstrate flexibility on the Cambodia issue in order to appease concerns over its belligerence and to abate the ostracism it endured from the part of the international community.⁵²

2.- Geography and Society

a) A Strategic Location

Vietnam is strategically located in Southeast Asia, at the "crossroads of many important cultures and civilizations".⁵³ It lies between 8°33' and 23°22' north latitude, extends over 1,600 kilometers in length⁵⁴ and covers an area of 329,560 sq. km of which 40% is forested and 22% cultivated.⁵⁵ Its coastline, islands excluded, is 3,444 km long⁵⁶ and runs along the Gulf of Thailand in the south, the South China Sea in the east and the

⁴⁷ "The Legal System of Vietnam", *supra* note 13 at 9A.70.11. Saigon was renamed Ho Chi Minh City after the communist leader who died in September 1969. *Ibid.* at 9A.70.10.

⁴⁸ F. Frost, *Vietnam's Foreign Relations - Dynamic of Change* (Singapore: Institute of Southeast Asian Studies, 1993) at 51.

⁴⁹ SarDesai, *supra* note 7 at 142-143.

⁵⁰ Frost, *supra* note 48 at 53. "By the end of the 1980s, the character and context of Vietnam's relations with Laos and Cambodia had changed markedly. Vietnam's military and advisory presence was now greatly diminished, the process of market-oriented economic reform in all three countries was highlighting the need for each state to diversify its economic relations and this process was encouraged further by the rapid cutbacks in Soviet aid and assistance. Vietnam was now not in a position to try to maintain a regional alliance in Indochina." *Ibid.* But see SarDesai, *supra* note 7 at 143: "Vietnam's withdrawal of troops from Cambodia did not mean abandonment of the desire to influence that country's government."

⁵¹ *Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict*, 23 October 1991, U.N. Doc. A/46/608, S/23177 (30 October, 1991), 31 I.L.M. 174 (1992).

⁵² The resolution of the Cambodia issue was also part of the "road map" Vietnam had to follow in order to see the normalization of its relations with the United States. See P.G. Furniss, "The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization" (1994) 35 Harv. Int'l L.J. 238. See also section 2 of the last part of this chapter on page 37, below, for a discussion of the reestablishment of diplomatic relations between Vietnam and the United States.

⁵³ "The Legal System of Vietnam", *supra* note 13 at 9A.70.7.

⁵⁴ Beresford, *supra* note 23 at 3.

⁵⁵ U.S. Central Intelligence Agency, "The World Factbook, Vietnam" (October 20, 1994), available in LEXIS, Asiapc Library, Wofact File [hereinafter "World Factbook, Vietnam"].

⁵⁶ *Ibid.*

Gulf of Tonkin in the north. Vietnam has a total of 3,818 km of land borders with its neighbors: 1,281 km with China, 1,555 km with Laos and 982 km with Cambodia.⁵⁷

b) Climate

Vietnam lies in the subtropical zone in the north and in the tropical zone in the south.⁵⁸ While the northern part of the country experiences substantial temperature variations from winter to summer, temperatures in the south are much more stable throughout the year. Due to tropical polar monsoons, northern Vietnam's winters are much colder than those in other tropical zones, but warmer than those in extra-tropical zones and they are characterized by sharp fluctuations in temperature.⁵⁹ Northern Vietnam receives more rainfall than regions located in the same latitude; its climate is essentially a wet tropical climate.⁶⁰ The south for its part is much more equable, although rain is unpredictable and typhoons are frequent in the center.⁶¹ Humidity is prevalent throughout the country all year long.⁶²

c) Natural Resources

Vietnam offers a wealth of unexploited natural resources⁶³ and its agricultural sector is definitely gaining ground.⁶⁴ Furthermore, the natural beauty of the country

⁵⁷ *Ibid.*

⁵⁸ "The Legal System of Vietnam", *supra* note 13 at 9A.70.5.

⁵⁹ *Ibid.* Northern Vietnam is the region that lies north of the twentieth parallel. In winter, the temperature can go from 3-5°C in the plains and 0°C in the hills to 25°C on warm days.

⁶⁰ *Ibid.* at 9A.70.6.

⁶¹ *Country Profile*, *supra* note 9 at 3. The hottest month in Hanoi is June (26-33°C), while in Ho Chi Minh City it is April (24-35°C) and, in both cities, the coldest month is the month of January with temperatures of 13-20°C in Hanoi and 21-32°C in Ho Chi Minh City. *Ibid.*

⁶² ABC-Clio, "KCWD/Kaleidoscope: Vietnam" (February 20, 1995), available in LEXIS, Asiapc Library, Vietnam File [hereinafter "KCWD/Kaleidoscope"].

⁶³ B. Castelli, "The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Cooperation? (1995) 13 Dick. J. Int'l L. 297 at 327. "A significant amount of natural resources, most specifically petroleum, gas, and mineral deposits, await exploration in Vietnam." *Ibid.*

⁶⁴ *Ibid.* "Recently, Vietnam has experienced an agricultural renaissance, achieving the status of the third largest exporter of rice in the world." *Ibid.* Vietnam was expected to produce more than 27 million tonnes of grain in 1995: 24 million tonnes of rice and 3 million tonnes of subsidiary food crops. IBC USA, "Int'l Country Risk Guide - Vietnam" (July 1995), available in LEXIS, Asiapc Library, Vietnam File [hereinafter "Int'l Country Risk Guide"].

presents an incomparable asset for the tourist industry.⁶⁵ Foreign investors, for their part, seem intent on taking advantage of Vietnam's natural resource potential, showing a particular interest in oil and gas exploration and in the tourism industry.⁶⁶ Vietnam has always been very active in the mining sector and nowadays its mining industry plays a significant role in the country's economy.⁶⁷ In the past few years, significant new mineral reserves have been discovered.⁶⁸ While coal is the most prevalent mineral,⁶⁹ Vietnam's gem industry has enormous growth potential as the country boasts a vast supply of high-quality gemstones.⁷⁰ Unfortunately, the know-how and the technology required to fully exploit these mineral resources are lacking at the present time.⁷¹ Some mining activities, especially in gold and non-metallics, are also conducted outside the official channels.⁷²

⁶⁵ L.A. McGrath, "Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment under *Doi Moi*" (1995) 18:5 Fordham Int'l L.J. 2095 at 2104.

⁶⁶ The World Bank, *Viet Nam - Transition to the Market* (East Asia and Pacific Region: The World Bank, Country Operations Division - Country Department I, September 1993) at 81 [hereinafter *Viet Nam - Transition to the Market*].

⁶⁷ J. Prud'homme, *Mineral Investment Conditions in Vietnam* (Montreal: Centre d'études en administration internationale, École des Hautes Études commerciales, 1993) at 8. "Vietnam was one of the few countries in southern Asia to have had a well-developed, tax-paying mineral industry long before the French colonial era. As early as 1810, Vietnam had 76 tax-paying mines. Indochina's richness in minerals was partly responsible for French interest in the region (...)" Prud'homme notes that Vietnam produces yearly approximately 5.5 MT of coal, 1.8 MT of cement, as well as important quantities of gold, chromite, graphite, gemstones, illmenite sands, tin and other metallic and non-metallic minerals. *Ibid.* at 7.

⁶⁸ *Ibid.* at 8.

⁶⁹ *Ibid.* at 9. In the first six months of 1995, Vietnam produced 4.2 m tons of coal, 41% more than at the same time in 1994 and 66% of its production target for 1995. *Country Report - Vietnam: 3rd quarter 1995* (London: The Economist Intelligence Unit, 1995) at 25 [hereinafter *Country Report 3rd quarter 1995*].

⁷⁰ A. Schwarz, "Precious Little - Vietnam rethinks its gem policy" (June 29, 1995) Far E. Econ. Rev. 65 [hereinafter "Precious Little"]. "Vietnam has the potential to become a major gem and jewellery exporter." However, at this point, the gem industry is plagued with policy confusion, cumbersome bureaucracy and corruption that impede its growth and have given rise to an important illegal trade sector. Not only does the State fail to enforce existing regulations, but it also disregards its own rules (the article reports on a state-owned jewellery replete with jewels bought from illegal traders). A team appointed by Prime Minister Vo Van Kiet has proposed a plan to revamp the industry. However, pending the new mining law, the new policy has still not been implemented. *Ibid.* Note that, since then, both a decree regulating activities in the gem industry, *Decree No. 65-CP of October 13, 1995 of the Government promulgating the Regulation on the Management of Activities in Gem Business*, reprinted in *Official Gazette* no. 24 (31-12-1995) at 20 [hereinafter *Decree 65-CP*] and the new mining law have been adopted. The *Law on Minerals*, reprinted in "New Legislation" (April 1996) 2:20 Vietnam Law & Legal Forum 1, was passed by Vietnam's National Assembly on March 20, 1996 and became effective on September 1, 1996.

⁷¹ Prud'homme, *supra* note 67 at 8.

⁷² Such activities are "if not encouraged, at least openly tolerated." *Ibid.* at 7-8. Prud'homme later speaks of a "near-clandestine mining sector". *Ibid.* at 11.

Under such circumstances, the major restructuring that Vietnam's mineral industry is currently undergoing could not be conducted at a better time.⁷³

In addition to its important coal reserves, Vietnam enjoys particularly abundant resources of petroleum and gas.⁷⁴ So far, the oil and gas sector accounts for a total foreign investment capital of 1,186 billion dollars, through twenty-seven contracts.⁷⁵ Of the seven million tonnes of crude oil Vietnam produced in 1994, 6.3 million tonnes (or 90% of the total output) were produced by Vietsovpetro, a joint venture between the government of Russia and Vietnam.⁷⁶ The oil production in Vietnam translates into important revenues that may very well finance the country's industrialization drive.⁷⁷ Three oil fields are currently in operation in Vietnam: *Bach Ho* (White Tiger), *Dai Hung* (Big Bear), and

⁷³ This restructuring is compared to the one that took place in Indonesia in 1965 or in Bolivia in 1985. *Ibid.* at 8. "The draft mining law, (...) is now expected to go to the National Assembly during its session next April. (...) It includes provisions on exclusive rights, fixed-term exploration and tax incentives. For the first time, only one licence will be required for exploration and exploitation." *Country Report - Vietnam: 4th quarter 1995* (London: The Economist Intelligence Unit, 1995) at 26 [hereinafter *Country Report 4th quarter 1995*]. Note that the legislator seems to have changed his mind concerning the last part of the just-quoted passage as a mineral prospecting permit (art. 21), an exploration license (art. 25), a mineral mining [exploitation] license (art. 31), a processing license (art. 44) and a full extraction license are all provided for under the now effective *Law on Minerals*. However, it has been noted that three of these licenses [exploration, mining and processing licenses] can now be held concurrently under the *Law on Minerals*. In the past, these activities were considered separate phases and had to be approved under three distinct applications. *Country Report - Vietnam: 2nd quarter 1996* (London: The Economist Intelligence Unit, 1996) at 13 [hereinafter *Country Report 2nd quarter 1996*].

⁷⁴ C. Ngo, "Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam" (1992) 16:1 *Hastings Int'l & Comp. L. R.* 67 at 77. Ngo states that Vietnam's oil production is superior to China's and that according to industry analysts, Vietnam could become a "significant oil exporter by the turn of the century". Compare: "Int'l Country Risk Guide", *supra* note 64, where it is predicted that Vietnam will be a medium-sized oil producer by the turn of the century and A. Schwarz, "Where Oil and Water Mix" (March 16, 1995) *Far E. Econ. Rev.* 54 [hereinafter "Where Oil and Water Mix"], where the president of Mobil Eastern Exploration & Development is quoted as saying that "Vietnam isn't going to be the Middle East, but it is going to be a very nice petroleum province". *Contra*: N.M. Tri & N.A. Thi, "If the price is right - Vietnam's gas industry is set for a bright future, providing tariff [sic] issues can be resolved" (February 1996) 22 *Vietnam Economic Times* 26, reporting that, according to some observers, the oil industry in Vietnam is now considered "modest in global terms" and, in comparison to the gas sector, far less promising.

⁷⁵ "Int'l Country Risk Guide", *ibid.*

⁷⁶ *Ibid.*

⁷⁷ "Where Oil and Water Mix", *supra* note 74 at 54. In 1994, oil exports reached \$976 million or 27% of Vietnam's total export revenues. The oil industry accounts for 12% of the total foreign investment approved since 1988, for a value of 1.2 billion dollars. *Ibid.*

Rong (Dragon).⁷⁸ Furthermore, recent oil and gas discoveries have rekindled interest in Vietnam's offshore fields.⁷⁹ Thus, although the surroundings of the Spratly Islands are still mostly unexplored, oil and gas-producing sedimentary basins indicate that there could be oil and gas reserves in the area.⁸⁰ Consequently, it is not surprising that the territoriality of the islands is now disputed among several countries.⁸¹ In order to fully exploit its oil and gas potential, Vietnam will need to elaborate a plan to coordinate the development of these resources.⁸²

d) Demography

The first traces of human habitation in Northern Vietnam go back to approximately 500,000 years.⁸³ Today, with its population estimated at 74 million,⁸⁴ Vietnam is the

⁷⁸ C. Moore, "The Well Isn't Dry Yet" (August 1996) 4:4 *The Vietnam Business Journal* 23. There are reports that PetroVietnam has now agreed to renegotiate the terms of its production-sharing contract with BHP, the Australian company operating the *Dai Hung* oil field, following complaints from BHP that the field's reserves are much lower than originally anticipated (production has plummeted from 35,000 barrels/day in September 1994 to 16,000 barrels/day a year later). However, in spite of the lower than predicted output at the *Dai Hung* field, total production is expected to climb from 138,600 barrels/day (6.9m tons) last year to around 155,000 barrels/day (7.7m tons), an increase of 11.6%. *Country Report 4th quarter 1995*, *supra* note 73 at 25.

⁷⁹ "Where Oil and Water Mix", *supra* note 74 at 54.

⁸⁰ U.S. Central Intelligence Agency, "The World Factbook, Spratly Islands" (October 20, 1994), available in LEXIS, Asiapc Library, Wofact File [hereinafter "World Factbook, Spratly Islands"].

⁸¹ The Islands are claimed in their entirety by China, Taiwan and Vietnam, while Malaysia and the Philippines only claim part of them. In 1984, Brunei created an exclusive economic zone comprising Louisa Reef, but stopped short of making any public claim on the Islands. "World Factbook, Spratly Islands" *ibid*. "There is no doubt the islands' worth is crucial for Vietnam's economic future and its plans for self-reliance in oil." SarDesai, *supra* note 7 at 128. Vietnam awards contracts to foreign oil companies in the hope that their presence will support its territorial claims in the area. "Where Oil and Water Mix", *supra* note 74 at 56. Thus, on April 10 1996, Vietnam granted to the American oil giant Conoco two exploration blocks in disputed waters off its southern coast. The blocks leased to Conoco cover more than half of an area that China had already rented to a smaller American oil company, Crestone Energy, back in May 1992. A. Schwarz & M. Forney, "Oil on Troubled Waters - Vietnam's Conoco deal draws fire from China" (April 25, 1996) *Far E. Econ. Rev.* 65. Tensions are so high in the region that the U.S. sent its ships to the South China Sea "with the State Department saying US interests are best served by helping keep sea and air navigation there safe". "The treasured islands" *South China Morning Post - International Weekly* (12 August 1995) 8.

⁸² "Where Oil and Water Mix", *ibid.* at 55. The Vietnamese government is working on a Gas Master Plan to address problems in the gas industry. A. Schwarz, "Something's Out There - Vietnam eyes the potential of its offshore gas" (March 23, 1995) *Far E. Econ. Rev.* 60 [hereinafter "Something's Out There"].

⁸³ Beresford, *supra* note 23 at 3.

⁸⁴ 1995 estimate. United Nations Development Programme, *Briefing Note on the Socialist Republic of Viet Nam* (Hanoi: UNDP, October 1995) at 1 [hereinafter *UNDP Briefing Note*]. The CIA demographic data include the following 1994 estimates: 1.78% population growth rate, 27.13 births per thousand, 45.5 infant deaths per thousand, 7.76 deaths per thousand, life expectancy for men, 63.37 years and for women,

thirteenth most populated country in the world.⁸⁵ Vietnam's population is mostly rural and located in the two principal rice-growing deltas, the Red River in the north and the Mekong in the south.⁸⁶ Vietnam boasts an impressive literacy rate of 88% of the population over 15 years of age.⁸⁷ However, despite this remarkable educational achievement, the level of poverty in Vietnam remains appalling.⁸⁸ The annual per capita income is less than \$250⁸⁹ and the unemployment rate stands at about 25%.⁹⁰ The country's unemployment problems were exacerbated by the demobilization of 500,000 troops, the reform of state-owned enterprises,⁹¹ the return of several hundred thousand guest workers formerly in Eastern Europe and the Gulf states, and the repatriation of

67.58 years, and a fertility rate of 3.33 children per woman. "World Factbook, Vietnam", *supra* note 55. 90% of the population is Vietnamese, 3% is Chinese and 7% is made up of various ethnic groups, including Muong, Thai, Meo, Khmer, Man and Cham. "KCDW/Kaleidoscope", *supra* note 62. Minority rights in Vietnam are protected by article 5 of the 1992 *Constitution* which prohibits discrimination. Vietnamese is the official language and French, English, Chinese, Khmer, Mon-Khmer and Malayo-Polynesian are also spoken. While the country's main religion is Buddhism, Confucianism, Taoism, Catholicism, Islam and Protestantism are also practiced. "KCDW/Kaleidoscope", *ibid*.

⁸⁵ "KCDW/Kaleidoscope", *ibid*. By the year 2000, Vietnam's population should exceed 80 million. In an effort to reduce population growth, the United Nations Population Fund has granted Vietnam a budget of \$25 million for 1992-1995, the third largest after China and India. M. Hiebert, "In the Family Way - One thing is booming in Vietnam: its population" (22 April, 1993) *Far E. Econ. Rev.* 72.

⁸⁶ *Country Profile*, *supra* note 9 at 16. In 1992, the rural population rate stood at 78%, down from 85% in 1960. Vietnam's biggest cities are Ho Chi Minh City, with a population of over 4 million, followed by Hanoi, with a registered population of 3.1 million and Haiphong, with 1.4 million inhabitants. *Ibid.* at 17-18. It is further noted that, compared with other developing countries in Southeast Asia, Vietnam is underurbanized. The tight controls on population movement and the little difference between rural and urban income would explain the low urban population.

⁸⁷ *Country Profile*, *ibid.* at 18. Based on a 1989 census. In the cities, 94% of the population is literate, as opposed to 87% in the rural areas. *Ibid.*

⁸⁸ According to the World Bank, 51% of the Vietnamese population lives in abject poverty, as opposed to 9% in China, 15% in Indonesia and 21% in the Philippines. *Country Report - Vietnam: 2nd quarter 1995* (London: The Economist Intelligence Unit, 1995) at 21 [hereinafter *Country Report 2nd quarter 1995*]. Almost half the children under five years old are malnourished and more than half the population consumes less than 2,100 calories per day. *Ibid.* at 21-22. See also J. Stackhouse, "Vietnam's war on poverty" *The [Toronto] Globe and Mail* (4 May, 1995) A10.

⁸⁹ *Country Reference - Investing, Licensing & Trading: Conditions Abroad - Vietnam* (London: The Economist Intelligence Unit, 1995) at 4 [hereinafter *Country Reference*].

⁹⁰ "World Factbook, Vietnam", *supra* note 55.

⁹¹ According to government sources, Vietnam has now approximately 7,000 state-owned firms, compared to 12,000 in 1990; the total number of state enterprise employees stood at 1.7 million in 1993, down from 2.7 million in 1988. A. Schwarz, "The Way We Were - Breaking up is hard to do for Vietnamese state firms" (March 2, 1995) *Far E. Econ. Rev.* 56 [hereinafter "The Way We Were"].

refugees.⁹² The World Bank has stressed that the solution to easing poverty in Vietnam resides in increased social and infrastructure spending and rapid economic growth.⁹³

3.- Political Organization

a) Communist Party: "Leading Force of the State and Society"

Since the fall of the Soviet Union in 1991, Vietnam is one of the few countries in the world which continues to adhere to the principles of communism.⁹⁴ Thus, the 1992 *Constitution* maintains the Communist Party of Vietnam (*Dang Cong san Vietnam*) at the apex of the country's political structure.⁹⁵ Although the powers of the Prime Minister, the President and the National Assembly have all increased with the new constitution, "the present governmental structure still permits the VCP to remain the country's true

⁹² The World Bank, *Trends in Developing Economies 1995* (Washington: International Bank for Development and Reconstruction/The World Bank, 1995) at 554 [hereinafter *Trends in Developing Economies*].

⁹³ *Country Report 2nd quarter 1995*, *supra* note 88 at 22. Vietnamese authorities seem to recognize the necessity to address the needs of their population, as social spending was set to continue to rise in 1995. Asian Development Bank, *Asian Development Outlook 1995 and 1996* (New York: Oxford University Press, 1995) at 127 [hereinafter *Asian Development Outlook*]. The government actually wants to see poverty completely eliminated in Vietnam by the year 2010. UNDP *Briefing Note*, *supra* note 84 at 16.

⁹⁴ "Communism runs deep in the hearts of many Vietnamese who fought and suffered for Vietnam's unification. To fully abandon communism and embrace capitalism and democracy would be to admit that the decades of fighting for independence from foreign dominion were in vain." Ngo, *supra* note 74 at 81-82. Ngo adds that this perception of communism will most likely persist for many years to come. "Unlike those in India, Indonesia or Malaysia, the only nationalists who spoke for all of Vietnam were communists." E. Fawcett, "A Survey of Vietnam - The Road to Capitalism" *The Economist* (8 July 1995) 9. The Communist Party's recruitment drive in 1995 was its most successful one since 1986 with 85,900 new members adhering to its ranks. This number, representing about 4% of the entire Party membership, is an increase of 46.5% compared to recruitment figures for 1994. However, the Party deplores the fact that young people, students and members of the ethnic communities only form a low proportion of the newly recruited members. *Country Report 2nd quarter 1996*, *supra* note 73 at 12.

⁹⁵ Article 4 reads as follows: "The Communist Party of Vietnam, the vanguard unit of the Vietnamese working class and the faithful representative of the interests of the working class, of the laboring people, and of the entire nation, pursues Marxism-Leninism and Ho Chi Minh thought and is the leading force of the state and society. All party organizations operate within the framework of the Constitution and the law." Emphasis added. The wording found in article 4 of the 1980 *Constitution* was however even stronger, referring to the communist party as "the only force leading the State and society". During a speech in early 1995, far from making any apologies for the prominent role communists play in Vietnam, President Le Duc Anh advocated an even greater involvement of the party in the running of the country: "We have to further strengthen the leadership of the party over government, over the entire political system and over the renovation process itself". K. Cooke & J. Grant, "Investors are questioning their rush into Vietnam" *The Financial Post* (18 November 1995) 23.

leader".⁹⁶ Governmental policies are indeed still issued by the Politburo.⁹⁷ Manifestly, the Communist Party has no intention of abandoning its stronghold in Vietnam's political hierarchy and is very unlikely to embark upon the road to pluralism.⁹⁸

b) The National Assembly (*Quoc Hoi*)

Pursuant to the *1992 Constitution*, the National Assembly is vested with supreme state power and decides on domestic, foreign, and socioeconomic policies.⁹⁹ Moreover, it elects the country's President, the National Assembly Chairman and Vice-Chairmen, and the members of its Standing Committee.¹⁰⁰ Following the President's proposal, the National Assembly appoints the Vice-President, the Prime Minister, the Chief Justice of the Supreme People's Court and the Chief Procurator of the Supreme People's Organ of Control.¹⁰¹ It also ratifies the Prime Minister's appointments of the deputy prime ministers,

⁹⁶ Ngo, *supra* note 74 at 81. Moreover, the Communist Party also controls the electoral process. *Country Report 2nd quarter 1995*, *supra* note 88 at 2.

⁹⁷ *Country Profile*, *supra* note 9 at 11. Following the eighth congress of the Communist Party of Vietnam, held in Hanoi from June 28th to July 1st 1996, the number of Politburo members has been increased from 16 to 19 (there are actually 18 members at this point, as one of them, Nguyen Dinh Tu, died just two days before the convening of the congress). The congress also established the new Politburo Standing Board. Sitting on this new five-member committee are General Secretary Do Muoi, President Le Duc Anh, Prime Minister Vo Van Kiet, General Le Kha Phieu, head of the political department of the army, and Nguyen Tan Dung, Deputy Minister of the Interior. The Standing Board, which replaces the party Secretariat, will carry on the daily activities of the Politburo and will most likely wield a lot of power within the party apparatus. Members of the Central Committee of the Party, now totalling 170, have also been elected during last June's congress. A. Schwarz, "Safety First - Economic reform will continue, but at a more cautious pace. That's the message that emerged from the Communist Party's congress, where military and security figures gained ground." (July 11, 1996) *Far E. Econ. Rev.* 14 at 15-16 [hereinafter "Safety First"].

⁹⁸ A. Bockel, "Communisme et Économie de marché - La nouvelle constitution du Vietnam" (1992) 108 *Rev. D.P. & S.P.* 1707 at 1712-1713. Vietnam has often criticized Soviet officials for opening the door to pluralism, which it considers to have caused the demise of the Soviet empire. *Ibid.* Nguyen Duc Binh, a Politburo member and party theoretician, published a book in 1993 where he identifies the two causes for the collapse of the Soviet Union: Party reformers were given too much room within the Politburo and Soviet officials failed to counter the "peaceful evolution" brought about by the increased contact with outside forces. *Country Report - Vietnam: 1st quarter 1996* (London: The Economist Intelligence Unit, 1996) at 10 [hereinafter *Country Report 1st quarter 1996*]. In fact, Vietnamese officials will not hesitate to remind party members that one cannot stray too far away from the official line. Thus, two prominent Communist Party leaders, Do Trung Hieu and Hoang Minh Chinh, were respectively sentenced to 15 months and one year in jail for demanding more pluralism in the Party. "The two are being punished for demanding a more-open party, and their sentences are meant primarily as a warning to other party malcontents ahead of a pivotal congress in June [1996]." A. Schwarz, "Let That Be a Warning - Hanoi court punishes two party dissidents" (November 23, 1995) *Far E. Econ. Rev.* 23.

⁹⁹ *1992 Constitution*, art. 83. "It is the sole constitutional and legislative agency".

¹⁰⁰ *Ibid.*, art. 83(7).

¹⁰¹ *Ibid.*, arts. 83(7) and 103(1).

cabinet ministers, and other members of the government.¹⁰² Its members are elected for a five-year term¹⁰³ and, barring any extraordinary session, it meets twice a year at the convocation of its Standing Committee.¹⁰⁴

c) The Standing Committee of the National Assembly

The Standing Committee of the National Assembly has the power to interpret the Constitution and the various laws and decrees.¹⁰⁵ It also supervises the activities of the government, the Supreme People's Court, and the Supreme People's Organ of Control.¹⁰⁶ In addition, it oversees the implementation of the Constitution, the laws and resolutions. Finally, it issues decrees on matters deferred to it by the National Assembly.¹⁰⁷ For all practical purposes, the Standing Committee exercises the powers of the National Assembly when it is not in session.¹⁰⁸

d) The President of the State

The President, currently Le Duc Anh,¹⁰⁹ is the head of state and represents Vietnam in domestic and foreign affairs.¹¹⁰ The position of president, reinstated with the *1992 Constitution*, replaced the former Council of State under the *1980 Constitution*¹¹¹ and thus signalled the end of the principle of collegial presidency that had been followed since the death of Ho Chi Minh.¹¹² The National Assembly elects the President among its

¹⁰² *Ibid.*, art. 83(7). If the National Assembly is not in session, its Standing Committee will ratify the Prime Minister's recommendations for these positions, art. 91(8).

¹⁰³ *Ibid.*, art. 85. The number of deputies is defined by law. On July 19, 1992, 395 deputies were elected to the ninth legislature of the National Assembly. Their five-year term started the following September. C.A. Thayer, "Recent Political Developments: Constitutional Change and the 1992 Elections" in C.A. Thayer & D.G. Marr, eds., *Vietnam and the Rule of Law* (Canberra: Department of Political and Social Change - Research School of Pacific Studies, Australian National University, 1993) 50 at 55.

¹⁰⁴ *1992 Constitution*, art. 86.

¹⁰⁵ *Ibid.*, art. 91(3).

¹⁰⁶ *Ibid.*, art. 91(5).

¹⁰⁷ *Ibid.*, art. 91(4).

¹⁰⁸ Bockel, *supra* note 98 at 1714.

¹⁰⁹ *Country Report 2nd quarter 1995*, *supra* note 88 at 2.

¹¹⁰ *1992 Constitution*, art. 101. His functions and powers are enumerated in article 103 of the *1992 Constitution*.

¹¹¹ Pursuant to article 98 of the *1980 Constitution*, the Council of State acted as the collective presidency of Vietnam.

¹¹² Bockel, *supra* note 98 at 1716. Before collective presidential rule was officially instituted under the *1980 Constitution*, the position of president of the Republic was provided for under article 61 of the *1959*

members for the same term as its own.¹¹³ The President is responsible to the National Assembly.¹¹⁴ He can also ask the National Assembly to dismiss the Prime Minister.¹¹⁵ In fact, his position was created precisely to counterbalance the enhanced powers of the Prime Minister, after the elimination of the State Council in the final draft of the *1992 Constitution*.¹¹⁶ At the time, Vietnamese rulers were indeed particularly concerned about the dangers of concentrating power into the hands of one single official, as they considered that the communist party of the Soviet Union fell into disarray because leaders like Gorbachev and Yeltsin wielded too much influence.¹¹⁷

e) The Government

The highest administrative organ of the country,¹¹⁸ the executive, is made up of the Prime Minister, the Deputy Prime Ministers, the Ministers and other members¹¹⁹ chosen by the Prime Minister.¹²⁰ The position of prime minister has been held since August 1991 by Vo Van Kiet¹²¹ and his Deputy Prime Ministers are Nguyen Khanh, Tran Duc Luong and Phan Van Khai.¹²² The Prime Minister is responsible to the National Assembly,¹²³ as is the rest of his cabinet collectively¹²⁴ and individually.¹²⁵ The *1992 Constitution* has unquestionably bestowed on the Prime Minister the role of leader of the government, granting him extended powers. Thus, he is in charge of directing the activities

Constitution (the last constitution before Ho Chi Minh's death) and under article 45 of the *1946 Constitution*.

¹¹³ *1992 Constitution*, art. 102.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, art. 103(3).

¹¹⁶ R. H. Hiang Khng, "The 1992 Revised Constitution of Vietnam: Background and Scope of Changes" (1992) 14:3 *Contemporary Southeast Asia* 221 at 227.

¹¹⁷ *Ibid.*

¹¹⁸ *1992 Constitution*, art. 109.

¹¹⁹ *Ibid.*, art. 110.

¹²⁰ *Ibid.*, art. 84(7). Note that pursuant to article 110 of the Constitution, members of the government must not necessarily also be members of the National Assembly.

¹²¹ "KCWD/Kaleidoscope", *supra* note 62.

¹²² *Country Report 2nd quarter 1995*, *supra* note 88 at 2.

¹²³ *1992 Constitution*, art. 110.

¹²⁴ *Ibid.*, art. 109.

¹²⁵ *Ibid.*, art. 117.

of the executive¹²⁶ and is responsible for insuring that decisions and directives issued by his cabinet and local authorities are compatible with higher-ranking legislation.¹²⁷

f) Local Authorities

Vietnam is administratively divided into fifty provinces (*tin*) and three municipalities (*tan* *pho*),¹²⁸ all subordinate to the central government.¹²⁹ In turn, provinces are divided into precincts and municipalities subordinate to provincial and city governments, while municipalities are divided into districts, precincts and cities.¹³⁰ People's Councils are elected in every locality¹³¹ to issue resolutions on the enforcement of the Constitution and local laws.¹³² They also elect People's Committees as their executive organs.¹³³ The People's Committees are responsible for enforcing the Constitution, national legislation and resolutions of the People's Councils¹³⁴ and they may also issue decisions and directives on matters entrusted to them by law.¹³⁵

g) The Vietnam Fatherland Front (VFF)

First founded in 1930, the Vietnam Fatherland Front was reestablished in 1977, after the merger of North Vietnam's National Fatherland Front with South Vietnam's National Liberation Front.¹³⁶ It groups together various peasant, women and youth organizations, trade unions and the Communist Party.¹³⁷ Pursuant to article 9 of the 1992 Constitution, the VFF and its satellite organizations "serve as political bases of people's power" and promote solidarity among the people. In conjunction with the state, the Vietnam Fatherland Front protects the legitimate interests of the people and motivates it to exercise its right to mastery, implements the Constitution and the legislation, and

¹²⁶ *Ibid.*, art. 114(1).

¹²⁷ *Ibid.*, art. 114(5).

¹²⁸ "KCWD/Kaleidoscope", *supra* note 62.

¹²⁹ 1992 Constitution, art. 118.

¹³⁰ *Ibid.* These territorial units are also further divided into a complex web of subunits. *Ibid.*

¹³¹ *Ibid.*, art. 119.

¹³² *Ibid.*, art. 120.

¹³³ *Ibid.*, art. 123. People's Committees are also the state administrative authority at the local level. *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, art. 124.

¹³⁶ "KCWD/Kaleidoscope", *supra* note 62.

¹³⁷ *Ibid.*

supervises the activities of state organs, elected representatives and state employees.¹³⁸ The chairman of the VFF may participate in meetings held by People's Councils and People's Committees which must in turn inform the Vietnam Fatherland Front and other mass organizations of all matters affecting their localities.¹³⁹ Furthermore, together with local groups, the VFF designates the candidates for election in every constituency.¹⁴⁰

B.- 1986: A Program of "Renovation" - *Doi Moi*¹⁴¹

1.- Sources and Origins

Vietnam's overall dismal situation in the 1980's forced it to reexamine its whole economic agenda in an effort to halt the acute crisis it was going through at that time.¹⁴² Stagnation in the country's economy was brought about by a number of factors. Desperately in need of reconstruction assistance after its war against the United States, Vietnam suffered greatly from the American embargo and the lack of funding from international institutions.¹⁴³ The centrally planned economic model imposed on South Vietnam after the war had a negative effect on the level of productivity¹⁴⁴ and overall investment was low.¹⁴⁵ The central planning system failed in many regards in Vietnam. Most importantly, Vietnamese authorities were simply unable to control the economy.¹⁴⁶ To finance its ever-increasing expenditures, the government printed more and more money,¹⁴⁷ bringing inflation to annual rates of 100% and even 400% in 1985 and 1986.¹⁴⁸

¹³⁸ 1992 Constitution, art. 9.

¹³⁹ *Ibid.*, art. 125.

¹⁴⁰ "KCWD/Kaleidoscope", *supra* note 62.

¹⁴¹ "To describe reform under socialism in Vietnam, the Vietnamese Communist Party (VCP) coined the term *doi moi*, a compound meaning change and newness or, as commonly translated, renovation." W.S. Turley, "Introduction" in W.S. Turley & M. Selden, eds., *Reinventing Vietnamese Socialism - Doi Moi in Comparative Perspective* (Boulder, Colo.: Westview Press, 1993) at 1.

¹⁴² *Trends in Developing Economies*, *supra* note 92 at 553.

¹⁴³ T.J. Lang, "Satisfaction of claims against Vietnam for the expropriation of U.S. citizens' property in South Vietnam in 1975" (1995) 28:1 Cornell Int'l L.J. 265 at 273. See Section 1.- The American Embargo in the last part of this chapter, on page 36, below, for a more detailed discussion of the U.S. trade embargo against Vietnam.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Trends in Developing Economies*, *supra* note 92 at 553.

¹⁴⁶ J.D. Ryan & J.C. Wandel, *Viet Nam's Reform Experience - the Quest for Stability during Transition* (Hanoi: United Nations Development Programme, May 1996) at 2. Eastern European countries, the Soviet Union and China fared much better in that respect compared to Vietnam. *Ibid.*

¹⁴⁷ *Trends in Developing Economies*, *supra* note 92 at 553.

¹⁴⁸ Lang, *supra* note 143 at 273.

With a dreadful poverty level,¹⁴⁹ the need for economic reform only grew more crying. It was thus against this bleak backdrop that the Sixth Communist Party Congress was convened.

2.- The Sixth Communist Party Congress

The Sixth Party Congress was held in December 1986 at a time when Vietnam was spurned by most of the world and when its economy had plummeted to record levels.¹⁵⁰ By contrast, other Asian countries such as Thailand, Indonesia and Malaysia were experiencing rapid development. Vietnam could simply not afford to lag behind economically, if it was to take advantage of the region's growth opportunities.¹⁵¹ The time was indeed ripe for the initiation of reforms¹⁵² and for reevaluating the party's performance over the years. Vietnam adopted its own glasnot policy with a campaign to eradicate corruption within the party and by allowing an unprecedented level of criticism.¹⁵³ The Sixth Party Congress introduced a reform program designed to promote Vietnam's transition from a centrally-planned to a market economy.¹⁵⁴

3.- The End of Central Planning

By 1989, three years after the introduction of *doi moi*, Vietnam had fully embraced market economy.¹⁵⁵ Thus, the Vietnamese government abolished almost all direct subsidies and price controls, devalued the dong to market rates, decollectivized agriculture, liberalized private enterprise and reduced the number of its employees.¹⁵⁶ With the liberalization of foreign trade, goods and investment started to pour into Vietnam,

¹⁴⁹ *Ibid.*

¹⁵⁰ Williams, *supra* note 8 at 26-27.

¹⁵¹ Turley in Turley & Selden, eds., *supra* note 141, 1 at 6-7.

¹⁵² As has been pointed out, "[e]conomic necessity was the mother of reformist invention". D. Wurfel, "Doi Moi in Comparative Perspective", in Turley & Selden, eds., *ibid.*, 19 at 23.

¹⁵³ Williams, *supra* note 8 at 27. The party's paper *Nhan Dan* (People's Daily) was particularly scathing in its reports.

¹⁵⁴ McGrath, *supra* note 65 at 2095.

¹⁵⁵ *Ibid.* at 2103. As noted, "renovation soon dropped all pretense of perfecting the existing system with the launching of fundamental change in 1988. The centerpiece of this change in the economic sphere was a dramatic shift toward a market economy." Turley in Turley & Selden, eds., *supra* note 141, 1 at 7.

¹⁵⁶ Turley in Turley & Selden, eds., *ibid.*

while private enterprises developed first in the south, then in the north.¹⁵⁷ However, for all the benefits Vietnam has reaped from its transition to a market-oriented economy, it has also had to deal with the social costs associated with reform in a socialist country, including rising unemployment, corruption and inflation.¹⁵⁸ Furthermore, in the wake of this transition, the Vietnamese have also been confronted with a new environment where collective values clash with private interests; where, although legalized, the private sector is burdened with heavy regulation; and where democracy is kept at bay by the ruling Communist Party.¹⁵⁹

4.- "Market Socialism"

At the end of the 1980's, many socialist countries introduced reform programs staging their transition to market economy. The changes that took place in the Soviet Union particularly affected Vietnam, as they signaled not only the end of economic aid from that country, but also the loss of an important trading partner,¹⁶⁰ forcing the Vietnamese to explore new markets and develop their foreign trade sector.¹⁶¹ Upon embarking on its transition to free market, Vietnam did not, however, discard socialism.¹⁶² Quite the opposite, Vietnam's shift to a market economy was designed to give the country the necessary tools to facilitate its progression toward its ultimate goal, socialism.¹⁶³ In

¹⁵⁷ Williams, *supra* note 8 at 53. See also McGrath, *supra* note 65 at 2103.

¹⁵⁸ Turley in Turley & Selden, eds., *supra* note 141, 1 at 2. With senior officials and a Supreme Court judge facing corruption charges, General Secretary Do Muoi described the pervading corruption in the country as a "blot on the nation". *Country Report 4th quarter 1995*, *supra* note 73 at 10.

¹⁵⁹ Turley in Turley & Selden, eds., *ibid.*

¹⁶⁰ *Trends in Developing Economies*, *supra* note 92 at 553. "The enormous political fallout aside, the break-up of Vietnam's patron, the Soviet Union, poses further acute problems for Vietnam. Moscow's initial decision in 1990 to restructure its economic relations with all remaining communist party states had already placed Hanoi in difficulties." Williams, *supra* note 8 at 53. For a more detailed discussion of the reforms in communist countries and their consequences on Vietnam, see B. Womack, "Political Reform and Political Change in Communist Countries: Implications for Vietnam" in Turley & Selden, eds., *supra* note 141 at 277ff.

¹⁶¹ *Viet Nam - Transition to the Market*, *supra* note 66 at 73.

¹⁶² In fact, *doi moi* has been described as an attempt "to reconcile capitalist and socialist forms under state guidance". Turley in Turley & Selden, eds., *supra* note 141, 1 at 9. Moreover, article 15 of the 1992 Constitution makes it clear that Vietnam retains its socialist orientation: "The state develops the multisectoral commodity economy in accordance with the market mechanism based on state management and socialist orientations".

¹⁶³ "The government and the party have made clear that economic renovation and a free market orientation are the *means* of perfecting socialism and *not* ends in themselves." F.Z. Brown, "The

that sense, Vietnam's reform agenda is closer to China's than to that of any other socialist country.¹⁶⁴ The Vietnamese leadership is basically attempting to operate a gradual liberalization of the country's economy without giving up political control.¹⁶⁵ Having witnessed the demise of other communist parties in the Soviet Union and in Eastern Europe, political reform appears indeed much too risky for Vietnam's communist leaders who are still clinging to power. Yet, whether the Party will always be able to repress the ever-stronger call for political reforms that will undoubtedly come from the market forces is open to question.¹⁶⁶

5.- Democratic Centralism

Pursuant to article 6 of the *1992 Constitution*, the National Assembly and all other state agencies are organized and operate according to the principle of democratic centralism. Thus, the doctrine of separation of powers was not entrenched in the Constitution, as it was held to "violate the Marxist tenet of democratic centralism".¹⁶⁷ Although the *1992 Constitution* attempts to give a more precise division of the functions and authority in the state apparatus, it does not purport to establish a system of checks and balances among the different state organs.¹⁶⁸

6.- Toward Political Reform?

Vietnam's economic reform has so far been conducted without any changes in the political structure of the country.¹⁶⁹ To date, Vietnamese leaders have chosen to ignore the

Economic Development of Vietnam, Laos, and Cambodia" in Y.C. Kim, ed., *The Southeast Asian Economic Miracle* (New Brunswick, N.J.: Transactions Publishers, 1995) 85 at 93-94.

¹⁶⁴ Turley in Turley & Selden, eds., *supra* note 141, 1 at 2. Vietnam admits to examining China's reforms, but insists it did not copy them. Turley speaks of "the emergence of a distinctive Asian, at least Sino-Vietnamese, socialism". *Ibid.* at 3. For an excellent summary of the similarities and differences between the two countries' reform programs, see G. Irvin, "Vietnam: Assessing the Achievements of *Doi Moi*" (1995) 31:5 *The Journal of Development Studies* 725 at 727-728 and 744-745.

¹⁶⁵ Ngo, *supra* note 74 at 81. So far, no socialist country has been able to sustain "these antithetical objectives". *Ibid.* at 82. See also Fawcett, *supra* note 94 at 18, where market Leninism is described as "a mixture of capitalist economics and communist politics", a combination that cannot work.

¹⁶⁶ See *infra* note 170 and accompanying text.

¹⁶⁷ Hiang Khng, *supra* note 116 at 224.

¹⁶⁸ *Ibid.* at 224-225.

¹⁶⁹ L.D. Thuy, "Economic *Doi Moi* in Vietnam: Content, Achievements, and Prospects" in Turley & Selden, eds., *supra* note 141, 97 at 105.

call for political reforms that necessarily comes with economic liberalization.¹⁷⁰ Yet, successful reform of the country's economy depends on whether it can be achieved in the right political context.¹⁷¹ Thus, the government requires greater democratization in order to have the legitimacy necessary to implement its reform program.¹⁷² However, enhanced popular participation should not be achieved at the expense of political stability, but gradually and through the appropriate political institutions.¹⁷³

At the present time, the Vietnamese government is much more preoccupied with maintaining stability than with democratizing its institutions.¹⁷⁴ The introduction of pluralism in a one-party rule system such as Vietnam's would naturally entail a large degree of reorganization in the power structure. Moreover, for some in Vietnam, pluralism is perceived as a rejection of Marxism-Leninism and the Communist Party.¹⁷⁵ Indeed, the fall of the Soviet and Eastern European communist regimes in the wake of political reforms at the end of the 1980's would support this view. However, one must keep in mind that Vietnam's Communist Party, as the liberator from colonialist oppression and foreign domination, enjoys a legitimacy lacking the Soviet-installed communist parties in Eastern Europe.¹⁷⁶ Nevertheless, it remains to be seen whether history will always suffice

¹⁷⁰ "In contrast to the centralized planned economy model, the market economy model regulates things in such a way as to democratize economic and social life." *Ibid.* However, it seems that this is not about to happen in Vietnam. Indeed, during the Eighth Party Congress last June, the Communist Party stated its intention to keep a firm grip on the country. "The party intends to reassert its authority over every facet of Vietnamese life: economic, political and social." "Safety First", *supra* note 97 at 14. See also *infra* note 822 and accompanying text.

¹⁷¹ Wurfel in Turley & Selden, eds., *supra* note 152 at 48.

¹⁷² *Ibid.*

¹⁷³ "The leadership of every state must find the proper balance of order and stability, on the one hand, and legitimacy through democratic participation, on the other." *Ibid.* at 49.

¹⁷⁴ M. Sidel, "Law Reform in Vietnam: the Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training" (1993) 11 Pac. Basin L.J. 221 at 223. "[The Vietnamese leadership] has allowed that deep desire for stability to guide and sometimes limit the pace in which pluralism emerges." *Ibid.* In Vietnam, political stability is "code for one-party rule". Fawcett, *supra* note 94 at 6. On the issue of political stability in Vietnam, see also *infra* notes 816 and 817 and accompanying text.

¹⁷⁵ D.W.P. Elliott, "Dilemmas of Reform in Vietnam" in Turley & Selden, eds., *supra* note 141, 53 at 72. "When the Polish and Hungarian parties gave up their control over their respective governments to non-Communists, VCP leaders made it clear that they believed pluralist ideas had played into imperialist schemes to undermine socialist regimes and restore capitalism." G. Porter, *Vietnam - The Politics of Bureaucratic Socialism* (Ithaca: Cornell University Press, 1993) at 99.

¹⁷⁶ Womack in Turley & Selden, eds., *supra* note 160 at 287-288. This legitimacy would explain why Vietnam and China were the only single-party socialist countries implementing reforms left in the 1990's.

to vindicate the Communist Party's stronghold on power as pressure for greater democratization will undoubtedly increase together with the pace of economic reform. In any case, for the time being, the Communist Party remains wary about pluralism¹⁷⁷ or, for that matter, about any changes that could undermine its authority.¹⁷⁸

7.- Social and Legal Reform in Vietnam

Along with pressure for political reform in the wake of Vietnam's transition to market economy comes also pressure for social and legal reform in the country. In fact, even some members of the Communist Party acknowledge that greater personal freedom for the citizens is necessary to further the country's economic reform.¹⁷⁹ The implementation of economic reform has necessarily an effect on societal organization and gives rise to social issues that must be addressed.¹⁸⁰ Vietnam's renovation policy has also

Turley in Turley & Selden, eds., *supra* note 141, 1 at 2-3. On the special link between Vietnam and communism, see also *supra* note 94.

¹⁷⁷ A Vietnamese analyst was quoted as saying: "Behind pluralism are US-style economic promises designed to encourage the socialist countries to adopt pluralism and accept the emergence and operation of forces opposing the Communist Party. It is necessary to point out that the bourgeoisie has used pluralism to inflict losses on the revolutionary forces." Elliott in Turley & Selden, eds., *supra* note 175 at 73. Later, Elliott also refers to Vietnam's fear, at the end of 1990, of "a Western plot to 'wipe out socialism'". *Ibid.* at 90.

¹⁷⁸ Even reformers, such as Prime Minister Vo Van Kiet, do not support the idea of introducing a multi-party system in Vietnamese politics. "Safety First", *supra* note 97 at 15. In fact, the government will not hesitate to take measures to reassert its authority, even at the price of slowing economic reform. Thus, on January 1, 1995, a new property decree [*Decree 18-CP on Rights and Obligations of Domestic Organizations with Land Allocated or Leased from the State*] became retroactively effective (the decree was issued on February 13, 1995). Pursuant to article 6(2) of the decree, Vietnamese parties contributing land to a joint venture had to convert their land-use right into leases, with rents to be paid to the State. "[Some lawyers and businessmen] believe conservatives in the Communist Party, fearful that the acceptance of private-property rights will weaken the party's legitimacy, are using the decree to slow economic reform." A. Schwarz, "Economic Minefield - A new property decree in Vietnam strikes a nerve" (April 27, 1995) *Far E. Econ. Rev.* 68 [hereinafter "Economic Minefield"]. It seems however that, in this particular instance, authorities have paid attention to the heavy criticism surrounding the enactment of the decree, as another decree annulling its effects has reportedly been drafted. *Country Report 4th quarter 1995*, *supra* note 73 at 27. See also *infra* notes 753 and 754 and accompanying text.

¹⁷⁹ Sidel, *supra* note 174 at 223. There is already indication that authorities are now paying more attention to public opinion. After a policeman was condemned to five years in jail for killing and robbing a young man, his sentence was reviewed following extremely violent demonstrations in Hanoi. He was eventually executed for his crime. "Courts of public opinion" *The Economist* (24 December 1994 - 6 January 1995) 39.

¹⁸⁰ "Reform disrupts the established pattern of distribution of benefits within society and, as growth increases the potential differential between those who have more and those who have less, new questions arise about the basis on which this distribution is made. Maintaining or reestablishing a societal consensus

led to reform in its legal sphere. In keeping with *doi moi*, a host of new laws and regulations have been adopted to update the country's legal framework.¹⁸¹ Thus, the foreign investment legislation, the "central plank" of *doi moi*,¹⁸² is meant to reflect Vietnam's new economic policies and its desire to attract foreign investors. Although modifications have been brought to the foreign investment legislative framework to deal with investors' concerns, it nonetheless remains an efficient means for the Communist Party to keep a stringent control on the economy and thus reassert its preponderance in the country's political structure.¹⁸³

In fact, Vietnam's entire legal reform is conducted through its communist institutions, thereby reinforcing their influence on the country's development.¹⁸⁴ However, as Vietnam receives assistance in its legal reform from international organizations, such as the United Nations Development Programme (UNDP),¹⁸⁵ as well as from various countries,¹⁸⁶ one can only hope that their input will help to remove party concerns from the forefront of the reform agenda¹⁸⁷ and bring into focus the pressing issues that need to

on how its resources are to be shared is essential." Elliott in Turley & Selden, eds., *supra* note 175, 53 at 54.

¹⁸¹ "A law unto themselves" *The Economist* (22 October 1994) 41. 40 laws and 50 decrees have been issued in connection with the country's economic reform. *Ibid.*

¹⁸² J. Gillespie, "Foreign Investment in SR Vietnam Revisited" (1990) 18:9 IBL 416 at 417 [hereinafter "Foreign Investment Revisited"].

¹⁸³ Ngo, *supra* note 74 at 95, 97. Ngo is particularly critical of Vietnam's foreign investment approval process and proposes that Vietnam adopt the no approval necessary policy in effect in Thailand (see Subsection f) "No Approval Necessary Policy": the Solution for Vietnam?, on page 101, below). Although efforts have been made to expedite the approval process since the writing of her article, foreign investors are still required to obtain government approval before implementation of their projects can start. "Vietnam wants to reap the rewards of capitalism but stubbornly refuses to eliminate the control inherent in a communist system." *Ibid.* at 98. The foreign investment pre- and post-establishment control measures in Vietnam will be discussed at length in the first part of Chapter III, on pp. 94-113, below.

¹⁸⁴ McGrath, *supra* note 65 at 2099. "The VPC expects to realize its goals of economic development and political entrenchment through the renovation of the legal system." *Ibid.* at 2110.

¹⁸⁵ H. Anh, "Vietnam: UNDP Aids Legal Reform" *Vietnam Investment Review* (2 May 1994) 18. In April 1994, the UNDP granted Vietnam \$1.2 million for a two-year project to reform its legal system.

¹⁸⁶ M. Hiebert, "Miles to Go - Despite reform, legal system leaves much to be desired" (29 July, 1993) *Far E. Econ. Rev.* 24 [hereinafter "Miles to Go"]. Among others, France, Sweden and Canada have lent Vietnam assistance in the reform of its legal system. *Ibid.*

¹⁸⁷ "Vietnam's one power, the Communist Party, looks unbudgeable, but not unchangeable." Fawcett, *supra* note 94 at 18.

be addressed.¹⁸⁸ Legal reform in Vietnam must serve to facilitate the country's transition toward market economy by establishing a predictable and stable investment framework conducive to business which, in turn, will contribute to the growth of the economy and improve living standards for the whole population. This can only be achieved if the Communist Party refrains from using reform measures as means to further entrench its control. The greatest obstacle to legal development in Vietnam is indeed the threat it poses to communism.

C.- Vietnam's Constitution and its Foreign Investment Legislation

1.- The 1992 Constitution

a) A Legal Basis for *Doi Moi*

After the inception of *doi moi* in 1986, Vietnam amended its *1980 Constitution* twice in 1988 and 1989 in an effort to keep it up to date with the new era of renovation.¹⁸⁹ However, the amendments to the preamble and some articles of the Constitution proved insufficient to adequately reflect the country's reform policy. The *1992 Constitution* was eventually adopted by the National Assembly on April 15, 1992 and became effective three days later on April 18.¹⁹⁰ It provides the legal basis necessary for Vietnam to implement its renovation policy,¹⁹¹ but should not be construed as an instrument guaranteeing fundamental rights,¹⁹² since the rights it includes cannot be invoked on their

¹⁸⁸ For instance, a French Embassy official has stated that Vietnam should implement separation of powers in its political structure as it will not only influence the country's legal future, but also whether or not France will get further involved in Vietnamese legal development. V. Senghor, "Vietnam: France Lends a Hand for Legal Overhaul" *Vietnam Investment Review* (10 October 1994) 1.

¹⁸⁹ *République socialiste du Vietnam - Constitution 1992* (Hanoi: The Gioi - Éditions en Langues étrangères, 1992) at 5. For a discussion of Vietnam's first three Constitutions (1946, 1959 and 1980), see P.V. Bach & V.D. Hoe, "The Three Successive Constitutions of Vietnam" (1984) 1 *Int'l Rev. Cont. L.* 105.

¹⁹⁰ *République socialiste du Vietnam - Constitution 1992, ibid.* The new constitution is divided into twelve chapters and contains 147 articles. Of these 147 articles, 115 are simply revisions of articles of the *1980 Constitution*, twelve are the same and twenty are completely new ones. While the structures of the two constitutions are quite similar, "[t]his is not to say that the constitution does not imply significant changes for Vietnam, but the changes are often subtle ones". L. Do, "Vietnam's Revised Constitution: Impact on Foreign Investment" in Thayer & Marr, eds., *supra* note 103 at 116.

¹⁹¹ Do in Thayer & Marr, eds., *ibid.*

¹⁹² J. Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis" (1994) 30:2 *Stanf. J. Int'l L.* 325 at 334 [hereinafter "Private Commercial Rights"].

own or interpreted by the courts before they have been further enacted into legislation.¹⁹³ Although not a source of individual rights, the Constitution nevertheless contains a set of broad principles binding upon the legislature, the executive and the courts¹⁹⁴ and stands as an official acknowledgment of the country's renovation policy.

b) Constitutional Recognition of the Private Sector¹⁹⁵

Recognition of certain rights in the Constitution is very significant as it indicates a strong commitment on the part of the Vietnamese state to promote them. Thus, in line with its renovation policy and its desire to attract foreign investment, Vietnam has entrenched in its Constitution the right for private entities to engage in business¹⁹⁶ and the principle of equality before the law for all business enterprises as well as their right to enter into joint ventures and cooperation agreements with Vietnamese or foreign individuals or organizations.¹⁹⁷ Furthermore, in its chapter on Citizens' Fundamental Rights and Duties, the *1992 Constitution* recognizes free enterprise,¹⁹⁸ the right of ownership¹⁹⁹ and freedom of movement;²⁰⁰ it also protects copyrights and industrial property.²⁰¹ Finally, article 25 offers foreign investors a guarantee against nationalization, translating into the Constitution Vietnam's commitment to encourage foreign investment.²⁰²

¹⁹³ *Ibid.* at 333. "Vietnamese courts, for example, cannot recognize the existence of a right by drawing a general inference from the Constitution." *Ibid.* Incidentally, statutes adopted by the National Assembly are generally statements of principle and also require further implementing regulations. *Ibid.* at 334.

¹⁹⁴ *Ibid.* at 334.

¹⁹⁵ The reader will find a more detailed discussion of private rights and private enterprises in Vietnam in the first section of the last part of Chapter III, on pp. 134ff, below.

¹⁹⁶ *1992 Constitution*, art. 21.

¹⁹⁷ *Ibid.*, art. 22. "Their capital and property shall be protected by the state". *Ibid.*

¹⁹⁸ *Ibid.*, art. 57.

¹⁹⁹ *Ibid.*, art. 58.

²⁰⁰ *Ibid.*, art. 68.

²⁰¹ *Ibid.*, art. 60.

²⁰² The guarantee against nationalization was at that time already included in article 21 of the *Foreign Investment Law*, dated 29 December 1987 [hereinafter FIL]. Pursuant to article 23 of the *1992 Constitution*, Vietnamese individuals and organizations are also granted protection against nationalization. However, in certain cases, the state may purchase their property upon payment of compensation at market-value prices. There is no such reservation in article 25 as far as foreign investors are concerned. See also *infra* notes 687 and 688 and accompanying text. Vietnam's investment protection guarantees will be examined in Chapter III, on pp. 113ff, below.

2.- Promotion of Foreign Investment

Attracting foreign investment to help rebuild Vietnam's reeling economy has been at the fulcrum of the renovation policy.²⁰³ Located in one of the most economically promising regions of the world, Vietnam vies with its neighbors to attract foreign capital. It is therefore of the utmost importance for Vietnam to create a favorable investment climate that also protects its national interests. In 1987, only one year after the introduction of its *doi moi* policy, Vietnam adopted its *Foreign Investment Law*, thereby effectively repealing the *1977 Regulations on Foreign Investment*.²⁰⁴

a) The 1977 Regulations on Foreign Investment

Promulgated by the Communist Party,²⁰⁵ the *1977 Regulations on Foreign Investment*²⁰⁶ concentrated on heavy industrialization and technology.²⁰⁷ Their vagueness and their failure to establish clear guidelines²⁰⁸ precluded them from providing a legal framework capable of attracting foreign investment.²⁰⁹ Thus, the adoption of the *Foreign Investment Law* in 1987 was absolutely essential to instill confidence in prospective investors and to insure the success of Vietnam's economic reform.

²⁰³ "The central tenet of *doi moi* is rapid industrial growth and development through increased foreign investment." McGrath, *supra* note 65 at 2096. "Vietnam has a strong party, but too weak a state bureaucracy to fine-tune a trade-and-industry policy. World trade conditions, besides, are more competitive. Vietnam, of necessity, is more open to foreign investment." Fawcett, *supra* note 94 at 14.

²⁰⁴ FIL, art. 41.

²⁰⁵ W.G. Vause, "Doing Business with Vietnam - Prospects and Concerns for the 1990s" (1989) 4:2 Fla. Int'l L.J. 231 at 237.

²⁰⁶ *The Regulations on Foreign Investment in the Socialist Republic of Vietnam*, issued in conjunction with Decree No. 115/CP dated April 18, 1977 [hereinafter the *1977 Regulations*]. For a more detailed discussion of the *1977 Regulations* see section four of "The Legal System of Vietnam" *supra* note 13 at 9A.100.3ff. See also generally S. Hickok, "Note: Foreign Investment - Regulations of Foreign Investments - Decree No 115/CP, April 18, 1977, Socialist Republic of Vietnam" (1978) 19 Harv. Int'l L.J. 681 and L.T. Thanh Trai, "Foreign Investment Code of the Socialist Republic of Vietnam" (1979) 13 Int'l Lawyer 329.

²⁰⁷ Vause, *supra* note 205 at 248.

²⁰⁸ "The Legal System of Vietnam" *supra* note 13 at 9A.100.21. For instance, the *1977 Regulations* were silent on the question of capital repatriation in case of balance of payment difficulties. *Ibid.* at 9A.100.14.

²⁰⁹ In ten years, the *1977 Regulations* attracted only one enterprise, a French pharmaceutical firm. D. Pike, "The Winds of Liberalization" (1988) 12:2 Fletcher Forum 245 at 247.

b) The Foreign Investment Law

Vietnam's late start in the pursuit of foreign investment has had the advantage of allowing it to profit from the experience of other countries in the area.²¹⁰ Although Vietnamese officials are reluctant to admit it, their approach to economic reform coupled with tight political control, closely resembles that taken by China.²¹¹ To their credit, Vietnamese authorities have demonstrated their willingness to make certain adjustments to the country's investment framework in order to keep Vietnam an attractive place of business. Vietnam's foreign investment legislation has even been praised as the most liberal in Southeast Asia.²¹² The *Foreign Investment Law* has been amended twice since it was first adopted almost ten years ago.²¹³ Pursuant to the *1990 Amendments*, private Vietnamese enterprises were permitted to enter into business cooperation contracts with foreigners.²¹⁴ For their part, the *1992 Amendments* introduced, *inter alia*, the build-operate-transfer (BOT) contract.²¹⁵ In view of the country's specific development needs, the *Foreign Investment Law* sets out five priority areas where foreigners are particularly

²¹⁰ J.L. Golin, "Tiger by the Tail" (1995) 81 ABA Journal 62 at 65.

²¹¹ Fawcett, *supra* note 94 at 6. Vietnam's commercial legislation has also been directly inspired by China's. R. Nutt, "Canada set to pounce as U.S. embargo lifted" *The Vancouver Sun* (5 February 1994) H3. Indeed, the forms of investment under the FIL are essentially the same as those found in the Chinese Foreign Investment Law. "Foreign Investment Revisited", *supra* note 182 at 416. The Singapore model of economic liberalization through political stability has also inspired Vietnam. Le Poste d'Expansion Économique à Hanoi, étude réalisée par C. Vérot, *Vietnam - Guide de l'investissement* (Paris: Les Éditions du Centre Français du Commerce Extérieur, 1993) at 11 [hereinafter *Vietnam - Guide de l'investissement*]. But see Turley in Turley & Selden, eds., *supra* note 141, 1 at 6: "While the resemblance between specific Vietnamese policies and measures adopted in other socialist countries suggested the Vietnamese had been studying others' experiment, reform in Vietnam had a strongly indigenous character and must be counted among the early and distinctive reform movements in the socialist world."

²¹² Nutt, *ibid.* Quoting Bill Neilson, director of the University of Victoria's Centre for Asia Pacific.

²¹³ *Law on amendment of and addition to a number of articles of the Law on Foreign Investment in Vietnam* dated June 30, 1990 [hereinafter *1990 Amendments*] and *Law on amendment of and addition to a number of articles of the Law on Foreign Investment in Vietnam* dated December 23, 1992 [hereinafter *1992 Amendments*]. As noted, *supra* note 2, a revised version of the FIL came into effect at the end of 1996. Apart from very few exceptions discussed in this thesis, the new law essentially restates the pre-existing framework.

²¹⁴ *1990 Amendments*, art. 1(2). Previously, only state firms were permitted to enter into business cooperation contracts with foreign enterprises or individuals.

²¹⁵ *1992 Amendments*, art. 1. Incidentally, the 1996 FIL provides for two variants of the BOT contract, the build-transfer-operate (BTO) contract and the build and transfer (BT) contract. 1996 FIL, arts. 2(12)(13) and 19. Other amendments brought in 1992 included the extension of the duration of enterprises with foreign-owned capital to a maximum of seventy years (FIL, art. 15); the establishment of export processing zones (FIL, arts. 2(14) and 19a); and a guarantee against adverse legislative changes (FIL, art. 21).

encouraged to invest: export production and import substitution programs, high-tech enterprises requiring skilled labor, labor intensive industries using Vietnam's raw materials and natural resources, infrastructure projects, and foreign currency earning services.²¹⁶

It should be pointed out that the *Foreign Investment Law* is meant to provide a general framework for investment. Thus, from the time it was first promulgated in 1987 up until now, over ninety pieces of legislation providing for its implementation have been enacted.²¹⁷ In this regard, the *Foreign Investment Law* is not any different from other statutes adopted by the National Assembly, as it is the Vietnamese legislative practice to leave implementation details to be determined through subsequent regulations.²¹⁸ This practice, however, presents certain disadvantages. For one, it forces foreign investors to deal with an excessive amount of legislation.²¹⁹ In addition, it gives rise to the possibility of contradictions between national legislation and the regulations issued by local authorities.²²⁰

²¹⁶ FIL, art. 3. Article 3(1) of the 1996 FIL provides for the same sectors where investment is encouraged, except for foreign currency earning services, which is replaced by breeding, planting or processing of agricultural, forestry or marine products. In addition, article 3(2) of the 1996 FIL specifies two encouraged areas of investment: mountainous, isolated, or remote areas; and regions of socio-economic hardship. It should be noted that article 3(2) also stipulates that the government will now and then issue "a list of areas where foreign investment is encouraged; a list of investment categories in which foreign investment is encouraged or especially encouraged; a list of investment categories in which certain conditions shall be applied for foreign investment; and a list of investment categories in which foreign investment is not allowed."

²¹⁷ Ministry of Planning and Investment, *Presentation Regarding the Law on Amending [and] Supplementing the Law on Foreign Investment in Vietnam*, trans. Baker & McKenzie (Hanoi: Ministry of Planning and Investment, 1996), document obtained from Mr. Frederick Burke, on file with the author [hereinafter *MPI Presentation Regarding the 1996 FIL*].

²¹⁸ "In Vietnam, to a greater extent than in the West, laws passed by the National Assembly require further implementing regulations, because laws passed by the National Assembly only contain general guiding principles and statements of intent." Do in Thayer & Marr, eds., *supra* note 190 at 118.

²¹⁹ "Other laws affecting foreign investment include those enacted by the National Assembly (such as the Land Law); ordinances, decrees, and regulations issued by the [former] Council of State and the government; and circulars, decisions, and notices made by relevant government ministries and agencies." V.U. Nguyen, "Foreign Investment in Vietnam Through Business Cooperation Contracts" (1994) 28:1 Int'l Lawyer 133 [hereinafter "Foreign Investment Through BCCs"].

²²⁰ "Although much of the economy remains centrally controlled, local people's committees and other pressure groups often have considerable power and at times contradict central government decrees." Cooke & Grant, *supra* note 95 at 23.

c) Economic Outlook

Vietnam began to see its efforts to attract outside capital rewarded in 1989 as foreign investors started to enter its market.²²¹ Since then, the country has continued to experience substantial growth,²²² with the economy even booming in certain sectors.²²³ In fact, it has been suggested that Vietnam has better prospects for rapid economic development than China.²²⁴ As of May 1996, the total value of approved foreign investment projects in Vietnam since 1988 stood at approximately \$22 billion,²²⁵ the five leading foreign investors by country are Taiwan, Japan, Singapore, Hong Kong and South Korea.²²⁶ Vietnam has the ambitious goal of attracting \$13 to 14 billion worth of foreign direct investment (FDI) to support its five-year development plan for the period of 1996-2000.²²⁷ Whether or not this objective will be met depends largely on how favorable a place of business Vietnam is considered to be by foreign investors.²²⁸

²²¹ Williams, *supra* note 8 at 51. By June 1989, 62 foreign investment projects had been approved, for a total value of \$640 million. *Ibid.* at 52.

²²² A. Fforde, "Vietnamese Commerce - The 'Tiger on a Bicycle' Syndrome" (1993) 28:4 Colum. J. World Bus. 49. Fforde attributes Vietnam's success since 1989 partly to the growth of commerce in the north in the 1980's which, combined to the southern entrepreneurship, has helped the country's economy to recover. *Ibid.* at 49-50.

²²³ For instance, there is a boom in the construction industry in Hanoi. J. Stackhouse, "Honeymoon ends quickly for investors in Vietnam" *The [Toronto] Globe and Mail* (9 May, 1995) B1.

²²⁴ Golin, *supra* note 210 at 65. While China was in relative isolation for thirty years, former capitalist south Vietnam was only shut off from the rest of the world for a little more than ten years. People in this most active commercial part of Vietnam have retained "sophisticated business skills", lacking to the Chinese. *Ibid.* In addition, the average value of a foreign investment project in Vietnam is approximately \$13.5 million, compared to \$1 million in China. "With investments from investors representing some 50 nations, there is no single country with more than 18 percent of the total investment in Viet Nam, while in China some 60 percent is channeled through Hong Kong. Such diversity ensures a degree of stability in FDI growth and makes Viet Nam's FDI policy robust against external factors such as adverse political or economic developments in one or more of the investing countries." Ryan & Wandel, *supra* note 146 at 6.

²²⁵ Ryan & Wandel, *ibid.* at 5. However, it should be noted that less than a third of the approved projects (for a value of more than \$6 billion) has actually been implemented to date. *Ibid.* See also *infra* note 563 and accompanying text on the low rate of project implementation in Vietnam.

²²⁶ Based on data released by the Ministry of Planning and Investment on the total value of approved projects as of August 23, 1996. *Country Report 4th quarter 1996*, *supra* note 6 at 20. For its part, Canada ranks 23rd with 11 projects valued at \$54 million (Canadian). Reuters News Agency and Associated Press, "Canada backs Vietnam's APEC bid" *The [Toronto] Globe and Mail* (16 April 1996) B7 [hereinafter "Canada backs Vietnam's APEC bid"]. As of July 31, 1995, 22% of the approved foreign investment projects were in the hotel and tourism sector, 12% in the heavy industry, 10% in the light industry, 8% in the oil and gas sector, 24% in construction and 24% in other sectors (of which 4% in agriculture and forestry and 3% in export zones). UNDP *Briefing Note*, *supra* note 84 at 8-9.

²²⁷ *Socio-Economic Development and Investment Requirements for the Five Years 1996-2000* - Government Report to the Consultative Group Meeting in Paris, 30 November to 1 December 1995

A developing country sorely lacking equipment, technology and know-how, Vietnam also has a weak infrastructure resulting in higher transportation and communication costs.²²⁹ Bureaucracy and corruption still plague the administrative system²³⁰ and financial mechanisms to mobilize capital are either non-existent or lacking sophistication.²³¹ Yet, in spite of all these serious handicaps, the country has considerable advantages to offer, including vast and only partially exploited natural resources, a well-educated labor force and its prime location in the fastest growing region of the world.²³² Moreover, following its reintegration in the world community, Vietnam now benefits from official development assistance (ODA) which will eventually translate into better infrastructure and stronger growth.²³³ Finally, Vietnamese leaders' commitment to economic reform is also very important to bolster foreign investment in the country.²³⁴

(Hanoi: Socialist Republic of Vietnam, October 1995) at 15-16 [hereinafter *Investment Requirements for 1996-2000*].

²²⁸ More specifically, the UNDP cautions Vietnam that while its investment targets may be reached in terms of license approvals, "the actual realization of such an amount of foreign investment spending will require a much more substantive streamlining of foreign investment procedures and practices than has been the case to date. The Government still needs to further ease entry restrictions in a number of sectors, improve access to land, and strengthen and stabilize the legal framework facing foreign investors". UNDP *Briefing Note*, *supra* note 84 at 8.

²²⁹ *Vietnam - Guide de l'investissement*, *supra* note 211 at 11-12.

²³⁰ *Ibid.* at 12. In March 1995, Deputy Prime Minister Phan Van Khai told the National Assembly that corruption and waste would be the targets of an administrative reform program. *Country Report 2nd quarter 1995*, *supra* note 88 at 10.

²³¹ *Country Report 2nd quarter 1995*, *ibid.* at 27. For instance, the stock market was scheduled to open in 1996. Now, Vietnamese officials, including the governor of the State Bank, have hinted that the stock market will probably not be operating before 2000. *Country Report 4th quarter 1995*, *supra* note 73 at 27.

²³² *Vietnam - Guide de l'investissement*, *supra* note 211 at 11.

²³³ A. Schwarz, "Economic Monitor: Vietnam - Like Wildfire" (Dec. 29, 1994 & Jan. 5, 1995) *Far E. Econ. Rev.* 96 [hereinafter "Vietnam - Like Wildfire"]. At their first meeting in 1993, foreign donors approved \$1.86 billion in grants and concessional loans to Vietnam and, in November 1994, they pledged an additional \$2 billion for 1995. Vietnam's GDP growth is expected to stand at 10% for both 1995 and 1996. *Ibid.* The donors' pledge for 1996 has been raised to \$2.3 billion. *Country Report 4th quarter 1995*, *supra* note 73 at 18.

²³⁴ On that point, however, the consensus reached at the Eighth Communist Party Congress last July will be somewhat disappointing to foreign investors. Indeed, far from answering their call for an accelerated implementation of the country's reform program, party officials instead opted for "a more cautious approach to further reform". "Safety First", *supra* note 97 at 14. In fact, foreign investors are not the only ones dissatisfied with the pace of reforms in Vietnam. A recent UNDP report warned that unless Vietnam accelerated the pace of its economic reforms, it might be faced with future diminishing growth. A. Schwarz, "Mixed Signals - Hanoi's reforms called too slow for comfort" (December 19, 1996) *Far E. Econ. Rev.* 70 [hereinafter "Hanoi's reforms called too slow for comfort"].

D.- The End of Isolation

1.- The American Embargo²³⁵

a) Consequences for Vietnam

After the end of the war, the United States extended to the rest of the country the economic embargo President Johnson had first imposed on Northern Vietnam in 1964.²³⁶ As a result of the U.S. embargo, Vietnam was also deprived of economic assistance from other Western nations.²³⁷ There is no doubt that the American embargo hampered Vietnam's war recovery.²³⁸ Moreover, following the invasion of Cambodia, the U.S. tightened its embargo and opposed lending to Vietnam from international financial institutions such as the Asian Development Bank (ADB), the International Monetary Fund (IMF) and the World Bank.²³⁹

b) Lifting of the Embargo

The lifting of the American embargo against Vietnam was actually part of a "road map" policy leading up to the normalization of the relations between the two countries.²⁴⁰

²³⁵ The trade embargo against Vietnam was authorized pursuant to the *Trading with the Enemy Act of 1917*, ch. 106, 40 Stat. 411 (1910) (codified at 50 App. U.S.C. §§ 1-44 (1992)), and renewed annually through presidential determination. President Clinton renewed it for the last time in 1993, *Presidential Determination No. 93-58*, 58 Fed. Reg. 51,209 (1993).

²³⁶ Furniss, *supra* note 52 at 238.

²³⁷ Lang, *supra*, note 143 at 273. Many countries were dissuaded from extending aid to Vietnam for fear of putting a strain on their relations with the United States. Turley in Turley & Selden, eds., *supra* note 141, 1 at 5. But see Vause, *supra* note 205 at 246, who states that Japan and Singapore have essentially disregarded the U.S. embargo and increased trade with Vietnam. "Japan is Vietnam's biggest non-communist trading partner with 1986 trade figures at \$280 million." *Ibid.*

²³⁸ The lack of economic assistance has precluded Vietnam from accessing the technology required to improve its infrastructure and develop its manufacture and agriculture sectors. Lang, *ibid.* at 273.

²³⁹ Turley in Turley & Selden, eds., *supra* note 141, 1 at 5. The United States, as a rich nation, is very influential in the decisional proceedings of those financial institutions. For instance, although the International Monetary Fund does not grant a veto to any of its members, voting power is determined according to the share an individual member contributes to the IMF's capital reserves. At the moment, the United States controls 19% of the voting. Since an 85% majority is necessary for the most important decisions, the U.S. has a veto power for all practical purposes. In other cases, a 70-75% majority is sufficient, but still confers on the United States a lot of weight in the decision-making process. Furniss, *supra* note 52 at 239.

²⁴⁰ Castelli, *supra* note 63 at 311. The road map was in effect a unilateral declaration made by the Bush Administration outlining a four-phase agenda for the normalization of the relations between the two countries. Under Phase 1, Vietnam was to sign a peace agreement with Cambodia and to lend its cooperation in resolving the POW/MIA issue. In return the U.S. was to lift its twenty-five mile travel ban on U.N. Vietnamese diplomats, begin talks on normalization, allow its citizens to travel to Vietnam and proceed to normalize its relations with Cambodia. Phase 2 was to begin upon completion of phase 1 and

It was nonetheless surrounded by controversy as the embargo was vociferously supported by a strong lobby of veteran groups who saw it as the key to the resolution of the POW/MIA issue.²⁴¹ The actual lifting of the trade embargo was preceded by its partial relaxation. Indeed, on July 2, 1993, President Clinton announced that the U.S. would no longer oppose the restructuring of Vietnam's debt with the International Monetary Fund and when he renewed the embargo in September 1993, he excluded from its application all projects funded by international financial institutions.²⁴² The 19-year old American embargo against Vietnam was officially lifted on February 3, 1994 at 5:05 EST.²⁴³

2.- Diplomatic Relations between the United States and Vietnam

Twenty years after the end of the war and a little more than a year after the lifting of the embargo, the United States reestablished diplomatic relations with Vietnam on July 11, 1995.²⁴⁴ While full diplomatic relations between the two countries signal the current

the arrival of U.N. peacekeepers in Cambodia. Vietnam was to give its full support to the Paris Peace Agreement and continue to cooperate on the POW/MIA issue. The U.S. was to establish telecommunications with Vietnam and U.S. companies were to be permitted to sign prospective contracts executory with the lifting of the embargo. Further, the U.S. was to allow commercial transactions fulfilling basic human needs, lift restrictions on NGOs in Vietnam, and discuss with other countries the refinancing of Vietnam's IMF debt. Phase 3 essentially provided for Vietnam to continue to cooperate on the POW/MIA issue and to convince Phnom Penh to do the same. The U.S. was to lift its embargo against Vietnam and to open a diplomatic mission in Hanoi. In Phase 4, free elections were to be held in Cambodia, a new National Assembly had to begin the writing of a new constitution and the factional Cambodian forces had to be dismembered. Only then would the U.S. reestablish full diplomatic relations with Vietnam and, depending on its human rights record, "consider" granting Vietnam most-favored-nation status and "favorably consider" non-basic human needs loans from international financing institutions. Furniss, *ibid.* at 243-245.

²⁴¹ F.G. Connor, "Vietnam: Trading with the Enemy or Investing in the Future?" (1994) 25:2 Law & Pol'y Int'l Bus. 481 at 488. 58,000 Americans lost their lives during the Vietnam conflict. Of that number, 4% remained unaccounted for, compared with 20% in World War II and 15% in the Korean War. Furniss, *ibid.* at 247.

²⁴² Connor, *ibid.* at 487. Since Vietnam was once again receiving loans from international financing institutions (IFIs), the U.S. administration had no choice but to allow American companies to participate in projects funded by IFIs. Otherwise, it would have meant that the money the United States provides to those institutions was being spent on projects from which American businesses were excluded. *Ibid.*

²⁴³ M. Bravin, "Risks, Rewards In Vietnam Trading: End of 19-Year-Old Embargo Presents New Opportunities" (April 25, 1994) 17:17 Pennsylvania Law Weekly S6. In the end, the U.S. was only shutting itself out of business opportunities in Vietnam, as its allies had ceased to support the embargo with the withdrawal of Vietnamese troops from Cambodia and were taking advantage of this emerging market. Castelli, *supra* note 63 at 322-323.

²⁴⁴ N. Holloway, "Winning the Peace - Clinton grants Hanoi diplomatic recognition" (July 20, 1995) Far E. Econ. Rev. 16.

shifting of alliance in the region,²⁴⁵ in the long run, they will translate into economic benefits for both sides. In Vietnam's particular case, reestablishment of its relations with the United States means that it is a step closer to obtaining the coveted most-favored-nation (MFN) trade status.²⁴⁶ However, before the United States can grant MFN status to Vietnam, a bilateral trade agreement will have to be concluded between the two countries.²⁴⁷ Moreover, in order for U.S. businesses to fully benefit from this new market, investment protection mechanisms, such as those provided by the Overseas Private Investment Corporation (O.P.I.C.), which insures American corporations against political risks, and investment financing services, such as those offered by the U.S. Export-Import Bank, must be made available to them through separate presidential authorizations.²⁴⁸ On

²⁴⁵ "New friends, new enemies" *The Economist* (15 July 1995) 24. The article also stresses the need for the United States to establish a strategic presence in the area in view of its increasingly tense relations with China. Henry Kissinger has been quoted as saying: "Those more concerned about China are friendly with Vietnam. Those concerned about Vietnam are friendlier with China". G. Fraser, "U.S. set to end Vietnam standoff" *The [Toronto] Globe and Mail* (11 July 1995) A1 at A7.

²⁴⁶ "If the USA also agrees to grant Vietnam most-favored-nation (MFN) status, American (and overall) investments are expected to boom." *Country Reference*, *supra* note 89 at 8. The granting of the MFN status to Vietnam has strong political overtones in the United States. Indeed, the Jackson-Vanik amendment adopted by the Congress links MFN status with a country's emigration policy (the President can however waive this emigration requirement through executive order). Moreover, cooperation on the MIA/POW issue will also play a part, as well as Vietnam's record on human rights and democracy. S.E. Vecchi & L. Levaggi Borter, "U.S. MFN Status for Vietnam" (May 15, 1995) E. Asian Exec. Rep. 6 at 20. Like China, Vietnam, as a communist country, would however see its trade status subject to annual renewal. Holloway, *supra* note 244 at 16. Canada has already granted MFN status to Vietnam as part of the implementation of the bilateral trade agreement signed by the two countries in November 1995. Baker & McKenzie, "Vietnam - Other Developments" (1996) 4:4 *Indochina Law Quarterly* 70 at 72.

²⁴⁷ Since Vietnam is not a member of the GATT, it is not automatically entitled to the MFN treatment on the part of the United States. Thus, the only way for Vietnam to obtain MFN status from the U.S. is through the conclusion of a bilateral trade agreement between the two countries. Vecchi & Levaggi Borter, *ibid.* at 19. Vietnam's lack of MFN status affects every exporter from Vietnam to the United States, regardless of its nationality: "(...) denial of MFN status to Vietnam also hurts American companies. U.S. firms cannot take advantage of the benefits of producing in Vietnam for the American market." *Ibid.* at 21. The Coalition for United States-Vietnam Trade, which includes 112 major U.S. companies, is pressing the U.S. government to conclude a bilateral trade agreement with Vietnam. J. Preston, "The Investors - For Business, A Decision Aiding Trade", *The New York Times* (12 July 1995) A9.

²⁴⁸ A. Mitchell, "U.S. grants Full Ties to Hanoi; Time for Healing, Clinton says" *The New York Times* (12 July 1995) A1. By law, the U.S. Eximbank is prohibited from lending money for projects in Marxist-Leninist countries, unless the president makes an exception for a particular country. "U.S. and Vietnam open Liaison Offices" (January 15, 1995) E. Asian Exec. Rep. 5. According to the *Wall Street Journal*, prospects are good in that respect as Eximbank's board will soon hold a meeting to discuss project financing in Vietnam. For her part, the president of the OPIC, Ms. Ruth Harkin, recently paid a visit to Vietnam with members of the Congress. "U.S. Normalizes Relations With Vietnam..." (June 15, 1995) E. Asian Exec. Rep. 4. But see *Country Report 4th quarter 1995*, *supra* note 73 at 13 relating that after a September 1995 visit to the United States to discuss the normalization of economic relations, Vietnam's Minister of Foreign Affairs, Manh Cam, and Minister of Commerce, Le Van Triet, both indicated that the

August 5, 1995, after signing the documents officially reestablishing diplomatic ties with Vietnam, Secretary of State Warren Christopher opened the new U.S. embassy in Hanoi.²⁴⁹ On May 24, 1996, President Clinton nominated Congressman Pete Peterson, a Vietnam War veteran, to be the United States ambassador to Vietnam.²⁵⁰

3.- Vietnam as an Economic Partner

On July 28, 1995, Vietnam became a full member of the Association of Southeast Asian Nations (ASEAN).²⁵¹ Vietnam's membership of ASEAN signals the beginning of its economic integration into the region and brings more weight on a geopolitical level to the Association itself.²⁵² Indeed, with the entry of Vietnam into ASEAN, the latter now

conclusion of a trade agreement between the U.S. and Vietnam was "some way off", refusing to talk about a timetable for the negotiations.

²⁴⁹ A. Schwarz, "Now What? U.S.-Vietnam normalization clears way for new issues" (August 17, 1995) *Far E. Econ. Rev.* 22. The Canadian embassy was opened in Hanoi in November 1994 by Prime Minister Jean Chrétien who appointed Ms. Christine Deloges as Canadian ambassador to Vietnam. Before the opening of the embassy, Canada was represented in Vietnam through a *chargé d'affaires*. B. Stormont, "The University of British Columbia and Legal Development in Vietnam" (May 1995) 53:3 *Advocate* 427 at 429.

²⁵⁰ "Peterson Nominated for Ambassadorship" (August 1996) 4:4 *The Vietnam Business Journal* 16. Mr. Peterson's nomination must still be confirmed by the Senate Foreign Relations Committee and then approved by the Senate. *Ibid.*

²⁵¹ U.S. Dept. of State, "Fact Sheet: Association of Southeast Asian Nations" (July 31, 1995), available in LEXIS, Asiapc Library, Allnws File [hereinafter "Fact Sheet: ASEAN"]. Vietnam had previously been enjoying observer status in ASEAN since July 1992. *Doing Business in Vietnam* (New York: Ernst & Young International, 1994) at 10. According to Malaysia's Foreign Minister, Datuk Abdullah Badawi, Vietnam's membership will make ASEAN stronger. L.K. Chew, "Vietnam becomes part of Asean" *The Straits Times Weekly Edition* (5 August 1995) 11. The other members of ASEAN are Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. "Fact Sheet: ASEAN", *ibid.* When ASEAN was first established in 1967, its goal was to eventually comprise the ten Southeast Asian nations and according to the Thai foreign minister, ASEAN will remain incomplete as long as all Southeast Asian countries are not members. Chew, *ibid.* A recent ASEAN meeting in Bangkok gathered for the first time the leaders of all ten Southeast Asian nations. Members agreed to integrate Cambodia and Laos (both countries now enjoy observer status, but want full membership by 1997) and most probably Myanmar (which may be granted observer status in 1997) into the association before the year 2000. "Unity in Diversity - In Bangkok, ASEAN's Leaders Choose Faster Change" *Asiaweek* (5 January 1996) 19 [hereinafter "Unity in Diversity"]. Burma [Myanmar] now reportedly wants to apply for full membership as early as 1998; after Burma's entry, ASEAN officials have indicated that the Association will not be seeking any new members. F. Ching, "Asean Nearing Founders' Vision - After 1997 Burma may be the only nonmember in the region" (July 11, 1996) *Far E. Econ. Rev.* 36.

²⁵² Reuters News Agency, "Vietnam moves to end isolation by joining ASEAN" *The [Toronto] Globe and Mail* (28 July 1995) A7. "Vietnam's smooth entry to ASEAN, despite lingering doubts among some members about what Hanoi's 'socialist-nationalists' will do for cherished ASEAN cohesion, can be put down to China and the need for strength and unity elsewhere." G. Torode, "ASEAN talk aimed at safe targets" *South China Morning Post - International Weekly* (12 August 1995) 8.

constitutes an even more attractive market of 400 million people.²⁵³ Thus, not only are the Vietnamese in a better position to take advantage of the growth potential of the region, but from a strategic point of view, entry into ASEAN might also help their country in its territorial dispute with China in the South China Sea.²⁵⁴ The Association will give Vietnam access to a consultation forum to resolve future differences with its neighbors.²⁵⁵ In joining ASEAN, Vietnam agreed to participate in the ASEAN Free Trade Area (Afta), which means that it will eventually have to cut its tariffs to comply with Afta regulations.²⁵⁶ In order to become an interesting base for all foreign corporations, Vietnam will also have to join the World Trade Organization.²⁵⁷

²⁵³ "Fact Sheet: ASEAN", *supra* note 251.

²⁵⁴ "Vietnam moves to end isolation by joining ASEAN", *ibid.* "Regional challenges such as use of the Mekong River and ownership of the Spratly islands demand the services of such a forum." "Unity in Diversity", *supra* note 251 at 20. But see "The treasured islands", *supra* note 81, where it is reported that an August 1995 ASEAN meeting aimed at easing territorial disputes was virtually fruitless, and Fawcett, *supra* note 94 at 17, pointing out that ASEAN is not a security alliance.

²⁵⁵ "Fact Sheet: ASEAN", *supra* note 251. ASEAN has been praised for its role in the Cambodian peace effort which eventually led to free elections in 1993. "The U.S. sees the ARF [ASEAN Regional Forum] as a useful forum for developing habits of consultation and dialogue to prevent future conflicts in the Asia-Pacific." *Ibid.*

²⁵⁶ "Vietnam moves to end isolation by joining ASEAN", *supra* note 252. By 2003, tariffs should be cut to a maximum of 5%. Vietnam has been granted an extension of three years until 2006 to comply with the tariff reduction. *Ibid.* "This could have been a major problem for Vietnam, whose economic reforms are still at an early stage and which needs tariff flexibility to protect itself during what could be an extended transition period." "Int'l Country Risk Guide", *supra* note 64. In any case, if Vietnam is to become an attractive export base in the region, it will eventually have to lower its tariffs. *Country Reference*, *supra* note 89 at 12. There is also talk that full implementation of Afta could be sped up to the year 2000. M. Vatikiotis, "A Definite Maybe - Asean ministers agree to accelerate Afta - partly" (September 21, 1995) *Far E. Econ. Rev.* 80.

²⁵⁷ Finance Minister Paul Martin indicated that Canada supports Vietnam's applications to both the Asia-Pacific Economic Co-operation (APEC) forum and the World Trade Organization. "Canada backs Vietnam's APEC bid", *supra* note 226. Notice, however, that until Vietnam secures MFN status from the United States, its accession to the WTO is improbable. *Country Report 4th quarter 1996*, *supra* note 6 at 17. "(...) Vietnam is far from being an attractive locale for U.S. corporations. For example, Vietnam is not a party to the General Agreement on Tariffs and Trade (GATT) and thus is not required to abide by internationally agreed upon trade rules considered crucial by businesses to long-term profitable trade relations." Lang, *supra* note 143 at 274. For an interesting discussion of the advantages for Southeast Asian nations of lowering their tariffs on all imports, on a most-favored-nation basis (open regionalism), as opposed to removing tariffs and other trade barriers within ASEAN (Afta), see D.A. DeRosa, "Southeast Asia's Timid Traders" (January 11, 1996) *Far E. Econ. Rev.* 27. DeRosa contends that Afta will force Southeast Asian countries to produce goods in which they do not have a comparative advantage so that they can trade among themselves, diverting them from labor-intensive industries and natural resource-based commodities where they do have a comparative advantage.

II.- Foreign Investment Regulation in Vietnam

In the hope that the input of foreign firms will help reconstruct the nation's severely ill economy, Vietnam has adopted one of the most liberal foreign investment laws of any country.²⁵⁸ The major pieces of legislation governing foreign investment in Vietnam are the *Foreign Investment Law*, adopted by the National Assembly on December 29, 1987 and twice amended on June 30, 1990 and December 23, 1992,²⁵⁹ its implementing regulations, *Detailed Implementing Regulations for the Law on Foreign Investment in Vietnam* enacted under *Decree 18-CP* on April 16, 1993,²⁶⁰ and *Circular 215/UB-LXT on Guidelines for Foreign Direct Investment Activities in Vietnam*, issued by the State Committee for Cooperation and Investment on February 8, 1995.²⁶¹ In addition, Vietnam's foreign investment legislation is made up of a number of decrees, regulations and circulars covering, *inter alia*, such issues as immigration, customs, imports/exports, taxation, posts

²⁵⁸ M. Thompson, "Capitalism is back - U.S. Lawyers Find Receptive Market in Vietnam" *Los Angeles Daily Journal* (27 June 1995) 1. See also *supra* note 212 and accompanying text. "The climate for foreign firms is more favorable. The government has favored foreign firms over domestic business because it believes that foreign investors can provide a greater spur to the economy while constituting less risk to the Communists' political dominance." IBC USA, "Climate for Business, Political Risk Services" (October 1, 1995), available in LEXIS, Asiapc Library, Vietnam File [hereinafter "Climate for Business"]. It should be noted, however, that a law designed to promote domestic investment, the *Law on Promotion of Domestic Investment*, was adopted by Vietnam's National Assembly on June 22, 1994 and became effective on January 1, 1995. Reprinted in *Foreign Investment Laws of Vietnam* (Melbourne: State Committee for Cooperation and Investment of Vietnam and Phillips Fox of Australia, 1993-) at I-319.

²⁵⁹ Reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at I-1. As noted, a revised version of the FIL was approved by the National Assembly on November 12, 1996. See *supra* note 2.

²⁶⁰ Reprinted in "Implementing Regulations For Vietnam's Amended Foreign Investment Law" (December 1993 to May 1994) E. Asian Exec. Rep. [hereinafter *Decree 18-CP*]. *Decree 18-CP* replaces *Decree 28-HDBT* of the Council of Ministers, dated 6 February 1991. *Decree 18-CP*, art. 103. *Decree 28-HDBT* itself replaced *Decree 139-HDBT* of the Council of Ministers, dated 5 September 1988. *Decree 28-HDBT*, art. 106.

²⁶¹ Reprinted in *Guidelines for Foreign Direct Investment Activities in Vietnam* (Hanoi: The Office of the State Committee for Cooperation and Investment, 1995) [hereinafter *Circular 215/UB-LXT*]. The State Committee for Cooperation and Investment (SCCI) was the body responsible for overseeing foreign investment activities in Vietnam before its merger with the State Planning Committee (SPC) in October 1995. The functions of the two former agencies are now performed by the newly created Ministry of Planning and Investment (MPI). *Country Report 4th quarter 1995*, *supra* note 73 at 1 and 12. The State Planning Committee, for its part, was the body in charge of processing foreign aid projects. *Country Reference*, *supra* note 89 at 13. According to Mr. Van T. Tran, Trade and Investment Director of the Vietnam-Canada Trade Council, the merger does not affect the approval procedures themselves. All references to the SCCI should now be read as designating the Ministry of Planning and Investment. Conversation with Mr. Tran at the Canada-Asia Seminars and Business Luncheon '96, held in Montreal on February 9, 1996.

and telecommunications, accounting, finance, foreign exchange control, construction, public security and labor.²⁶² The main objectives of the FIL, as stated in its preamble, are to expand Vietnam's economic ties with other countries, develop the national economy, step up exports on the basis of effective exploitation of the country's natural and human resources and other potentialities, and encourage and create favorable conditions for foreign investment in Vietnam. While the *Foreign Investment Law* essentially outlines the forms of investment and their basic structures,²⁶³ *Decree 18-CP* provides for its actual implementation.²⁶⁴ Together, they comprise provisions on labor relations, taxation, foreign exchange control, customs, repatriation guarantees and immigration.²⁶⁵

No matter where they do business, two issues are of particular concern to foreign investors: the stability of their host country's legal and economic environment and the security of their investment. In this second chapter, we will examine how Vietnam has tried to reconcile foreign interests with its development needs in its investment framework.²⁶⁶ Thus, in the first part, we will begin by analyzing the three forms of foreign

²⁶² F. Burke, ed., *Vietnam - Business Law Guide* (Singapore: CCH Asia, 1995) at 10,022 [hereinafter *Vietnam - Business Law Guide*]. These are issued by the various ministries, government agencies and local People's Committees. S. Hayward & J. Lay, "A Brief Overview of Vietnam's Foreign Investment Regulations" in *An Investor's Guide to Vietnam* (London: Euromoney Publications, 1995) 9.

²⁶³ The FIL is composed of forty-two articles divided in six chapters: Chapter I (articles 1 to 3) - General Provisions; Chapter II (articles 4 to 19b) - Forms of Investment; Chapter III (articles 20 to 25) - Investment Guarantee Measures; Chapter IV (articles 26 to 35a) - Rights and Obligations of Foreign Organizations and Individuals; Chapter V (articles 36 to 38) - State Body in Charge of Foreign Investment; and Chapter VI (articles 39 to 42) - Final Provisions.

²⁶⁴ "This Decree concretizes the Law on Foreign Investment and regulates in detail direct investment activities of foreigners. The forms of indirect investment activities such as international credit, international aid, etc., are not stipulated in this Decree." *Decree 18-CP*, art. 1.

²⁶⁵ J.S. Finch & S.E. Vecchi, "New Amendments, Regulations To Foreign Investment Law" (November 1993) E. Asian Exec. Rep. 7 at 23.

²⁶⁶ Article 1 of the FIL makes clear that Vietnam will not compromise its sovereignty in its desire to attract foreign investment: "The State of the Socialist Republic of Vietnam welcomes and encourages foreign organizations and individuals to invest capital and technology in Vietnam *on the basis of respect for the independence and sovereignty of Vietnam, observance of Vietnamese laws, equality and mutual benefit.* (...)" Emphasis added. "On a theoretical level, the ideological tension between traditional international law on FDI protection and developing countries' customary concerns for national sovereignty is heightened in Vietnam's case by its people's historically strong nationalism and by its government's continued embrace of a Communist political system." "Protection of Foreign Direct Investment in a New World Order: Vietnam - A Case Study" (1994) 107:8 Harv. L.R. 1995 at 1996.

investment under the FIL.²⁶⁷ In the second part, we will review other ways foreign investors can do business in Vietnam, namely through BOT contracts, representative offices, and branches. Finally, the third part will be devoted to the special investment areas in the country.

A.- The Three Forms of Investment Pursuant to the *Foreign Investment Law*

1.- Business Cooperation Contracts (BCCs)

a) Nature of the BCC

The first form of foreign investment under the FIL is the business cooperation contract. The BCC consists in an agreement between foreign and Vietnamese parties to carry on a business operation together.²⁶⁸ It does not create a separate juridical entity,²⁶⁹ but rather a simple contractual relationship between the parties, who themselves remain separate legal entities under Vietnamese law. It is thus comparable to the partnership found in Western legal systems.²⁷⁰ The BCC allows for the allocation of responsibilities and the sharing of profits and losses between two or more parties conducting business activities together.²⁷¹ Commercial contracts and other economic contracts for the exchange of goods, such as delivery of raw materials in return for finished products, are not considered business cooperation contracts.²⁷² Although there is no set limit on the duration of business cooperation contracts, they typically are short-term agreements, lasting from three to five years.²⁷³ This type of investment is particularly suited for simple

²⁶⁷ The three forms of foreign investment currently approved by Vietnamese authorities are the business cooperation contract, the joint venture and the wholly foreign-owned enterprise. Strictly speaking, the Build-Operate-Transfer (BOT) contract is not a form of investment. See *infra* note 429 and accompanying text. Joint ventures make up 64.6% of foreign investment projects (65.3% of investment capital), wholly foreign-owned enterprises amount to 27.1% of all foreign projects (17.8% of investment capital), and business cooperation contracts account for only 8.3% of foreign investment projects (16.9% of investment capital). *Investment Requirements for 1996-2000*, *supra* note 227 at 14. Since it is by far the preferred vehicle for foreign investment in Vietnam, we will put a much greater emphasis on the analysis of the joint venture enterprise.

²⁶⁸ FIL, arts. 4(1) and 5 and *Decree 18-CP*, arts. 8 to 18.

²⁶⁹ *Decree 18-CP*, art. 8(1).

²⁷⁰ J.F. Chapman, "Establishing Business in Vietnam: Legal Aspects" (1993) 38:9 *Journal of the Law Society of Scotland* 360.

²⁷¹ *Decree 18-CP*, art. 8(1).

²⁷² *Ibid.*, art. 8(2).

²⁷³ *Vietnam - Guide de l'investissement*, *supra* note 211 at 33.

manufacturing projects,²⁷⁴ production-sharing contracts or large-scale projects.²⁷⁵ It has also been widely used in the oil and gas sector.²⁷⁶ Upon approval of their project, the parties to a BCC are issued a business license.²⁷⁷

b) Advantages and Disadvantages of the BCC

One of the most important advantages of the BCC is that the parties enjoy a great deal of freedom in establishing the framework of their investment.²⁷⁸ Thus, provisions on management, operation and termination are more flexible in the case of the business cooperation contract than they are with the other forms of investment.²⁷⁹ While joint venture agreements must include the invested capital, the prescribed capital and the proportion of capital contribution by each party,²⁸⁰ there is no such requirement for business cooperation contracts. The major disadvantage of the business cooperation contract is that the parties are personally liable for their project under Vietnamese law.²⁸¹

²⁷⁴ Hayward & Lay, *supra* note 262 at 10.

²⁷⁵ "Foreign Investment Through BCCs", *supra* note 219 at 134. "Investment under a BCC (...) often proves to be suitable for production-sharing contracts where the local party is well established and does not need substantial equity injection, or for large-scale projects with the Vietnamese Government or a state-owned enterprise as the local partner, such as infrastructure development projects, Build-Operate-Transfer (BOT) projects, and the like." *Ibid.* The government has recently stated that the military-run Electronics Communication Equipment Company (ECEC) will no longer be permitted to form joint ventures, implying that it will only be allowed to sign one-off contracts or BCCs. Similarly, there has also been discussion that state-owned Vietnam Posts and Telecommunications (VNPT) will only be authorized to conclude business cooperation contracts. *Country Report 3rd quarter 1995, supra* note 69 at 23.

²⁷⁶ *Country Report 3rd quarter 1995, ibid.* Since BCCs are often chosen as the form of investment for such large-scale projects, it is not surprising that although they account for only 8.3% of all foreign investment projects, they make up 16.9% of the investment capital, almost as much as wholly foreign-owned enterprises which account for 17.8% of the investment capital and 27.1% of all projects (see *supra* note 267).

²⁷⁷ *Decree 18-CP*, art. 9. In the cases of joint ventures, wholly foreign-owned enterprises and Build-Operate-Transfer contracts, investment licenses are issued. *Ibid.*, arts. 20, 46 and 57.

²⁷⁸ However, it should be noted that a more or less equal involvement of the parties is required to obtain approval for the project. *Vietnam - Business Law Guide, supra* note 262 at 10,224. "(...) projects that merely involve subcontracting arrangements or which otherwise segregate the parties' activities are not apt to be approved by the SCCI as a BCC." *Ibid.* The approval process for foreign investment projects will be examined in Chapter III, below.

²⁷⁹ *Vietnam - Business Law Guide, ibid.* at 10,321.

²⁸⁰ *Decree 18-CP*, art. 21.

²⁸¹ "Foreign Investment Through BCCs", *supra* note 219 at 134. "(...) there have been no cases involving the liability of the parties to a business cooperation contract, but neither the LOFI [*Law on Foreign Investment*] nor the Implementing Regulations state that the liability of the parties is limited." M. L. Genovese, "Succeeding in Vietnam's Emerging Market Economy - Part I: Representatives Offices, Types

This type of investment also presents a particular disadvantage for the foreign party who will sometimes find himself excluded from decision-making on certain matters. For instance, since the BCC is not a separate legal entity, it cannot employ Vietnamese workers directly. They must be engaged by the Vietnamese partner, thereby silencing the foreign partner, for all practical purposes, on the issue of hiring and firing Vietnamese personnel.²⁸² In addition, the flexible nature of the BCC, subject to only a few requirements under the *Foreign Investment Law*, can constitute a drawback for the foreign party in that he exerts less influence over his Vietnamese partner. Thus, it would be hard to compel a recalcitrant local party to abide by a non-competition clause in a business cooperation contract.²⁸³ Finally, it should be pointed out that business cooperation contracts are not granted the profits tax exemptions that joint ventures and wholly foreign-owned enterprises enjoy.²⁸⁴

2.- Joint Venture Enterprises

a) Nature of the Joint Venture

By far the most popular vehicle of foreign investment in Vietnam,²⁸⁵ the joint venture agreement is the second form of investment under the FIL.²⁸⁶ Joint ventures differ from business cooperation contracts in that they create a separate legal entity, distinct from either of the parties to the agreement.²⁸⁷ Furthermore, contrary to the BCC, the joint

of Foreign Investment" (May 15, 1995) E. Asian Exec. Rep. 7 at 23 [hereinafter "Succeeding in Vietnam - Part I"].

²⁸² *Vietnam - Business Law Guide*, *supra* note 262 at 10,224.

²⁸³ "Succeeding in Vietnam - Part I", *supra* note 281 at 23. Moreover, to make matters worse, the issues of exclusivity and confidentiality in business dealings are not well understood in Vietnam. *Ibid.*

²⁸⁴ Pursuant to article 27 of the FIL and depending on certain factors (sector of the economy in which the investment is made, location of the investment, scale of capital contribution, volume of exports, volume of substitutions for imports of those products which are not yet produced or not produced in sufficient quantity in Vietnam, nature and duration of the business), joint ventures and wholly foreign-owned enterprises may be granted profits tax holidays. See also *Decree 18-CP*, art. 69.

²⁸⁵ Hayward & Lay, *supra* note 262 at 10. "They [joint ventures] also tend to be favored by Vietnamese authorities as being an effective way of involving local partners in the development of their country and allowing for Vietnamese citizens to be trained in modern business, production and management techniques." *Ibid.* See also *supra* note 267.

²⁸⁶ FIL, arts. 4(2), 6 to 13 and 15 to 19 and *Decree 18-CP*, arts. 19 to 42.

²⁸⁷ FIL, art. 6. *Decree 18-CP*, art. 19(2) also stipulates that the joint venture is "a Vietnamese juridical person".

venture is a limited liability company²⁸⁸ and while there is no set limit on the duration of business cooperation contracts,²⁸⁹ joint ventures have a maximum duration of fifty years, with possible extension to seventy years.²⁹⁰ A joint venture enterprise can be set up by one or more Vietnamese parties and one or more foreign parties, by the Vietnamese Government and a foreign government, or by an existing joint enterprise and a foreign party.²⁹¹ Although joint ventures may invest in any sector of the Vietnamese economy,²⁹² in practice they tend to be concentrated in service industries and they are rarely permitted to enter into competition with established local entities.²⁹³ Choosing the right location and the right local partner is of paramount importance to the success of a joint venture. The choice of a location might be based on the need to locate the project in an area where a more developed infrastructure is already in place.²⁹⁴ Special tax incentives in remote areas

²⁸⁸ FIL, art. 10. "(...) The liability of each joint venture party to the others, to the joint venture enterprise, and to third parties shall be limited to its capital contribution to the prescribed capital." *Decree 18-CP*, art. 19(2).

²⁸⁹ See *supra* note 273 and accompanying text.

²⁹⁰ FIL, art. 15 and *Decree 18-CP*, art. 35. Duration is determined on a case-by-case basis. Pursuant to article 15 of the FIL, dated 29 December, 1987, the original maximum duration for a joint venture was 20 years, with possibility of extension. "The Foreign Investment Law provides for a maximum duration of 50 years, which will be granted only on justifiable grounds, such as where a long period is needed to generate a reasonable return on capital. Most investments, including manufacturing projects, are typically granted only 20 year licenses. Under extraordinary circumstances 70 year licenses may be granted." P. Ruderman, "Joint Ventures" in *An Investor's Guide to Vietnam*, *supra* note 262, 17 at 18. In addition to national guidelines, local guidelines may also influence the duration of a project. For instance, investments in service industries and real estate development are usually granted shorter terms. *Vietnam - Business Law Guide*, *supra* note 262 at 10,222.

²⁹¹ FIL, art. 2(11) and *Decree 18-CP*, art. 19(1).

²⁹² FIL, art. 3. See also *supra* note 216 and accompanying text on the five priority sectors of investment.

²⁹³ *Vietnam - Business Law Guide*, *supra* note 262 at 10,023. As a rule, the government closely monitors foreign investment in any sector of the country's economy. "Following a spate of new joint-venture agreements, the Ministry of Heavy Industry has announced that it will not seek further foreign investment in the basic plastics sector until 2000." *Country Report 3rd quarter 1995*, *supra* note 69 at 21.

²⁹⁴ The importance of choosing the right location for a project should never be underestimated. The recent case of the French oil company Total immediately comes to mind. Total canceled a \$1.2 billion project after the government's decision to locate the refinery in an undeveloped region of the center of the country. The necessary infrastructure construction would have resulted in the project's cost soaring up between \$300 and \$600 million. A. Schwarz, "Investment - Opportunity's Costs" (October 26, 1995) *Far E. Econ. Rev.* 56 [hereinafter "Investment - Opportunity's Costs"]. Yet, the Vietnamese government remains determined to see the refinery project located in Dung Quat in spite of Total's withdrawal. At the present time, two South Korean companies, Daewoo and the LG group, have indicated their interest in replacing Total. *Country Report 4th quarter 1995*, *supra* note 73 at 24.

or special zones, such as the export processing zones and the industrial zones, can also be the motivating factor behind the selection of a particular location.²⁹⁵

b) The Local Partner

- Almost Always a State-Owned Enterprise (SOE)

As stated, finding the right local partner is crucial to the success of a joint venture.²⁹⁶ Indeed, not only has the Vietnamese partner an important say in the management of the enterprise,²⁹⁷ but he also plays a key role at the local level in establishing a good relationship with the government and the population, and in setting up a distribution network, purchasing local supplies and recruiting labor.²⁹⁸ In addition to his greater understanding of the Vietnamese market, the local partner's knowledge of the bureaucratic process will be of invaluable help in the joint venture's dealings with the authorities.²⁹⁹ Following the *1992 Amendments*, private Vietnamese enterprises are now considered within the meaning of "Vietnamese Party" of article 2 of the *Foreign Investment Law*. Yet, local partners in joint ventures are still almost always state-owned enterprises, government ministries or their affiliates.³⁰⁰

²⁹⁵ Hayward & Lay, *supra* note 262 at 11. Both these special zones will be discussed further in the last part of this chapter, on page 81, below. Approximately 80% of approved projects are located in four geographical areas: 40% in Ho Chi Minh City, 21% in Hanoi, 11% in Dong Nai (south) and 8% in Haiphong (northern port). The government's efforts to change the pattern of investment in the country have been virtually fruitless [and in some cases disastrous, as illustrated by the above-mentioned case of Total]. *Country Report 3rd quarter 1995*, *supra* note 69 at 19.

²⁹⁶ This decision has been qualified as the most important in the implementation of the foreign investor's business plan. J.W. Robinson, *Doing Business in Vietnam* (Rocklin, CA: Prima Publishing, 1995) at 67.

²⁹⁷ Pursuant to article 12 of the FIL, either the general director or first deputy general director of the board of management of the joint venture must be a Vietnamese citizen, regardless of the Vietnamese party's contribution to the prescribed capital of the enterprise. Furthermore, all key issues concerning the organization and the operation of the joint venture must be determined by a unanimous decision of the board of management. FIL, art. 13. Management of the joint venture will be analyzed in further details in Subsection e) Organization and Operation of the Joint Venture, on page 55, below.

²⁹⁸ T. T.-C. Chang, "Doing Business with Vietnam" (1994) 40:7 *The Practical Lawyer* 33 at 35.

²⁹⁹ *Vietnam - Guide de l'investissement*, *supra* note 211 at 38.

³⁰⁰ Ruderman, *supra* note 290 at 18. Ruderman points out that state-owned enterprises are still the preferred local partners despite the country's privatization program, as most private entities "remain small garden-variety operations which lack the requisite expertise, capital and political clout to be viable partners." *Ibid.* In fact, foreign companies choose state enterprises as joint venture partners in 97% of the cases. A. Schwarz, "Entrepreneurs - Reality Check: Government obstacles keep most private firms small" (February 29, 1996) *Far E. Econ. Rev.* 45 [hereinafter "Reality Check"].

The advantages of having a state-owned enterprise as a local partner are considerable.³⁰¹ To begin with, SOEs are very effective lobbyists. Thus, the choice of a particular enterprise as a venture partner will be based on the contacts it has with the appropriate level of government.³⁰² Not only do state enterprises have better access to land-use rights,³⁰³ but, as a matter of fact, they are the only ones that may contribute land to a joint venture.³⁰⁴ They can also more easily obtain the necessary governmental approvals and negotiate tax and import duty breaks.³⁰⁵ Furthermore, since the country has only recently embarked upon an open-market economy, SOEs naturally have more business experience than private Vietnamese enterprises. The latter, on the other hand, are more aggressive and demonstrate better entrepreneurship, but their credentials are harder to ascertain³⁰⁶ and, as noted, they are not allowed to contribute the value of their right to lease land to the capital of the joint venture under current land regulations.³⁰⁷

- "Government Control From Within"

For all the benefits state-owned enterprises present, the foreign party should nonetheless be aware that many of them are inadequately equipped, unacquainted with

³⁰¹ "The Vietnamese have a saying that 'the Government interprets the law for its friends and applies the law for strangers'. With appropriate partners, many bureaucratic hurdles can be smoothed over." S. Hayward, "Infrastructure and Development Initiatives in Vietnam" (1995) 12:3 ICLR 495 at 501.

³⁰² S.E. Vecchi, "Selecting a Vietnamese Joint Venture Partner" (December 1992) E. Asian Exec. Rep. 9 at 21 [hereinafter "Selecting a Vietnamese Joint Venture Partner"]. While state-owned enterprises are under the authority of a central government ministry or entity, provincial-owned enterprises (POEs) are associated with a local provincial or city People's Committee. *Ibid.* at 9.

³⁰³ Ruderman, *supra* note 290 at 18.

³⁰⁴ See Subsection c) Only SOEs may Contribute Land to a Joint Venture in the section on Vietnam's land legislation, on page 128, below. This is all the more important since the local party's contribution to the joint venture most often consists in land or a building. See *infra* note 333 and accompanying text.

³⁰⁵ Ruderman, *supra* note 290 at 18. The political influence enjoyed by the SOE will prove very useful, for instance, in obtaining project approval from the People's Committee of the city or the province where the investment is located. *Ibid.*

³⁰⁶ Robinson, *supra* note 296 at 28. For projects that do not require government support after the initial approval, private enterprises could be very apt local partners. "Selecting a Vietnamese Joint Venture Partner", *supra* note 302 at 21. But see "Reality Check", *supra* note 300 for a discussion of the many problems private firms face in Vietnam, ranging from difficulties in obtaining loans to discriminatory government regulations in favor of state-owned enterprises. See also Subsection c) Private Enterprises: Theoretical Equality...Difficult Reality in the section on private rights in Chapter III, on page 137, below.

³⁰⁷ Unless they have been allocated land from the State for the purposes of agriculture, forestry, aquaculture or salt production. *Decree 18-CP on Rights and Obligations of Domestic Organizations with Land Allocated or Leased from the State*, dated 13 February 1995, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-851 [hereinafter *Decree 18-CP*, dated 13 February 1995], arts. 6 and 10.

international business practices and face an uncertain future due to government cutbacks in subsidies.³⁰⁸ While their close connection with government makes it easier for them to obtain loans and other advantages, it also means that sometimes they act more like *compradors* of the government than business partners in a joint venture.³⁰⁹ The fact that Vietnamese authorities favor joint ventures over wholly foreign-owned enterprises³¹⁰ is most likely because joint ventures with SOEs as local partners offer an effective way of controlling foreign investment "from the inside",³¹¹ particularly in view of the requirement calling for a unanimous vote by the board of management on important issues.³¹²

c) Establishment of the Joint Venture

- Preliminary Consent

A state-owned enterprise must first get permission from its parent organization in order to become partner in a joint venture enterprise with a foreign investor.³¹³ Furthermore, prior to formally negotiating the joint venture agreement,³¹⁴ the parties must draft a letter of intent and have it approved by the People's Committee in the city or municipality where their project will be located.³¹⁵ In addition, the parties will also submit

³⁰⁸ Ruderman, *supra* note 290 at 18. In many cases, state-owned enterprises, no longer supported by the central government, have had no choice but to enter the market. "Selecting a Vietnamese Joint Venture Partner", *supra* note 302 at 9.

³⁰⁹ *Vietnam - Guide de l'investissement*, *supra* note 211 at 39. "The revenue from some SOEs supports the activities of their parent organizations or supervisory authorities. The supervisory authority is the government organization that created the SOE or POE and to which the enterprise reports." "Selecting a Vietnamese Joint Venture Partner", *ibid.* at 20.

³¹⁰ Ruderman, *supra* note 290 at 18. Ruderman specifies that if joint ventures account for over 75% of total approved investment, it is partly due to the fact that authorities remain reluctant to approve wholly foreign-owned enterprises. *Ibid.*

³¹¹ Ever-growing concern over the influence of foreign investors in the country has reportedly prompted the formulation of a plan to set up Communist Party cells in foreign joint ventures. A. Schwarz, "Bonfire of the Vanities" (March 7, 1996) *Far E. Econ. Rev.* 14 at 15 [hereinafter "Bonfire of the Vanities"]. See also *infra* note 657 and accompanying text.

³¹² See "Managerial Control of the Enterprise: Imbalance in Favor of the Vietnamese Partner" on page 55, below.

³¹³ M. L. Genovese, "Succeeding in Vietnam's Emerging Market Economy - Part II: Feasibility Studies, Approval, Guarantees, Strategies" (June 15, 1995) *E. Asian Exec. Rep.* 6 at 23 [hereinafter "Succeeding in Vietnam - Part II"]. The memorandum of understanding signed by the parties serves as a basis to request the preliminary approval of the parent organization of the Vietnamese partner. *Ibid.*

³¹⁴ *Decree 18-CP*, art. 21.

³¹⁵ Hayward & Lay, *supra* note 262 at 11. The letter of intent, although not a legally binding document, should nevertheless be couched very carefully as the parties will not be permitted to drift significantly from its contents when negotiating the final contract. *Ibid.*

to their local People's Committee a pre-feasibility study consisting in an outline or a section of the feasibility study to follow.³¹⁶ Once their project has been approved in principle by the People's Committee, the partners can proceed to submit their application to the SCCI [Ministry of Planning and Investment].³¹⁷

- Application for an Investment License

Pursuant to article 20 of *Decree 18-CP*, the application form for the investment license must be signed by the parties and submitted to the SCCI [Ministry of Planning and Investment] together with the joint venture contract,³¹⁸ the charter of the joint venture enterprise,³¹⁹ all information concerning the legal capacity and financial situation of the parties and a feasibility study of the project.³²⁰ The feasibility study required with the application is different from feasibility studies usually prepared in the West where they are not normally submitted for government approval, but rather serve to assess the

³¹⁶ Chapman, *supra* note 270 at 361.

³¹⁷ According to Dr. Nguyen Do Khue, Chief of the Division of International Cooperations and Investments of the Hanoi People's Committee, parties to a foreign investment project must secure the approval of the local People's Committee before submitting their application to the MPI. Interview with Dr. Khue in Hanoi, on June 14, 1996. "The need to obtain approval from People's Committees is a completely separate requirement from, and a condition precedent to, an application to SCCI [MPI] for an investment license. Although there may be a liaison between SCCI [MPI] and the relevant People's Committee, SCCI [MPI] has not actual authority to overrule or directly influence the decision making of these bodies at either a province or district level." "Foreign Investment Revisited", *supra* note 182 at 418.

³¹⁸ The content of the joint venture contract is listed in article 21 of *Decree 18-CP*. Foreign investors will often add provisions on certain issues that can prove contentious and that are not addressed by Vietnamese law, such as dispute resolution and control of the board of directors. Hayward & Lay, *supra* note 262 at 11. See also S.E. Vecchi, "Vietnam: Joint Venture Agreements" (1993) 21:1 IBL 25 at 28-29 [hereinafter "Vietnam: Joint Venture Agreements"] for standard clauses recommended in joint venture contracts. Note that pursuant to article 25 of *Decree 18-CP*, any amendment to the joint venture contract has to be approved by the SCCI [Ministry of Planning and Investment].

³¹⁹ The content of the charter of the joint venture enterprise is listed in article 22 of *Decree 18-CP*. Pursuant to article 25 of *Decree 18-CP*, amendments to the joint venture charter also have to be approved by the SCCI [Ministry of Planning and Investment].

³²⁰ See also FIL, art. 37. Article 9.1 of *Circular 215/UB-LXT* specifies which documents relating to the parties' legal and financial status need to be submitted with the application. All project documents, bound in hard cover, must be submitted in twelve copies. *Ibid.* Furthermore, pursuant to article 9(3) of *Decree 175-CP on the Protection of the Environment*, dated October 18, 1994, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-651, an evaluation of the environmental impact of the project must be carried out in the case of "projects with foreign aid, projects with investment capital or loan capital from foreign organizations, individuals or international organizations, or joint venture projects established within the territory of Vietnam". The environmental impact assessment will have to be submitted together with the rest of the documentation. *Vietnam - Business Law Guide*, *supra* note 262 at 10,724.

profitability of a particular project.³²¹ The feasibility study should spell out, *inter alia*, the activities conducted through the joint venture, the respective investment of the parties, the likely benefits to the country and the region where the joint venture will be located, the expected profits, and the environmental impact of the enterprise.³²² An application fee equivalent to 0.01% of the total invested capital of the joint venture enterprise, but no less than \$50 and no more than \$10,000, must be paid upon submitting the application.³²³ The joint venture is officially established after its investment license and the certificate of registration of its charter have been issued by the SCCI [Ministry of Planning and Investment].³²⁴

d) Capital Contribution of the Parties

- 30% Minimum Contribution by the Foreign Partner

The foreign investor must contribute at least 30% of the prescribed capital of the joint venture enterprise.³²⁵ Although there is no maximum set to the contribution of the

³²¹ Chang, *supra* note 298 at 36. See also generally "Succeeding in Vietnam - Part II", *supra* note 313 at 6 and 23. As a way to reduce the documentation required from foreign investors, simplify the approval process and thereby attract more small and medium foreign enterprises, the World Bank recommends that a feasibility study be required only for the larger projects of more than \$20 million. *Viet Nam - Transition to the Market*, *supra* note 66 at 90.

³²² Hayward & Lay, *supra* note 262 at 11. Furthermore, "it is essential that any requirements for imports and foreign exchange be set out in the study, as otherwise, it may not be possible to import necessary machinery or raw materials or to exchange dong (the Vietnamese currency) income for foreign currency once the venture is established." *Ibid.*

³²³ Circular 47-TC-TCND of the Ministry of Finance on the Collection of Application Fees Applicable to Foreign Invested Capital, dated October 21, 1989, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at I-23, art. II(1).

³²⁴ Decree 18-CP, art. 19(4). Pursuant to article 24 of Decree 18-CP, the joint venture becomes a legal entity at the time the SCCI [Ministry of Planning and Investment] issues the investment license and the certificate of registration of the charter of the joint venture.

³²⁵ FIL, art. 8 and Decree 18-CP, art. 27. Pursuant to article 2 of Decree 18-CP, "prescribed capital" is defined as the initial capital stated in the charter of the joint venture, excluding any item of loan capital, whereas "invested capital" is the capital for implementation of the investment project and consists of the prescribed capital and the loan capital. Pursuant to article 2(8) of the FIL, "contributed capital" is the capital actually contributed to the joint venture by a foreign or Vietnamese party; it is part of the capital of the enterprise, but does not include any loans or other credits. "Prescribed capital" refers to the equity as distinct from loan capital which the parties agree to contribute to a joint venture or other enterprise in Vietnam. The prescribed capital is recorded in the company charter. Alternative terminology commonly used is *legal capital*. The common law system equivalent of prescribed capital is authorized capital. (...) *Contributed capital* is that part of the prescribed (registered) capital which has actually been paid (cash capital) or contributed (capital in kind) to the enterprise concerned." *Foreign Investment Laws of Vietnam* (Melbourne: State Committee for Cooperation and Investment of Vietnam and Phillips Fox of Australia, 1992) at vii [hereinafter *Foreign Investment Laws of Vietnam* (1992)].

foreign partner to the prescribed capital of the joint venture,³²⁶ approval guidelines nonetheless provide that foreign investors' participation will be limited to 85% of the legal capital of the joint venture.³²⁷ Furthermore, while the SCCI [Ministry of Planning and Investment] usually prefers the partners to have an equal participation in the venture,³²⁸ the foreign investor's contribution often amount to 70%.³²⁹ The parties to a joint venture are free to invest any amount they feel appropriate for their project, as there is no minimum or maximum amount of investment set for joint venture enterprises in Vietnamese legislation.³³⁰ Article 7 of the *Foreign Investment Law* stipulates ways in which the parties may make their contributions to the prescribed capital.³³¹ Vietnamese parties may thus contribute natural resources and the value of their right to use land, water and sea surface.³³² With the local partner's capital contribution to the project actually taking the form of land-use rights in 80% of the cases,³³³ there has been a lot of complaints on the part of foreign investors that the land so contributed by the Vietnamese party is overvalued in order to allow him to meet his capital contribution requirements.³³⁴ On the other hand, there are also reports that some foreign partners have contributed

³²⁶ Pursuant to article 27 of *Decree 18-CP*, the prescribed capital must constitute at least 30% of the invested capital of the joint venture, with possible exceptions in certain cases with the approval of the SCCI [Ministry of Planning and Investment].

³²⁷ *Vietnam - Business Law Guide*, *supra* note 262 at 10,024. If the foreign investor wants more than an 85% interest in the venture, the wholly foreign-owned enterprise should be used as the vehicle of investment. *Ibid.*

³²⁸ *Doing Business in Vietnam*, *supra* note 251 at 23. In certain sectors, such as the health industry, the authorities will be extremely reluctant to give their approval to joint ventures with less than 50% local participation. *Vietnam - Guide de l'investissement*, *supra* note 211 at 52.

³²⁹ "Investment - Opportunity's Costs", *supra* note 294 at 57. The government now reportedly wants to see more and more local partners contributing 40% to joint ventures. Foreign investors frowned at this idea as they contend that finding a local party able to contribute 30% is already difficult and can oftentimes only be achieved through an overvaluation of land-use rights. A 40% local share means that certain projects just will not be economically feasible. *Ibid.*

³³⁰ *Vietnam - Business Law Guide*, *supra* note 262 at 10,024.

³³¹ These consist in cash, plants, buildings, equipment, spare parts, technical know-how, patents, etc. Article 7 *in fine* specifies that the parties may choose other ways of contributing to the prescribed capital.

³³² *Decree 18-CP*, art. 26. Note, however, that current land regulations do not allow private Vietnamese firms to contribute the value of their leased land-used rights to the joint venture (see *supra* note 307), thereby restricting the scope of article 26 of *Decree 18-CP*. See also, in Chapter III, the subsection "Only SOEs may Contribute Land to a Joint Venture", on page 128, below.

³³³ *Country Report 4th quarter 1996*, *supra* note 6 at 19. In another 8% of the cases, the contribution of local partners is in the form of existing facilities. *Ibid.*

³³⁴ Chang, *supra* note 298 at 37-38. The (over)valuation of land-use rights will be examined in greater details in Chapter III, on page 127, below.

obsolete machinery valued above market prices.³³⁵ Finally, article 8 of the FIL also provides for the gradual increase of the local party's contribution to the prescribed capital of a joint venture considered an important economic establishment by the Vietnamese government.³³⁶

- Capital Contribution Schedule

The partners may make their contributions to the enterprise in full upon the establishment of the joint venture or by installments over any "reasonable period of time".³³⁷ The method and the schedule of their contributions must be stated in the joint venture contract and must be in conformity with the feasibility study.³³⁸ The parties are normally expected to have completely fulfilled their undertakings within one year after the issuance of their investment license.³³⁹ While the foreign partner usually contributes most of the cash and moveable assets to the venture, the Vietnamese party's contribution, as noted, typically takes the form of land-use rights. Thus, as the latter fulfills his obligation from the very start of the venture, he will exert pressure on his foreign partner to provide his share of capitalization as soon as possible³⁴⁰ for, in the event that a party fails to comply with the schedule of contribution without reasonable cause, the SCCI [Ministry of

³³⁵ "Succeeding in Vietnam - Part I", *supra* note 281 at 24. Genovese adds that this is the reason why, as a rule, the Vietnamese will not accept used equipment as contribution to the joint venture. *Ibid.* Notice that article 9 of the 1996 FIL provides for an evaluation certification to be issued by an "independent evaluation organization" for all equipment and machinery contributed to the capital of a joint venture. Article 9 further specifies that the MPI may, when it deems it necessary, order a reevaluation of the capital contribution of the parties.

³³⁶ See also article 27 of *Decree 18-CP* and article 5.1 of *Circular 215/UB-LXT*. The gradual increase of the local partner's share in the joint venture will be discussed at length in the section on investment protection of Chapter III, on page 119, below.

³³⁷ *Decree 18-CP*, art. 28.

³³⁸ *Ibid.* Article 4.1 of *Circular 215/UB-LXT* stipulates that the method and schedule of contribution should also be stated in the charter of the enterprise.

³³⁹ *Vietnam - Business Law Guide*, *supra* note 262 at 10,024. "However, phased investments are routinely approved and conditions precedent to parties' obligations to contribute capital can (and should) be included in a joint venture contract." *Ibid.*

³⁴⁰ Ruderman, *supra* note 290 at 19. "The Vietnamese party's anxiety is well-founded: by the SCCI's count, over 60% of failed joint venture company projects are caused by the failure of FIs [foreign investors], many of whom are reportedly small-time brokers seeking to sell newly-minted investment licenses for profit, to contribute their capital share as required." *Ibid.*

Planning and Investment] has the power to revoke the investment license for the project.³⁴¹

- Changes in Capital

Pursuant to article 29 of *Decree 18-CP*, the parties are prohibited from reducing the prescribed capital of the joint venture enterprise. It is however possible to increase the amount contributed to the prescribed or invested capital and to change the proportion of capital contribution in the prescribed capital following a decision of the board of management of the venture and approval by the SCCI [Ministry of Planning and Investment].³⁴² It should be noted that an increase in the capital of the joint venture is only allowed in certain cases: firstly, to expand the scale of production or modify operations in accordance with Vietnam's investment promotion policies; secondly, to maintain business and production in the wake of natural disasters or to cope with other difficulties; and, thirdly, to adapt to market changes.³⁴³ By contrast, increases in the capital are not permitted in the following circumstances: to raise the quota of duty free imported machinery and other equipment unnecessary to the capital construction of the enterprise, to pursue activities inconsistent with the country's investment promotion policies or to expand the production scale in the absence of adequate conditions, such as sufficient usable land, materials, consumer demand or when environmental standards would not be respected.³⁴⁴ Thus, article 4.3(a) of *Circular 215/UB-LXT* provides two limitative lists of circumstances when an increase in capital is, and is not, permitted. This leads one to wonder what would happen when conditions not stipulated in the article arise or when circumstances where an increase is, and is not, allowed prevail at the same time. For instance, would the increase in capital be allowed in the case of a joint venture adapting to market changes by expanding its activities in an area that is not necessarily in line with the government's investment promotion policies? At any rate, the parties must submit an application for an increase in capital to the SCCI [Ministry of Planning and Investment],

³⁴¹ *Decree 18-CP*, art. 28.

³⁴² *Ibid.*, art. 29.

³⁴³ *Circular 215/UB-LXT*, art. 4.3(a).

³⁴⁴ *Ibid.*

which will only consider granting the increase when the parties have fully contributed the investment capital of the enterprise.³⁴⁵

e) Organization and Operation of the Joint Venture

- Managerial Control of the Enterprise: Imbalance in Favor of the Vietnamese Partner

Far from being entirely left up to the parties, as is the case with the business cooperation contract, managerial control of the joint venture is set in accordance with the detailed provisions of Vietnam's foreign investment legislation regulating decision-making powers within the venture. All key matters concerning the operation and organization of the joint venture must be determined by a unanimous decision of the board of management.³⁴⁶ This effectively translates into a veto power in favor of the local partner and insures that, regardless of his contribution to the capital of the venture, his voice can be heard on any important decision affecting the enterprise. As stated, the local partner is more often than not a state-owned corporation which means, for all practical purposes, the Vietnamese government. Furthermore, provisions of the foreign investment legislation, essentially leave it up to the MPI to break potential stalemates on important issues in the board of management.³⁴⁷ Against this backdrop, the unanimity requirement allows in effect the authorities to interfere in major issues concerning the operation of joint ventures and demonstrates Vietnam's intention to keep a firm grip on its economy despite the massive

³⁴⁵ *Ibid.*, art. 4.3(b).

³⁴⁶ FIL, art. 13. Pursuant to article 33(1) of *Decree 18-CP*, a unanimous vote is required on the following key issues: "annual and long-term production and business plans of the joint venture enterprise, its budget and decisions to borrow; any amendment of, and addition to the charter of the joint venture enterprise; appointment and dismissal of the board chairman, general director, the first deputy general director and chief accountant". See also *Circular 215/UB-LXT*, art. 1.3(b). "Even with a 70% interest in a Vietnamese JVC [joint venture company], foreign investors may find that they do not have effective managerial control." *Vietnam - Business Law Guide*, *supra* note 262 at 10,121.

³⁴⁷ Pursuant to article 33(3) of *Decree 18-CP* and article 1.3(d) of *Circular 215/UB-LXT*: if a unanimous decision on the important issues cannot be reached and the operations of the joint venture are adversely affected, the board of management can choose one of the following options [presumably by a majority vote]: a mediation council made up of an equal number of representatives of each party and headed by the SCCI [Ministry of Planning and Investment] will reach a decision which will have to be approved a majority vote of the council members and which will then be binding on the partners; the SCCI [Ministry of Planning and Investment] will act as a conciliator and will make a final decision on the contentious issue; finally, the parties may choose to dissolve their joint venture.

input of foreign investment in the country. Needless to say, the unanimity requirement has whipped up a storm of criticism.³⁴⁸

- The Board of Management

Authority within the joint venture is vested with the board of management whose members are appointed by the parties in proportion to their contribution to the prescribed capital of the enterprise³⁴⁹ and for a term no longer than five years.³⁵⁰ Day-to-day operations of the enterprise are conducted by the general director and the deputy general directors appointed by the board of management and to which they are also responsible for the operation of the joint venture.³⁵¹ The board of management itself convenes at least once a year³⁵² and a minimum of two thirds of the members must be present for the quorum to be reached.³⁵³ While, as noted, a unanimous vote is required on key issues,

³⁴⁸ Mr. Jemal-ud-din Kassum, vice-president of the World Bank's International Finance Corporation, criticized this provision of the FIL while visiting Vietnam in July 1995. *Country Report 3rd quarter 1995*, *supra* note 69 at 19.

³⁴⁹ FIL, art. 12, *Decree 18-CP*, art. 31 and *Circular 215/UB-LXT*, art. 1.1. In joint ventures with two partners, each one will appoint at least two members to the board of management and in a joint venture with more than two partners, each one will appoint at least one member. When there is one Vietnamese partner and more than one foreign partner or one foreign partner and more than one Vietnamese partner, each of the two sides will appoint at least two members to the board. FIL, art. 12. If the joint venture is comprised of an existing joint venture and a foreign party, each of them appoints at least two members to the board of management and if it is comprised of an existing joint venture and more than one foreign party, the existing joint venture appoints at least two of the board members. *Decree 18-CP*, art. 31(4). Note that article 1.1 of *Circular 215/UB-LXT* stipulates that, in this case, one of the two members appointed by the existing joint venture must be of Vietnamese nationality.

³⁵⁰ *Decree 18-CP*, art. 31(3).

³⁵¹ FIL, art. 12, *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, arts. 2.1 and 2.3. While the chairman of the board is appointed according to the agreement of the parties, either the general director or the first deputy general director of the board must be Vietnamese. *Ibid.*

³⁵² *Decree 18-CP*, art. 32(1) and *Circular 215/UB-LXT*, art. 1.2. Meetings of the board are convened by the board chairman or at the request of two thirds of the members; the general director or deputy general directors have the right to propose that a meeting of the board be convened by the chairman of the board. *Ibid.*

³⁵³ *Decree 18-CP*, art. 32(2) and *Circular 215/UB-LXT*, art. 1.2. Members can send duly authorized proxies to act on their behalf. *Ibid.* However, it would appear from the wording of both articles that only members, and not proxies, can form the quorum of the assembly. "Any meetings of the executive board shall require the attendance of at least two thirds of *its members* representing the joint venture parties. A member of the executive board may appoint in writing a proxy to attend board meetings and vote on his or her behalf on the matters authorized." *Decree 18-CP*, art. 32(2). *Emphasis added.*

other resolutions are adopted by a two third majority of the members present at the meeting.³⁵⁴

- The Chairman of the Board and the Directors of the Joint Venture

The role of the chairman of the board is essentially to convene and chair the meetings of the board and to supervise and expedite the implementation of the decisions of the board of management of the enterprise.³⁵⁵ He does not, however, have authority over the general director and the deputy general directors of the joint venture³⁵⁶ whose responsibility it is to conduct the daily operations of the enterprise.³⁵⁷ If the general director and the first deputy general director disagree on a decision relating to the management of the enterprise, the opinion of the former will prevail.³⁵⁸ After consulting with the first deputy general director, the general director also makes the final decision on issues that directly affect the implementation of the decisions of the board of management and on other important issues.³⁵⁹ Although the opinion of the director general supersedes that of the first deputy general director, the latter can express his reservations over the decision of the general director and submit his opinion to the next meeting of the board or

³⁵⁴ *Decree 18-CP*, art. 33(2) and *Circular 215/UB-LXT*, art. 1.3(c). Note that in the case of decisions on key issues requiring unanimity, both article 33(1) of *Decree 18-CP* and article 1.3(b) of *Circular 215/UB-LXT* stipulate that such decisions are to be made "by the members of the executive board by unanimous vote", which would lead to believe that all members, whether or not they attend the meeting, must concur with the resolution, contrary to decisions on others matters, which only require approval of two thirds of (potentially) two thirds of the members present (minimum number of board members to reach the quorum, see *supra* note 353). "Other resolutions made by the executive board shall be valid only if they have been approved by a two thirds majority of the board members present." *Decree 18-CP*, art. 33(2). Our emphasis.

³⁵⁵ *Circular 215/UB-LXT*, art. 1.4.

³⁵⁶ *Ibid.* Incidentally, article 2.2 of *Circular 215/UB-LXT* stipulates that when the same person holds both the positions of chairman of the board and general director, "he or she must distinguish the two different functions when managing the enterprise".

³⁵⁷ *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.1. The functions and duties of the general director and the deputy general director are set by the board of management to which they are responsible for the operation of the joint venture. *Ibid.*

³⁵⁸ *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.3.

³⁵⁹ Article 2.3 of *Circular 215/UB-LXT* gives a list of these other important issues: organizational structure, personnel, wages and bonuses; hiring and dismissal of key personnel; periodical and annual statements; and signing of economic contracts.

ask the chairman to convene a meeting to settle the matter.³⁶⁰ Yet, opposition from the first deputy general director will not prevent implementation of the decision of the general director.³⁶¹

- Management Companies

Finally, *Circular 215/UB-LXT* allows enterprises with foreign-owned capital, under certain conditions and upon approval of the SCCI [Ministry of Planning and Investment], to hire a management company.³⁶² The SCCI [Ministry of Planning and Investment] will not grant its approval to the management contract if it believes that the operations of the enterprise will suffer or that the interests of the State of Vietnam will be compromised as a result of the hiring of a management company.³⁶³ The joint venture remains responsible for its activities and for those of the management company within the scope of the management contract.³⁶⁴ Disputes between the parties to the management agreement are to be settled through negotiation and conciliation.³⁶⁵ If the parties fail to resolve their dispute, the case will be decided by an economic court of Vietnam through the application of Vietnamese laws.³⁶⁶

³⁶⁰ *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.3. While article 34 of *Decree 18-CP* appears to extend the ability of the deputy general director to reserve and submit his own opinion to the board on all issues relating to the conduct of the daily operations of the enterprise, the wording of article 2.3 of *Circular 215/UB-LXT* seems to imply that his opinion can only be reserved on matters having a direct effect on the implementation of decisions of the board of management and on the important issues enumerated in the article. Both articles fail to address the eventuality where the chairman refuses to convene a special meeting of the board. In that case, it seems that the problem would have to be resolved at the next meeting of the board. If the board only meets once a year (see *supra* note 352 and accompanying text), it could take a while before the matter is settled.

³⁶¹ *Circular 215/UB-LXT*, art. 2.3. In the face of gross incompetence, the only course of action available would be for the board to dismiss the general director (by a unanimous decision, *Decree 18-CP*, art. 33 and *Circular 215/UB-LXT*, art. 1.3(b)) at its next meeting or at a meeting specifically convened by the chairman of the board to resolve the difference of opinion between the general director and the deputy general director (*Circular 215/UB-LXT*, art. 2.3).

³⁶² Arts. 3.1 and 3.2. Among others, the location of the enterprise and the scale of the project will be taken into account by the SCCI [Ministry of Planning and Investment]. Furthermore, the decision to hire a management company must be unanimously approved by the board of management. *Ibid.*

³⁶³ *Circular 215/UB-LXT*, arts. 3.2 and 3.4.

³⁶⁴ *Ibid.*, art. 3.7. "The management company shall be directly responsible before the laws of Vietnam for its activities outside the terms of the management contract." *Ibid.*

³⁶⁵ *Ibid.*, art. 3.8.

³⁶⁶ *Ibid.*

f) Implementation of the Enterprise

Provisions on the implementation of the enterprise are very specific, demonstrating the government's intention of directing in detail the way foreign investment projects are carried out. Within ninety days after their investment license has been issued, the parties must meet in order to decide, *inter alia*, on the composition of the board of management and to approve regulations on its operations.³⁶⁷ The board of management will, in turn, elect a chairman and vice-chairman and appoint a general director, deputy general directors and the chief accountant of the enterprise.³⁶⁸ The parties must also establish a detailed plan and schedule for their capital contribution³⁶⁹ and determine the production plan of the enterprise.³⁷⁰ Furthermore, within 30 days from the date the investment license has been granted, its content must be published in a central or a local newspaper.³⁷¹ All the implementation formalities must be completed within six months after the issue of the investment license.³⁷²

g) Sale of a Partner's Share in the Joint Venture

The parties to a joint venture agreement may, on certain conditions, transfer ownership of their shares in the enterprise. Firstly, the other partners in the venture must be given the opportunity to exercise their option to buy the share put up for sale,³⁷³ if they decline to use their preemptive right, an offer can then be made to third parties.³⁷⁴

³⁶⁷ *Ibid.*, art. 10.2.

³⁶⁸ *Ibid.* The general director and the deputy general directors are also to accomplish administrative duties following their appointment, including the opening of a bank account for the enterprise, the registration of the office of the enterprise with the local People's Committee and the accounting system with the Ministry of Finance. *Ibid.*, art. 10.3.

³⁶⁹ *Ibid.*, art. 10.2. See "Capital Contribution Schedule" on page 53, above, for a more detailed discussion.

³⁷⁰ *Ibid.* Minutes of the first board meeting must be sent to the SCCI [Ministry of Planning and Investment], the People's Committee of the province or the city where the venture is located and the investors. *Ibid.*

³⁷¹ *Decree 18-CP*, art. 24. Article 10.3 of *Circular 215/UB-LXT* stipulates that details of the investment license be published in both a local and a central newspaper. This requirement is part of the administrative duties to be performed by the general director and the deputy general directors following their appointments. *Supra* note 368.

³⁷² *Circular 215/UB-LXT*, art. 10.5. If the formalities have not been completed within the prescribed time limit, the enterprise must apply for an extension to the SCCI [Ministry of Planning and Investment], stating the reasons for the delay.

³⁷³ *Decree 18-CP*, art. 30.

³⁷⁴ *Ibid.* Note that the joint venture partner may not sell his share to a third party at a better price or at better conditions than those originally refused by his partners. *Ibid.*

Secondly, the agreement between the selling party and his assignee must be submitted to the SCCI [Ministry of Planning and Investment].³⁷⁵ If the partner makes a profit on the sale of his share, he must pay a tax of 25% on the difference between his initial contribution and the price he has received in the transaction.³⁷⁶ Finally, the transfer must be unanimously approved by the board of management of the enterprise and by the SCCI [Ministry of Planning and Investment].³⁷⁷

h) Resolution of Disputes between Joint Venture Partners

As noted, disputes between members of the board of management on issues requiring a unanimous vote are settled in accordance with specific procedures.³⁷⁸ As far as disputes between joint venture partners themselves are concerned, the *Foreign Investment Law* stipulates that the parties must first seek to resolve them through negotiation and conciliation.³⁷⁹ Failing a negotiated solution to a dispute between the parties, their disagreement will have to be referred to arbitration³⁸⁰ or to a judicial body.³⁸¹ Parties to the joint venture agreement are granted a lot of leeway in the settlement of their disputes

³⁷⁵ *Decree 18-CP*, art. 30 and *Circular 215/UB-LXT*, art. 8.1. The assignment application includes the following documents: the assignment contract, an updated report on the implementation of the project, documents on the financial and legal status of the assignee, and the price of assignment. *Ibid.*

³⁷⁶ *Circular 215/UB-LXT*, *ibid.*

³⁷⁷ *Decree 18-CP*, art. 30.

³⁷⁸ See *supra* note 347 and accompanying text.

³⁷⁹ *FIL*, art. 25 and *Decree 18-CP*, art. 100.

³⁸⁰ *Ibid.* Article 100 of *Decree 18-CP* stipulates, *inter alia*, that the following forms of arbitration shall apply: "a Vietnamese arbitration body, or an arbitration body of a third country, or an international arbitration body; or an arbitration council established pursuant to an agreement between the parties to the disputes." Pursuant to article 21(6) of *Decree 18-CP*, the procedure for resolution of disputes between the partners, the arbitration body and the governing law must be specified in the joint venture contract. Note that, on July 28, 1995, Vietnam became a party to the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) 330 U.N.T.S. 38 No. 4739. Thus, on September 27, 1995, President Le Duc Anh, through *Order 42-L/CTN*, promulgated the *Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam*, passed by the Standing Committee of the National Assembly on September 14, 1995, reprinted in *Official Gazette* no. 24 (31-12-1995) at 3 [hereinafter *Ordinance 42-L/CTN*]. Pursuant to its article 23, *Ordinance 42-L/CTN* became effective on January 1st, 1996. See generally "Eyes on Arbitration" (February 1996) 22 *Vietnam Economic Times* 24 and "On the Settlement of Economic Disputes in Vietnam" (February 1996) 2:18 *Vietnam Law & Legal Forum* 18.

³⁸¹ *FIL*, art. 25. The dispute could then be heard by an Economic Court. Economic Courts were established in Vietnam on July 1, 1994 by an amendment to the *Law on Organization of the People's Court* enacted by the National Assembly through the *Law Amending and Adding a number of Articles to the Law on Organization of the People's Court*, dated 28 December 1993. *Vietnam - Business Law Guide*, *supra* note 262 at 65,124.

as they can choose both the body that will hear the case and the governing law. By contrast, disputes arising between an enterprise with foreign-owned capital or the foreign party to a business cooperation contract and a Vietnamese economic organization will be heard by a Vietnamese body applying the laws of Vietnam.³⁸² Disputes between an enterprise with foreign-owned capital or the foreign party to a business cooperation contract and Vietnamese government agencies will be settled, failing negotiation, by the competent authority of the State of Vietnam.³⁸³

i) Termination of the Joint Venture

Termination of the joint venture occurs upon expiration of its term,³⁸⁴ unless the parties have submitted a request for an extension to the SCCI [Ministry of Planning and Investment] at least six months before the date the term of the venture expires.³⁸⁵ Dissolution of the joint venture enterprise before the expiration of its term is possible in certain circumstances.³⁸⁶ The decision to dissolve an enterprise prior to the expiration of its term must be made by the board of management and approved by the SCCI [Ministry of Planning and Investment].³⁸⁷ Moreover, the SCCI [Ministry of Planning and Investment] can on its own initiative decide to order the dissolution of a joint venture prior to the expiration of its term if it finds that the enterprise conducts its activities contrary to Vietnamese laws or to the objectives stated in its investment license or its charter.³⁸⁸

³⁸² *Decree 18-CP*, art. 101.

³⁸³ *Ibid.*, art. 102. Decisions of the competent State authority are not appealable. *Ibid.*

³⁸⁴ See *supra* note 290 and accompanying text.

³⁸⁵ *Decree 18-CP*, art. 36.

³⁸⁶ Article 19 of the FIL states that the dissolution of a foreign-owned enterprise must be conducted in accordance with its charter and Vietnamese legislation. Four cases warrant the dissolution of a joint venture: an event of *force majeure* as provided for in the joint venture contract; the joint venture is unable to pursue its operations as a result of the failure of one of the parties to fulfill his obligations; the enterprise is making losses to the extent that it cannot afford to continue its activities; other circumstances stipulated in the contract. *Decree 18-CP*, art. 37 and *Circular 215/UB-LXT*, art. 11.1(b). If dissolution of the enterprise is imputable to the fault of any one or more parties, compensation, as stated in the contract, will be due to the other party or parties for the damages suffered. *Decree 18-CP*, art. 37.

³⁸⁷ *Decree 18-CP*, art. 38.

³⁸⁸ *Ibid.* and *Circular 215/UB-LXT*, art. 11.1(c). See also *infra* note 639 and accompanying text.

j) Liquidation of the Joint Venture

The liquidation of a joint venture enterprise should be completed within six months after the expiration of its term or the decision to dissolve it, with possible extension to a maximum of one year.³⁸⁹ The expenses contracted in the liquidation process are to be paid first over all other claims against the enterprise.³⁹⁰ A liquidation committee of at least three members is set up by the management board which also defines its powers and duties.³⁹¹ Its function is to assist the board of management in liquidating the assets of the company.³⁹² The committee must cease its activities after the period imparted to complete the liquidation, whether or not the liquidation has actually been completed, leaving the joint venture parties to take care of any outstanding issues.³⁹³ No later than two months after liquidation has been carried out, the committee must submit its report to the SCCI [Ministry of Planning and Investment].³⁹⁴ After dissolution of the enterprise, the balance of

³⁸⁹ *Decree 18-CP*, art. 39(1).

³⁹⁰ *Ibid.*, art. 39(3). Other claims are to be paid in the following order: wages and insurance premiums due on behalf of employees, taxes owed to the State of Vietnam, loans (capital and interests) and, lastly, other debts incurred by the joint venture. *Ibid.*, art. 39(4).

³⁹¹ *Ibid.*, art. 39(2). Members of the committee may be chosen from within or without the enterprise. The committee must be set up at least six months before the expiration of the joint venture or no later than one month after the decision to dissolve it before its expiration has been made. *Ibid.* Failing the establishment of the liquidation committee within the prescribed period of time, the SCCI [Ministry of Planning and Investment] will proceed to set it up. *Ibid.*, art. 40. In that case, however, the liquidation committee's powers and responsibilities will be different from those of a liquidation committee set up after the term of the enterprise has expired or after a decision to dissolve the company has been taken. It will notably act totally independently from the board of management. *Circular 215/UB-LXT*, art. 11.3. These two different committees have been referred to respectively as the "private liquidation committee" and the "public liquidation committee". *Vietnam - Business Law Guide*, *supra* note 262 at 10,923. "On the other hand, the public liquidation committee answers only to the SCCI and operates independently from the Board of Management. Consequently, the public liquidation committee can exercise a great deal of influence upon the liquidation process." *Ibid.*

³⁹² *Circular 215/UB-LXT*, art. 11.2. The liquidation committee is the representative of the enterprise and must not exceed the powers it was granted by the board of management; it is legally responsible for its actions. *Ibid.*, art. 11.2(a).

³⁹³ *Ibid.*, art. 11.2(d). Note that article 42 of *Decree 18-CP* seems to imply that the SCCI [Ministry of Planning and Investment], rather than the parties to the joint venture, will complete the liquidation of the enterprise in that case: "Even if there are disputes between the joint venture partners on liquidation issues, the State Committee for Cooperation and Investment shall, upon the expiration period stipulated in Article 39 of this Decree, terminate the work of the liquidation committee. Such disputes shall be settled in accordance with the provisions of Article 100 of this Decree."

³⁹⁴ *Decree 18-CP*, art. 41.

the liquidated assets will be distributed to the partners proportionately to their capital contribution, unless otherwise agreed.³⁹⁵

3.- Wholly Foreign-Owned Enterprises (WFOEs)

a) More Autonomy for the Foreign Investor

Vietnam has set no limit on the percentage of a business entity a foreigner can hold, making it possible for investors to own and control an enterprise in Vietnam.³⁹⁶ The numerous constraints associated with the joint venture enterprise, particularly the rules granting the minority partner a more than favorable say in management control,³⁹⁷ have boosted the popularity of wholly foreign-owned enterprises in Vietnam.³⁹⁸ As in the case of the joint venture, the 100% foreign-owned enterprise is constituted as a limited liability company and is a Vietnamese legal entity.³⁹⁹ It is also established for the same duration as the joint venture enterprise, *i.e.* for a maximum term of fifty years with possible extension up to seventy years.⁴⁰⁰

b) A Halfhearted Encouragement from the Government

It is worth noting that although wholly foreign-owned enterprises have been an approved form of investment since the enactment of the FIL in 1987, it is only since late 1993 that the Vietnamese government has begun to encourage foreign investors to use this

³⁹⁵ Ruderman, *supra* note 290 at 20. Provisions on the termination and dissolution of the enterprise must be included in the joint venture contract (*Decree 18-CP*, art. 21(5)) and in the charter of the joint venture enterprise (*Decree 18-CP*, art. 22(8)).

³⁹⁶ FIL, arts. 4(3) and 14. "An enterprise with 100 percent foreign invested capital is one which is established in Vietnam and owned by a foreign organization or individual, and which is fully responsible for its own management and business results." *Decree 18-CP*, art. 43. This type of provision is rarely found in a country's foreign investment legislation. *Vietnam - Guide de l'investissement*, *supra* note 211 at 34. "Unlike a number of countries that allow a foreign entity a maximum 49 percent equity ownership position, Vietnam permits a foreign party to own the entirety of the business it wishes to conduct in Vietnam." R.L. Wunker, "The Laws of Vietnam Affecting Foreign Investment" (1994) 28:2 Int'l Lawyer 363 at 367.

³⁹⁷ See *supra* note 346 and accompanying text.

³⁹⁸ *Vietnam - Guide de l'investissement*, *supra* note 211 at 34. See also "Investment - Opportunity's Costs", *supra* note 294 at 57 where it is reported that, so far, the majority of South Korean projects have been carried out as wholly foreign-owned enterprises.

³⁹⁹ FIL, art. 14 and *Decree 18-CP*, art. 44.

⁴⁰⁰ FIL, art. 15 and *Decree 18-CP*, art. 45. Under Vietnamese law, no corporation can be of perpetual duration. Wunker, *supra* note 396 at 367.

vehicle of investment in certain particular industries.⁴⁰¹ Thus, the great majority of oil and gas exploration projects are now carried out in the form of wholly foreign-owned enterprises.⁴⁰² However, in most other sectors of the economy, authorities still prefer to see foreigners invest in joint ventures instead of establishing their own businesses.⁴⁰³ The Vietnamese government seems to consider 100% foreign-owned enterprises as a necessary evil that must be endured in order to ensure a greater participation from foreign investors in the economic development of the country. Consequently, it remains harder to obtain approval for WFOEs⁴⁰⁴ and, in certain cases, for instance the service sector, 100% foreign-owned enterprises are simply not welcomed.⁴⁰⁵

In addition to the government's lukewarm reception for this type of investment, foreigners will also have to face more practical obstacles in the establishment of their own enterprises. For instance, not only is it extremely difficult to get access to land without the input of a local partner,⁴⁰⁶ but it is also more expensive to operate a wholly foreign-owned enterprise than it is to run a joint venture.⁴⁰⁷ Besides, foreign investors will find that,

⁴⁰¹ "Succeeding in Vietnam - Part I", *supra* note 281 at 24. Incidentally, it is due to the many disputes between joint venture partners that the government began to encourage wholly foreign-owned enterprises at that time. At first, only joint ventures enjoyed incentives. It is not before the beginning of 1991 that export-oriented WFOEs started to be permitted. In early 1992, wholly foreign-owned enterprises were also approved in such sectors as property development, high-tech and housing construction. *Ibid.*

⁴⁰² *Country Reference*, *supra* note 89 at 14. The SCCI [Ministry of Planning and Investment] will more readily approve WFOEs in provincial areas, where it is generally more difficult to attract foreign investment. Thus, provincial authorities of Dong Nai and Song Be near Ho Chi Minh City have smoothed the way for the establishment of 100% foreign-owned enterprises, with the SCCI [Ministry of Planning and Investment] condoning this practice. *Ibid.*

⁴⁰³ Hayward, *supra* note 301 at 497.

⁴⁰⁴ "A foreign party wishing to establish a FWOE [foreign wholly-owned enterprise] will need to show that the investment is in a high priority investment area, such as high technology, or that the size of the investment justifies preferential treatment. Investors who have previously made investments through joint ventures and who make commitments to train local workers will also receive favorable consideration." *Ibid.*

⁴⁰⁵ *Vietnam - Business Law Guide*, *supra* note 262 at 10,321. Hotels and fast-food restaurants are other current examples. "Succeeding in Vietnam - Part I", *supra* note 281 at 24. Moreover, on national security grounds, certain sensitive sectors, such as precious metals and gems mining and major utility systems operation are also off-limits to wholly foreign-owned enterprises. Wunker, *supra* note 396 at 367.

⁴⁰⁶ Hayward, *supra* note 301 at 500.

⁴⁰⁷ "Succeeding in Vietnam - Part I", *supra* note 281 at 25. "There is dual, and in some cases, multi-tiered pricing system in Vietnam. Foreigners are assessed higher fees for products and services." *Ibid.* For examples of the discriminatory pricing policy against foreigners in public services, see *Vietnam - Guide de l'investissement*, *supra* note 211 at 19-20.

without the help of a local partner, dealing with Vietnamese bureaucracy can turn out to be quite an endeavor.⁴⁰⁸ Our analysis of the joint venture enterprise has shown the extent of the government control involved within the organizational structure of the joint venture itself,⁴⁰⁹ in contrast to the much looser structure of the wholly foreign-owned enterprise.⁴¹⁰ The lesser control that Vietnamese authorities can exercise over WFOEs most certainly plays a part in their continuing reluctance to grant approval to this form of foreign investment. The uncertainty surrounding the future of wholly foreign-owned enterprises⁴¹¹ is also probably due to the same reason.

c) Capital of the Wholly Foreign-Owned Enterprise

Pursuant to article 47 of *Decree 18-CP*, the prescribed capital must amount to at least 30 percent of the total invested capital of the enterprise.⁴¹² As in the case of the joint venture,⁴¹³ any reduction in the prescribed capital during the term of the wholly foreign-owned enterprise is prohibited;⁴¹⁴ any increase in the prescribed capital or the invested capital of the WFOE must be approved by the SCCI [Ministry of Planning and Investment].⁴¹⁵ In addition, both article 14 of the *Foreign Investment Law* and article 47 of *Decree 18-CP* provide for the conversion of the wholly foreign-owned enterprises deemed to be operating in important economic sectors into joint ventures.⁴¹⁶ Since 1992, WFOEs also benefit from the two-year profit tax holiday and from the additional two-year profit tax break in sectors where foreign investment is particularly encouraged.⁴¹⁷

⁴⁰⁸ "Succeeding in Vietnam - Part I", *ibid.*

⁴⁰⁹ See especially "Managerial Control of the Enterprise: Imbalance in Favor of the Vietnamese Partner" on page 55, above.

⁴¹⁰ "The charter of the company determines the management structure. In this regard, a 100 percent foreign-owned enterprise is subject to fewer explicit requirements than is a joint venture." "Succeeding in Vietnam - Part I", *supra* note 281 at 24.

⁴¹¹ *Ibid.* at 25.

⁴¹² Exceptionally, the SCCI [Ministry of Planning and Investment] can approve a prescribed capital contribution of less than 30%. *Decree 18-CP*, art. 47.

⁴¹³ *Ibid.*, art. 29.

⁴¹⁴ *Ibid.*, art. 47.

⁴¹⁵ *Ibid.*

⁴¹⁶ See also article 5.2 of *Circular 215/UB-LXT*. The conversion of wholly foreign-owned enterprises into joint ventures will be examined in greater details in the section on investment protection of Chapter III, on page 121, below.

⁴¹⁷ FIL, art. 27. Prior to the 1992 Amendments, only joint ventures were granted, under certain conditions, tax holidays and tax breaks.

B.- Other Ways of Doing Business in Vietnam

In addition to the three forms of investment pursuant to the *Foreign Investment Law*, there are other ways foreign investors can enter the Vietnamese market, depending on the objectives they seek to attain. Thus, licensing and technology transfer agreements offer alternatives to the establishment of a full-fledged business.⁴¹⁸ For their part, foreign contractors interested in a specific project in Vietnam can apply for a Construction Contractor's License with the Ministry of Construction.⁴¹⁹ In the second part of this chapter, we will examine three of these other approaches to doing business in Vietnam, namely BOT contracts, representative offices and branches.

1.- Build-Operate-Transfer (BOT) Contracts

a) A Means of Fostering Infrastructure Development

The BOT contract was first introduced with the *1992 Amendments* to the *Foreign Investment Law*.⁴²⁰ A BOT contract is an agreement between a foreign enterprise or individual and an authorized Vietnamese government body for the construction and management of an infrastructure project for a fixed term.⁴²¹ The purpose of BOT

⁴¹⁸ Intellectual property, technology transfer and licensing agreements are regulated through various pieces of legislation in Vietnam. For an overview of the applicable regime, see M.J. Hagan, M.A. Pocklinghorne & D.L. Weller, "Technology Transfer and Licensing: Ensuring Maximum Protection Under Vietnam's Current Laws" (July 15, 1995) E. Asian Exec. Rep. 7. See also Baker & McKenzie, *Intellectual Property Guide - Vietnam* (Hong Kong: Baker & McKenzie, 1995).

⁴¹⁹ Hayward, *supra* note 301 at 499.

⁴²⁰ FIL, arts. 2(16) and 19(b). One of Vietnam's neighbors, the Philippines, has also turned to BOT projects to upgrade its infrastructure. Institutionalized under the Philippine Infrastructure Privatization Programme, the BOT scheme has been very successful in that country. See R. Tiglao, "Infrastructure - The BOT Solution" (June 13, 1996) Far E. Econ. Rev. 44.

⁴²¹ FIL, art. 2(16) and *Regulations on Investments in the Form of Build-Operate-Transfer Contracts issued with Government Decree 87-CP, dated 23 November 1993*, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at I-291, art. 1(4) [hereinafter *Regulations on BOT Contracts*]. It should be noted that BOT projects are not the preserve of foreign investors: article I(1) of *Circular 333/UB-LXT guiding the Implementation of the Regulations on Investments in the Form of Build-Operate-Transfer Contracts*, dated 28 February 1994, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at I-301 [hereinafter *Circular 333/UB-LXT*] stipulates that a BOT investor can also be a Vietnamese business enterprise, in which case separate provisions will apply. Incidentally, regulations applicable to Vietnamese investors in BOT projects, the *Regulations on the Participation of Domestic Investors in Build-Operate-Transfer Projects*, were expected to be issued by the government at the end of 1996. Baker & McKenzie, "Vietnam - Domestic Investment" (1996) 5:1 Indochina Law Quarterly 34.

contracts is to facilitate the undertaking of large-scale construction projects and thus provide Vietnam with the infrastructure it badly needs in order to attract more and more investment in other sectors of its economy. The projects to be carried out under BOT contracts are infrastructure projects such as the building of bridges, roads, airports, and power plants.⁴²² Obviously, the most important characteristic of the BOT contract is that at the end of a certain term, calculated so as to allow the parties to make a "reasonable profit" on their investment through the charging of tolls and fees,⁴²³ the project is to be turned over to the Vietnamese government without further compensation to the foreign investor.⁴²⁴ However, in view of the fact that infrastructure development is key to insuring the country's economic recovery, it would certainly be in Vietnam's best interests to be more specific on the kind of return foreign investors can expect to make on their investments, a "reasonable profit" assurance being clearly too vague.

⁴²² *Decree 18-CP*, art. 55. "Since financing is obtained by the investors largely from private sources, BOTs are, for a government, an obvious alternative to increasing its borrowings." J.S. Finch & S.E. Vecchi, "BOT Contracts in Vietnam: Regulations and Guidance" (March 15, 1995) E. Asian Exec. Rep. 6 [hereinafter "BOT Contracts in Vietnam"]. Funding for these infrastructure projects can also be obtained through international aid agencies. Robinson, *supra* note 296 at 65. It has been reported that Vietnam is presently anxious to attract BOT investment in three power plants in Phu My in the south and in Quang Ninh in the north. *Country Report 4th quarter 1995*, *supra* note 73 at 22. For a discussion focusing specifically on power projects, see S.W. Stein, "Construction Financing for BOT Projects in Vietnam - Developing a Bankable Infrastructure Project" (August 15, 1995) E. Asian Exec. Rep. 7 and E. Thornton, "Power Hungry - Vietnam needs more electricity to push it to 2010" (October 12, 1995) Far E. Econ. Rev. 147. Vietnam has reportedly concluded its first BOT power contract with an American company, Oxbow International Power. Construction of a \$300 million plant in the Quang Ninh province is expected to be completed by 1999. Under the terms of the agreement, the power station will revert to the Vietnamese government twenty years later in 2019. *Country Report - Vietnam: 3rd quarter 1996* (London: The Economist Intelligence Unit, 1996) at 23 [hereinafter *Country Report 3rd quarter 1996*].

⁴²³ *Regulations on BOT Contracts*, art. 9.

⁴²⁴ FIL, art. 2(16). "The investors will be responsible for organizing the construction of the project and managing it for a period of time of sufficient length to recover their invested capital plus a reasonable profit, after which they must transfer the project to the Government of Vietnam without any compensation." *Decree 18-CP*, art. 55. See also article 13 of *Regulations on BOT Contracts* which specifies that, in any case, the period of operation of the BOT project must not exceed the maximum duration of foreign owned-enterprises as stipulated in article 15 of the FIL, i.e. fifty years with possible extension to a maximum of seventy years. A parallel can be drawn between the BOT contract and the right of emphyteusis found in civil law jurisdictions and defined as follows in article 1195 of the Québec Civil Code: "Emphyteusis is the right which, for a certain time, grants a person the full benefit and enjoyment of an immovable owned by another provided he does not endanger its existence and undertakes to make constructions, works or plantations thereon that durably increase its value. Emphyteusis is established by contract or by will."

The first BOT contract in Vietnam was approved in March 1995.⁴²⁵ Binh An Water Corporation Ltd. is a venture between two Malaysian investors and Ho Chi Minh City for the construction and the operation of a water supply system over a period of twenty years, at which time the plant will be transferred to the Ho Chi Minh City People's Committee for \$1.⁴²⁶ Although this is the only BOT project licensed so far, negotiations for nearly twenty more projects are currently under way.⁴²⁷ Some of the problems cited to be affecting BOT projects at this point include the lack of coordination between central and local governments (well illustrated by the case of the Binh An Water Corp., still waiting for land-use approval and its construction permit from local authorities), Vietnam's changing pricing policies which render feasibility studies unreliable, and the difficulty to obtain project financing.⁴²⁸

Despite being frequently referred to as the fourth form of foreign investment in Vietnam, the Build-Operate-Transfer contract is not *per se* a vehicle of investment,⁴²⁹ but more precisely an improved version of the already existing forms of investment.⁴³⁰ In order to undertake a BOT project, the investor must first establish a BOT company⁴³¹ which is a

⁴²⁵ N.N. Chinh, "BOT investment slow to take off" *Vietnam Investment Review* (29 April - 5 May 1996) 26.

⁴²⁶ *Ibid.* Chinh notes, however, that the \$30 million project has yet to receive land-use approval and its construction permit.

⁴²⁷ *Vietnam - Business Law Guide*, *supra* note 262 at 10,322. "Why then, has this interest in Vietnam not, as yet, translated into a large number of signed contracts for major projects? There are clearly legal difficulties in Vietnam but the fundamental problem is the poverty of the country combined with the understandable desire of so many investors to do the second big project in any new environment. It is doubtful that the country is yet wealthy enough to generate the sort of levels of economic activity necessary to render domestic projects profitable." I. Arstall & D. Platt, "Project Finance" in *An Investor's Guide to Vietnam*, *supra* note 262, 27 at 28.

⁴²⁸ Chinh, *supra* note 425.

⁴²⁹ Restating that there are only three forms of foreign investment in Vietnam, Mr. Tran Hao Hung of the Investment Legislation and Promotion Department of the MPI referred to the BOT contract as "another method to attract foreign investment". Interview with Mr. Hung in Hanoi on July 1st, 1996. The reader will also note that BOT contracts are not listed with the three other forms of investment in article 4 of the FIL, but are provided for separately in article 19(b). Incidentally, this is also the case under the new FIL: pursuant to its article 4, there will still only be three forms of investment.

⁴³⁰ Notice that the 1996 FIL provides, in addition to the BOT contract, for the Build-Transfer-Operate (BTO) contract (art. 2(12)) and the Build-Transfer (BT) contract (art. 2(13)). 1996 FIL, art. 19.

⁴³¹ *Circular 333/UB-LXT*, art. I(2).

company with foreign-owned capital,⁴³² *i.e.* a joint venture or a wholly foreign-owned enterprise,⁴³³ benefiting from special incentives.⁴³⁴ The BOT project itself may adopt either one of the three forms of investment, to wit the business cooperation contract, the joint venture or the wholly foreign-owned enterprise.⁴³⁵ As in the case of the joint venture⁴³⁶ and the wholly foreign-owned enterprise,⁴³⁷ the parties to a BOT contract must apply to the SCCI [Ministry of Planning and Investment] for an investment license,⁴³⁸ which shall be issued after the project receives approval from the Prime Minister.⁴³⁹

b) The Authorized State Body

Implementation of the BOT project is conducted in accordance with the BOT contract concluded between the investor and the authorized state body.⁴⁴⁰ Pursuant to article I(6) of *Circular 333/UB-LXT*, the state bodies competent to enter into BOT contracts with BOT companies are the various ministries, departments and provincial or municipal People's Committees. Projects awarded under BOT contracts are drawn from a list established by the ministries and other agencies of the government and the People's Committees together with the SCCI [Ministry of Planning and Investment].⁴⁴¹ As a party to the BOT contract, the authorized state agency is responsible for its performance⁴⁴² and

⁴³² *Regulations on BOT Contracts*, art. 1(2). As noted, *supra* note 421, a BOT investor can also be a Vietnamese business enterprise.

⁴³³ FIL, art. 2(13).

⁴³⁴ Pursuant to article 2 of the *Regulations on BOT Contracts*, the Vietnamese government is to create favorable conditions and simplify procedures for BOT projects. Chapter II of the *Regulations on BOT Contracts* provides for preferential treatment and investment guarantees granted to BOT companies and their foreign contractors.

⁴³⁵ *Vietnam - Business Law Guide*, *supra* note 262 at 10,322. BCCs are particularly well suited for the large-scale projects undertaken through BOTs. See *supra* note 275 and accompanying text.

⁴³⁶ *Decree 18-CP*, art. 24.

⁴³⁷ *Ibid.*, art. 49.

⁴³⁸ *Ibid.*, art. 57. In the case of the business cooperation contract, the parties apply for a business license. *Ibid.*, art. 9.

⁴³⁹ *Regulations on BOT Contracts*, art. 16 and *Regulations 191-CP* (see *infra* note 588 and accompanying text), art. 6(1). The SCCI [Ministry of Planning and Investment] consults with the relevant ministries and submits its recommendation to the Prime Minister who gives the final approval to the project. *Regulations 191-CP*, art. 7.

⁴⁴⁰ *Regulations on BOT Contracts*, art. 1(4).

⁴⁴¹ *Ibid.*, art. 11(1). "On the basis of proposals of foreign investors, certain BOT projects which are not listed above may be approved by the government." *Ibid.*

⁴⁴² *Ibid.*, art. 1(3).

the supervision and inspection of the project implementation.⁴⁴³ The competent state body plays indeed an important role in the completion of the BOT project. Among others, it determines the methods of implementation of the project, prepares the feasibility study in conjunction with other state bodies, participates in the selection of the contractor and negotiates and signs the BOT contract.⁴⁴⁴

c) Awarding of the BOT Contract

The *Regulations on BOT Contracts* provide for three ways whereby the government can award a BOT contract, depending on the nature and scale of the project: by tender, by a selection of contractors, or through direct negotiation.⁴⁴⁵ Once a method has been established, the SCCI [Ministry of Planning and Investment], after consultation with the relevant state bodies, decides on the form the bidding, the selection or the negotiation will take.⁴⁴⁶ The government has issued draft BOT tender regulations providing for the procedures for selecting a contractor through tender.⁴⁴⁷ Pursuant to the draft tender regulations, during the second stage of the evaluation process, the actual selection phase,⁴⁴⁸ bidders are evaluated on their quotes for construction, implementation, operation, and maintenance of the project and with regards to the tolls and fees to be charged.⁴⁴⁹ The lowest bidder that also meets the requirements of the project will be awarded the contract and will then have thirty days to negotiate and conclude a contract with the authorized state body.⁴⁵⁰

It remains to be seen whether the BOT tender regulations will address the issue of allegations of irregularities in the tender process. It is very important that all bidders be

⁴⁴³ *Circular 333/UB-LXT*, arts. I(5) and III(1).

⁴⁴⁴ *Ibid.*, art. III(1).

⁴⁴⁵ *Regulations on BOT Contracts*, art. 11(2).

⁴⁴⁶ *Ibid.*, art. 11(3).

⁴⁴⁷ "BOT Contracts in Vietnam", *supra* note 422 at 25. The draft regulations provide for the documents to be submitted by contractors, the contents of the tender invitation package, the conditions to be met to qualify for the tender process, and the evaluation standards applied to contractors and projects. *Ibid.*

⁴⁴⁸ *Ibid.* at 26. During the preliminary phase of the evaluation process, both the credentials of the contractors and their feasibility studies are reviewed. *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

treated equally and that complaints be dealt with in a fair and equitable manner. Due to the substantial amounts at stake,⁴⁵¹ tender processes traditionally give rise to complaints from the part of rejected bidders. In order to attract reputable investors able to provide quality infrastructure development, Vietnam will have to make sure that its tender process remains free from corruption and that complaints are dealt with as fairly as possible for all bidders. At any rate, article 11(2) of the *Regulations on BOT Contracts* allows the authorities the freedom to choose the method of selecting the contractor for a given project.⁴⁵² Therefore, since the Vietnamese government already has the opportunity of selecting a contractor outside the bidding process, it is hoped that every effort will be made to ensure the regularity of the procedures when the selection is being made by tender. Otherwise, Vietnam exposes itself to the risk of being shunned by foreign investors, a price it cannot afford to pay, at least for the moment.

d) Incentives and Guarantees for the Foreign Investor

The incentive package offered to the parties to a BOT contract is in fact what differentiates it from the other forms of foreign investment in Vietnam.⁴⁵³ Thus, the BOT

⁴⁵¹ The preparation of a bid is a very time-consuming and costly undertaking for all applicants. Pursuant to the draft tender regulations, a letter of guarantee in the amount of one percent of the value of the project (to be kept as a deposit if the bidder is successful), a feasibility study and a non-refundable evaluation fee of \$10,000 must be submitted with the bidder's application. *Ibid.* at 25. It is estimated that, depending on the project, the feasibility study with proper review of all the legal, environmental and financial issues costs at least \$5 million. This money has to be spent before the foreign investor even knows whether he will be awarded the BOT contract, hence the importance for prospective investors to have confidence in the selection process. "In order for foreign investors to be prepared to spend this type of money, they need a degree of certainty and a certain amount of transparency so that they can ascertain how their project will be evaluated against other options and other potential investors' projects." *Vietnam - Business Law Guide*, *supra* note 262 at 10,324.

⁴⁵² "According to the US&FCS [U.S. and Foreign Commercial Service], open international bidding will likely be used rarely, perhaps only when several companies deliver proposals on the same project. If only one or a few proposals are received for a given project, it seems likely that a sole-source contract would be negotiated." "Doing Business in Vietnam: Best Projects, Major Projects" (November 15, 1994) E. Asian Exec. Rep. 6 at 15.

⁴⁵³ *Vietnam - Business Law Guide*, *supra* note 262 at 10,421. SCCI officials have reportedly admitted that despite the significant advantages offered to BOT companies in Vietnam, Pakistan and the Philippines both grant BOT projects better terms. *Country Report 4th quarter 1995*, *supra* note 73 at 22. As stated (*supra* note 420), the Philippines' BOT scheme is indeed very successful. See also Dow Jones Service, "Hydro-Québec in no rush for investment in Vietnam" *The [Toronto] Globe and Mail* (3 April 1996) B8 where Mr. Michel Therrien, chief executive of Hydro-Québec International Inc., points out that investment conditions in Vietnam are less attractive than in India, Pakistan, Indonesia, Malaysia and the Philippines.

company is subject to a ten percent profits tax,⁴⁵⁴ compared to the standard twenty-five percent rate⁴⁵⁵ and enjoys a profits tax holiday of four years commencing the first year the company earns profits, followed by a fifty percent profits tax reduction during the next four years.⁴⁵⁶ The BOT company and its foreign ancillary contractors⁴⁵⁷ are exempted from import duties on equipment and materials used in the BOT project.⁴⁵⁸ Furthermore, the government guarantees that the revenues earned during the operation of the BOT project can be converted into foreign currencies for certain purposes.⁴⁵⁹ Pursuant to article 7 of the *Regulations on BOT Contracts*, BOT companies will receive preferential treatment with respect to the right to use land and other public facilities and are exempted from paying rent for the land.

e) Mortgaging of Assets and Rights

In order to facilitate the financing of BOT projects, article 6 of the *Regulations on BOT Contracts* allows the BOT company, with permission from the state body party to the BOT contract, to mortgage certain of its assets and rights. There is, however, a couple of restriction: firstly, under current regulations, the mortgage can only be granted in favor

⁴⁵⁴ *Regulations on BOT Contracts*, art. 3(1). See also *Circular 333/UB-LXT*, art. II(1).

⁴⁵⁵ *Decree 18-CP*, art. 66.

⁴⁵⁶ *Regulations on BOT Contracts*, art. 3(1). The withholding tax for profits transferred abroad is at a rate of five percent. *Ibid.* The standard withholding tax due by foreign economic organizations or individuals is at a rate of 10%. *Decree 18-CP*, art. 70. Furthermore, the BOT company enjoys "the most preferential turnover tax rate and/or possible exemption from or reduction of turnover tax depending on each specific project and as decided by the Prime Minister of the Government." *Regulations on BOT Contracts*, art. 3(1).

⁴⁵⁷ "Ancillary contractors means any foreign or Vietnamese contractor who enters into an ancillary contract with a BOT company to construct, supply, use, finance, insure, advise, or invest for the purpose of carrying out a BOT project." *Regulations on BOT Contracts*, art. 1(6).

⁴⁵⁸ *Ibid.*, art. 3(3).

⁴⁵⁹ *Ibid.*, art. 5. Conversion into foreign currencies is guaranteed for the purposes of reimbursing a loan (capital and interests), paying expenditures requiring hard currency and paying foreign investors their share of profits transferred abroad. *Ibid.* Some foreign investors have nonetheless expressed reservations about this guarantee in the eventuality of a change in Vietnam's overall balance of payments. Chinh, *supra* note 425. "The lender is concerned not only that there is adequate cash flow from the project to cover debt service, but also that the cash flow is in the currency of the loan, or easily and promptly convertible into the currency of the loan at exchange rates that will not destroy the economic viability of the project. This is perhaps one of the most critical issues in structuring the financing package for infrastructure projects in developing countries." Stein, *supra* note 422 at 22.

of a Vietnamese bank;⁴⁶⁰ secondly, the mortgaged assets and rights must continue to be used in the implementation of the project in the event that a lender realizes its security.⁴⁶¹ From the point of view of the lender, this limitation on the use of the mortgaged assets and rights certainly renders the security less attractive.⁴⁶² Due to the utmost importance of infrastructure development for the success of its economic recovery, Vietnam understandably wants to make sure that BOT projects will be carried out in spite of the default of BOT companies. However, the danger is that with such restrictions attached to the securing of assets, financial institutions will not lend the funds necessary to get the projects off the ground. For without clear and enforceable guarantees, lenders (and investors, for that matter) will most likely shy away from Vietnam.⁴⁶³

f) Improvements to On-Going BOT Projects

The inherent characteristic of the BOT project, namely the fact that it is turned over to the Vietnamese government without further compensation after a certain period of time, might also actually constitute a deterrent for the BOT company to improve the agreed upon project. While the operation stage of this type of undertaking tends to bring

⁴⁶⁰ "The *Land Law* does allow for the mortgage of land use rights to 'national banks and other Vietnamese institutions'. In any event, under the *Land Law* and the *BOT Regulations*, it is possible for a BOT company to grant a mortgage over its land use right in favor of a Vietnamese bank and that bank may either issue a guarantee to the foreign lenders (backed by the security it holds) or enter into an agreement with foreign lenders pursuant to which they agree to hold the mortgage as security agent on behalf of the lenders and to enforce the same on the instructions and in the interest of foreign lenders." *Vietnam - Business Law Guide*, *supra* note 262 at 10,423.

⁴⁶¹ These assets are: factories, equipment, buildings, real estate properties and other assets owned by the BOT company, the right to use the land and other contractual rights of economic value. *Regulations on BOT Contracts*, art. 6. "Where the mortgagee cannot continue to carry out the objective of the project, the mortgaged assets shall be auctioned and the purchaser must continue to use the assets to carry out the objective of the project. In cases where the mortgagee wishes to use the mortgaged assets for other purposes, the approval of the State body authorized to enter into the contract must be obtained." *Circular 333/UB-LXT*, art. II(3.1). Similarly, if the mortgagee wishes to use the land for other purposes, it must first obtain the approval of the authorized state body party to the BOT contract. *Ibid.*, art. II(3.2).

⁴⁶² It should also be noted that wages, insurance premiums and taxes are given priority over the secured lender if the BOT company defaults on its payments or must be dissolved before the expiry of the BOT contract. *Circular 333/UB-LXT*, arts. II(3.1) and II(3.2).

⁴⁶³ Hydro-Québec points out that while it would be interested in building small power plants in Vietnam, the difficulty in obtaining debt financing makes it hard to undertake such projects. According to a senior official of the company, a BOT project is only possible if the foreign investor can afford to finance it entirely. "Builders might be comfortable with a long-term lease, but the bankers of the world won't accept that." "Hydro-Québec in no rush for investment in Vietnam", *supra* note 453.

into light the necessary adjustments that need to be performed, the motivation to upgrade the project might be lacking on the part of the foreign investor since any improvement would require additional spending that would not be covered by the BOT contract.⁴⁶⁴ As a matter of fact, not only is the BOT company denied compensation for the improvements it brings to the project, but it is also left to absorb the additional costs incurred for the upgrading which will only benefit the ultimate operator of the project, the Vietnamese government.

All in all, it may not be worthwhile for the investor to negotiate with the state body party to the BOT agreement (especially toward the end of the contract) the substantial increase in the tolls and fees that the improvements would require and to obtain the approval of the SCCI [Ministry of Planning and Investment], knowing that the project will have to be turned over to the government at some point in the future.⁴⁶⁵ The foreign investment legislation should provide for incentives whereby contractors would upgrade their original projects.⁴⁶⁶ Thus, Vietnam could fully take advantage of foreign investors' expertise in infrastructure development. For example, ways to promote the upgrading of on-going projects could include additional tax breaks and holidays, an extension in the period of operation so that the BOT company can recoup its additional spending, or even

⁴⁶⁴ The fees and tolls charged for the operation of the BOT project must be within the range stated in the BOT contract and any increase or reduction within that range must be notified to the SCCI [Ministry of Planning and Investment]. Increases that would result in higher fees and tolls than the maximum charges stipulated in the BOT contract must be approved by the SCCI [Ministry of Planning and Investment]. *Regulations on BOT Contracts*, art. 9. See also article II(4) of *Circular 333/UB-LXT*.

⁴⁶⁵ *Regulations on BOT Contracts*, art. 9 and *Circular 333/UB-LXT*, art. II(4). In addition, based on the already existing doubt surrounding the profitability of certain projects, it could also prove difficult to obtain an approval for an increase in fees and charges for the operation of a given project, however justified the increase may be. "(...) BOT financing are still limited because many large infrastructure projects are not commercially feasible. For example, it would be difficult to finance a road or bridge BOT in Vietnam because passengers cannot afford to pay substantial tolls at this point." Robinson, *supra* note 296 at 65.

⁴⁶⁶ "Suffusing the whole issue of BOT is the question which the experience of the past three years has firmly implanted in potential investors' minds, namely, whether the government really wants private infrastructure development or would prefer for mainly ideological reasons to finance projects with ODA [overseas development assistance]." *Country Report 4th quarter 1995*, *supra* note 73 at 22. See also Thornton, *supra* note 422, reporting that Vietnamese officials are increasingly cautious about granting control of infrastructure projects to foreign investors.

a financial compensation in the form of a lump sum upon transfer of the project to the government.

2.- Representative Offices

a) Applicable Legislation

Representatives offices are presently enjoying increasing popularity with foreign investors.⁴⁶⁷ Although they are not actually regarded as an investment in Vietnam, they nonetheless constitute a quick and efficient way of establishing a presence in the country.⁴⁶⁸ Representative offices are governed by the following pieces of legislation: *Decree 82-CP on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, issued by the Government on August 2, 1994⁴⁶⁹ and its regulations;⁴⁷⁰ *Decree 179-CP on Revisions of and Supplement to the Regulations on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, issued by the Government on November 2, 1994;⁴⁷¹ and *Circular 03/TM-PC on the Regulations on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, issued by the Ministry of Trade on February 10, 1995.⁴⁷² The Ministry of Trade, not the Ministry of Planning and Investment, is

⁴⁶⁷ F. Burke & F. Meier, "Representative Offices: Rules and Regulations" (February 15, 1995) E. Asian Exec. Rep. 20. The article reports that while there are more than 1,000 representative offices registered in Ho Chi Minh City, many others are operating without a license. *Ibid.*

⁴⁶⁸ *Doing Business in Vietnam*, *supra* note 251 at 24.

⁴⁶⁹ Reprinted in *Latest Regulations (1995) on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam* (Ho Chi Minh City: Saigon Times Group, 1995) [hereinafter *Decree 82-CP*]. This decree replaces *Decree 382-HDBT on Representative Offices* of the Council of Ministers dated November 5, 1990. *Decree 82-CP*, art. 2.

⁴⁷⁰ *Regulations on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam* issued and attached to *Decree 82-CP* dated 2 August 1994, reprinted in *Latest Regulations (1995) on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, *ibid.* [hereinafter *Regulations 82-CP*]. These regulations replace the regulations enacted under *Decree 382-HDBT. Regulations 82-CP*, art. 23.

⁴⁷¹ Reprinted in *Latest Regulations (1995) on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, *ibid.* [hereinafter *Decree 179-CP*].

⁴⁷² Reprinted in *Latest Regulations (1995) on the Opening and Operations of Foreign Economic Organizations' Representative Offices in Vietnam*, *ibid.* [hereinafter *Circular 03/TM-PC*]. This circular replaces *Circular 04/TN-PC on Representative Offices* issued by the Ministry of Trade on May 6, 1991. *Circular 03/TM-PC*, art. VIII.

responsible for granting foreign economic organizations licenses to operate representative offices.⁴⁷³

b) Establishment of a Representative Office

Article 2 of *Regulations 82-CP* stipulates the three requirements that a foreign organization must meet in order to open a representative office in Vietnam.⁴⁷⁴ Firstly, the applicant organization must be legally established in its country of origin; secondly, it must have been in business for a minimum of five years;⁴⁷⁵ and finally, its investment project must be of interest to Vietnamese parties and foster the development of Vietnam's economy.⁴⁷⁶ Applications for a license to open a representative office must be submitted to the Ministry of Trade,⁴⁷⁷ except in the case of credit and banking institutions whose

⁴⁷³ *Regulations 82-CP*, art. 4 and *Circular 03/TM-PC*, art. I(2). Note that foreign banks and credit institutions' licenses to operate representative offices are granted by the State Bank of Vietnam and not the Ministry of Trade. *Ibid.* The Ministry of Justice, which has jurisdiction over foreign law firms, has instructed the Ministry of Trade in January 1995 to hold off the issuance of representative office licenses to foreign lawyers. Succeeding in Vietnam - Part I", *supra* note 281 at 22. Thus, a decree [*Decree No. 42-CP on the 8th of July 1995 of the Government promulgating the Regulation on Legal Consultancy of Foreign Lawyers' Organizations in Vietnam*, reprinted in *Official Gazette* no. 19 (15-10-1995) at 30, hereinafter *Decree 42-CP*] forcing law firms to turn their representative offices into branches was passed later in 1995. The types of services foreign attorneys can provide in Vietnam was also significantly restricted (see *infra* note 850 and accompanying text). The Ministry of Justice has since issued a circular [*Circular No. 791/TT/LS-TVPL on the 8th of September 1995 guiding the Implementation of the Regulation on Legal Consultancy of Foreign Lawyers' Organizations in Vietnam*, reprinted in "New Legislation" (September 1995) *Vietnam Law & Legal Forum* 6, hereinafter *Circular 791*], confirming the spirit of *Decree 42-CP*, to the great dismay of foreign lawyers. *Circular 791* made it indeed compulsory for foreign firms to either apply for a branch license by January 1996 or leave the country [article 8], and limits them to advising on foreign and international law matters only [article 6.1]. All questions relating to Vietnamese law must now be handled by local firms which are prohibited from hiring foreign lawyers. A. Schwarz, "Laying Down the Law - Government restricts work of foreign attorneys" (November 9, 1995) *Far E. Econ. Rev.* 34 [hereinafter "Laying Down the Law"]. By around mid-year 1996, the Ministry of Justice had granted twenty-two branch licenses to foreign law firms. I.J. Robinson, "Vietnam Should Encourage, Not Restrict, Foreign Lawyers" (August 1996) 4:4 *The Vietnam Business Journal* 18 [hereinafter "Vietnam Should Encourage, Not Restrict, Foreign Lawyers"].

⁴⁷⁴ See also *Circular 03/TM-PC*, art. II.

⁴⁷⁵ Note, however, that this requirement can be waived in the case of foreign organizations wishing to implement projects estimated at \$10 million or more, or projects generating exports from Vietnam. Moreover, applications for these projects may even receive special consideration for approval. *Regulations 82-CP*, art. 2 and *Circular 03/TM-PC*, art. II(2). In addition, applications of foreign organizations established for five years or more and setting up new companies to deal with Vietnam can also be approved in priority. *Circular 03/TM-PC*, art. II(2).

⁴⁷⁶ Specifically, article II(1) of *Circular 03/TM-PC* states that such a project can consist in: an investment project already licensed in Vietnam; transfer of technology and know-how; and a contract for the import of goods produced in Vietnam, particularly goods targeted for export by Vietnamese authorities.

⁴⁷⁷ *Regulations 82-CP*, art. 4 and *Circular 03/TM-PC*, art. I(2).

applications must be approved by the State Bank of Vietnam.⁴⁷⁸ A license is issued for three years and can be renewed for additional three-year periods.⁴⁷⁹

Once the license has been granted, the successful applicant must pay a fee set by the Ministry of Finance.⁴⁸⁰ Within ninety days of the issuance of its license for opening a representative office, the foreign economic organization must register its operations with the People's Committee of the province or the city where its office is located.⁴⁸¹ In addition to the general registration requirements, local regulations may also provide for specific documents to be submitted⁴⁸² and special procedures to be followed. For instance, under *Decision 752/UB-QD*, foreign economic organizations wishing to open a representative office in Ho Chi Minh City must register with the HCMC Department of

⁴⁷⁸ *Ibid.* Pursuant to article 12 of *Circular 215-UB/LXT*, foreign-owned enterprises and parties to a business cooperation contract (whether or not their investment or business license has already been issued) wishing to also open a representative office (or a branch) should submit their application to the SCCI [Ministry of Planning and Investment], and not to the Ministry of Trade, as is the case with foreign economic organizations with no presence in Vietnam.

⁴⁷⁹ *Regulations 82-CP*, art. 7. The three-year period is calculated from the date of issuance of the license. An application for renewal must be sent thirty days prior to the expiry of the license to the Ministry of Trade. *Circular 03/TM-PC*, art. VI(2).

⁴⁸⁰ *Circular 03/TM-PC*, art. IV(1). The fee is currently \$5,000. "Succeeding in Vietnam - Part I", *supra* note 281 at 22.

⁴⁸¹ *Regulations 82-CP*, art. 8 and *Circular 03/TM-PC*, art. V(1). In the case of a license renewal, the registration with the People's Committee must be completed within fifteen days from the date of the renewal of the license by the Ministry of Trade. *Circular 03/TM-PC*, *ibid.* The documents to be submitted to the People's Committee include the following: the registration application on the prescribed form; a copy of any lease agreement entered into by the representative office; the employment contracts of the Vietnamese personnel; a letter appointing the director of the office to act on behalf of the foreign organization; and the *curricula vitae* of the office director and his employees (both foreign and Vietnamese). *Circular 03/TM-PC*, *ibid.*

⁴⁸² See *Vietnam - Business Law Guide*, *supra* note 262 at 20,322-20,324 for the registration documents required by Ho Chi Minh City and Hanoi authorities. Along with the documents listed in article V(1) of *Circular 03/TM-PC*, both cities require the following documentation to be submitted: three copies of a completed registration form; a copy of the license issued by the Ministry of Trade; a power of attorney; evidence that the registrant has an account with a Vietnamese bank; a list of all imported equipment and supply; and a sample of the chop, together with the permit to have it made, and the authorized signature for the office. In Ho Chi Minh City, the official seal of the representative office must be registered with the Police Department before registration of the representative office can be completed; in Hanoi, this can be done at any time. *Ibid.* at 20,323. For a discussion of the origin and the use of the seal in Vietnam, see S.E. Vecchi & N.V. Lan, "The Seal or Chop: Its Use And Significance in Vietnam" (June 15, 1995) E. Asian Exec. Rep. 6.

Trade which has the power to review the applications and to make recommendations to the Ministry of Trade.⁴⁸³

c) Authorized Activities

Representative offices are not authorized to carry on business activities, to provide services or to earn money in Vietnam.⁴⁸⁴ They are, however, permitted to conduct research for projects and programs of economic, scientific, and technological cooperation in Vietnam's interests and to promote and oversee the implementation of economic, commercial, and scientific-technological contracts signed with local businesses pursuant to Vietnamese law.⁴⁸⁵ Representative offices allow foreign investors to get a foothold in the Vietnamese market by establishing contacts with government agencies and potential trading partners and by investigating business opportunities. Operations carried out by a representative office must always remain within the scope of activities stipulated in its

⁴⁸³ In Ho Chi Minh City, representative offices are governed by *Decision 752/UB-QD Promulgating the Regulations Concerning the Operation of Resident Offices of Foreign Economic Organisations in Ho Chi Minh City*, issued by the People's Committee of Ho Chi Minh City on 21 December, 1991 [hereinafter *Decision 752/UB-QD*]. *Vietnam - Business Law Guide*, *ibid.* at 20,623. The Department of Trade of Ho Chi Minh City is responsible for reviewing application documents, overseeing the activities of representative offices and conducting periodical inspections to ensure compliance with applicable laws and regulations. *Ibid.*

⁴⁸⁴ *Regulations 82-CP*, art. 3. However, there seems to be a confusion in the legislation as to whether this restriction also applies to representative offices of foreign-owned enterprises and parties to a business cooperation contract. Thus, article 12.1 of *Circular 215-UB/LXT* refers to "representative or branch offices for the purposes of conducting business activities" (our emphasis) of foreign investment projects already licensed in Vietnam. For its part, article 12.2 of *Circular 215-UB/LXT* avoids the contradiction with article 3 of *Regulations 82-CP* (which categorically states that "representative offices are not authorized to directly do business, provide services or collect money in Vietnam in any form"). It reads as follows: "In cases where an investment license has already been issued, an enterprise which, *due to business requirements*, wishes to open a representative or branch office (...)" We underline. We have discussed this matter with Mr. Tran Hao Hung of the Foreign Investment Legislation & Promotion Department of the MPI. According to him, there has been a mistake in the wording of article 12.1: the passage "for the purposes of conducting business activities" should be deleted from the article. Interview with Mr. Hung, *supra* note 429. Article IV(2) of *Circular 03/TM-PC* also stipulates that representative offices are not allowed to sublease offices and accommodation or to represent other companies in Vietnam. Representative offices of foreign banks are only allowed to collect data and give information on their offshore services. They are not to provide any banking services in Vietnam. "Vietnam's Banking System" (November 15, 1994) E. Asian Exec. Rep. 16.

⁴⁸⁵ *Regulations 82-CP*, art. 3. Note that a representative office is not permitted to sign economic or commercial contracts with Vietnamese businesses unless it has power of attorney to enter into such contracts from the owner or the executive directors of its parent organization. *Ibid.*

license.⁴⁸⁶ Thus, representative offices' compliance with the terms of their licenses and Vietnamese laws is ensured through periodical and unannounced inspections of their operations.⁴⁸⁷ Furthermore, representative offices must send a report of their activities every six months to the Ministry of Trade and the People's Committee of their location.⁴⁸⁸ *Regulations 82-CP* provide for the various penalties and fines applicable in the cases of representative offices operating illegally.⁴⁸⁹

3.- Branches

The *Foreign Investment Law* itself does not provide for the establishment of branches of foreign companies in Vietnam.⁴⁹⁰ Nevertheless, certain foreign organizations are currently allowed to open up branches in Vietnam. Thus, foreign banks may establish branches in the country pursuant to the *Regulations on Foreign Bank Branches and Joint Venture Banks Operating in Vietnam*.⁴⁹¹ As is the case for representative offices, it is the State Bank of Vietnam which is in charge of reviewing applications to establish branches

⁴⁸⁶ *Regulations 82-CP*, art. 13. Note that a representative office can submit a proposal to modify the scope of activities stated in its license. *Circular 03/TM-PC*, art. VI(3.a).

⁴⁸⁷ *Regulations 82-CP*, art. 21(1) and *Circular 03/TM-PC*, art. VII(1). These inspections are organized and coordinated by the Ministry of Trade in conjunction with the competent authorities. While periodical inspections are conducted annually, unannounced inspections are carried out on a discretionary basis. *Ibid.* According to Mr. Dinh Van Hoi of the Department for Europe, America and International Organizations of the Ministry of Trade, inspections of representative offices are carried out mostly following complaints. An *ad hoc* committee will be set up to investigate the situation and to determine whether a fine should be handed out. Interview with Mr. Hoi in Hanoi, on July 17, 1996.

⁴⁸⁸ *Regulations 82-CP*, art. 17 and *Circular 03/TM-PC*, art. VII(2). Whenever necessary, the Ministry of Trade or the local People's Committees can also require representative offices to send documents and additional reports on their operations besides the semi-annual reports. *Ibid.*

⁴⁸⁹ The fines range from \$2,000 to \$50,000; serious violations will be prosecuted before a court of law. *Regulations 82-CP*, arts. 19 and 20. For instance, article 19 stipulates that a representative office operating without a license will be closed down and will be fined \$50,000. Pursuant to article 20, a representative office conducting activities outside the scope of operations stated in its investment license will be closed temporarily and fined \$10,000 and it will also have to pay all taxes in accordance with Vietnamese law; in the event of a second violation, it will be closed down and fined \$20,000.

⁴⁹⁰ Note, however, that article 12 of *Circular 215/UB-LXT* provides for the application to open up a branch in the case of enterprises with foreign-owned capital and parties to a business cooperation contract (see also *supra* note 478 on the representative offices of enterprises with foreign-owned capital and parties to a BCC in Vietnam). The application can either be submitted at the time of application for the investment [business] license or after the license has been issued by the SCCI [Ministry of Planning and Investment]. *Ibid.*

⁴⁹¹ Issued with *Decree 189-HDBT of the Council of Ministers*, dated 15 June 1991, reprinted in *Legal Writings on Foreign Investment in Vietnam* (Hanoi: Office of the State Committee for Cooperation and Investment, 1992) at 315 [hereinafter *Regulations on Foreign Bank Branches*].

of foreign banks.⁴⁹² In addition, three foreign tobacco companies have been allowed to set up branches in Vietnam on a trial basis.⁴⁹³ Finally, as noted, foreign law firms in Vietnam now conduct their activities through branches.⁴⁹⁴ The main differences between representative offices and branches are that only the latter are juridical entities⁴⁹⁵ and may earn money from their activities in Vietnam.⁴⁹⁶

Draft regulations issued by the Ministry of Trade, the *Draft Regulations on the Establishment and Operation of Branches of Foreign Companies in Vietnam*, make it possible for certain classes of foreign companies to open branches in Vietnam.⁴⁹⁷ Pursuant to the draft regulations, only companies manufacturing goods through a BCC or a joint venture, export-oriented companies that do not import goods into Vietnam, service providers such as airlines, banks, legal consultants and insurance companies, and companies trading goods essential to the development of the country's economy and trade will be allowed to set up branches in Vietnam.⁴⁹⁸ Furthermore, these companies must satisfy three conditions under the draft regulations: firstly, they must have been in operation for at least five years; secondly, branches must conduct their activities in accordance with Vietnamese laws and the goods or services provided must be essential to

⁴⁹² *Regulations on Foreign Bank Branches*, art. 2. The minimum operating capital of a foreign bank branch is \$15 million (for joint venture banks, it is \$10 million). *Ibid.*, art. 4.

⁴⁹³ The Ministry of Trade has allowed British American Tobacco, maker of the 555 cigarettes, Philip Morris, maker of the Marlboro cigarettes, and Rothmans of Pall Mall, maker of the Dunhill cigarettes to set up branches in Vietnam in order to counter cigarette smuggling into Vietnam and as a means of increasing state revenues through taxation. Interview with Dr. Tri, Director General of the Legal Department of the Ministry of Trade in Hanoi, on July 17, 1996. Unfortunately, according to Dr. Tri, the first objective has not been attained as cigarette smuggling into Vietnam is still very much prevalent. See also D. Hung, "Tobacco barons battling for reluctant Vietnamese smokers" *Vietnam Investment Review* (8-14 July 1996) 12, actually reporting an increase in smuggling as well as disappointing sale results in Vietnam for the three foreign companies.

⁴⁹⁴ See *supra* note 473.

⁴⁹⁵ Interview with Mr. Trinh Dinh Ban, Director of VietLaw, Lawyers and Investment Consultants, in Ho Chi Minh City on July 23, 1996. "(...) One of more branches of a foreign bank operating in Vietnam shall constitute a legal entity." *Regulations on Foreign Bank Branches*, art. 3(1).

⁴⁹⁶ See *supra* note 484 and accompanying text. See also articles 13 to 16 of the *Regulations on Foreign Bank Branches* for the activities foreign bank branches are permitted to conduct in Vietnam.

⁴⁹⁷ *Vietnam - Business Law Guide*, *supra* note 262 at 10,521. Note, however, that if the draft *Commercial Law* is adopted by the National Assembly in its actual form, separate regulations on branches will no longer be necessary as the new law will contain provisions on both representative offices and branches. Interview with Dr. Tri, *supra* note 493.

⁴⁹⁸ *Vietnam - Business Law Guide*, *ibid.* at 10,522.

the development of Vietnam's economy; and, finally, branches must have a capital of at least \$600,000.⁴⁹⁹ The right for branches to earn money is clearly stipulated in the draft regulations.⁵⁰⁰

C.- Special Investment Areas

We complete our study of Vietnam's foreign investment framework with a review, in the last part of this chapter, of its special investment zones as they offer yet particular incentives to foreign investors. These special areas were first set up in Vietnam in 1991 with the establishment of export processing zones (EPZs)⁵⁰¹ and more recently, in 1995, with the creation of industrial zones (IZs).⁵⁰² The objective behind these zones is to develop Vietnam's manufacturing sector by providing investment areas where the infrastructure sorely lacking in the rest of the country is already in place.⁵⁰³ Moreover, along with tax and other incentives,⁵⁰⁴ the special zones also offer an investment environment with fewer bureaucratic hurdles⁵⁰⁵ to both foreign and Vietnamese firms.⁵⁰⁶

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.* at 10,523.

⁵⁰¹ *Decree 322-HDBT on Special Export Processing Zones* issued by the Council of Ministers on 18 October 1991, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-61 [hereinafter *Decree 322-HDBT*].

⁵⁰² *Decree 192-CP on Industrial Zones* issued by the Government on 28 December 1994, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at X-751 [hereinafter *Decree 192-CP*]. Pursuant to its article 2, *Decree 192-CP* became effective on January 1, 1995.

⁵⁰³ *Country Reference*, *supra* note 89 at 15. Specifically, the objectives of export processing zones are: "to attract foreign investment; to create jobs for the work force; to produce goods which are competitive in the world markets and which thereby contribute to the integration of the national economy and the world economy; to introduce advanced technical skills and technology and modern management skills into Vietnam; to increase sources of foreign currencies and contribute towards improving the balance of foreign trade and international payments." *Circular 1126-HTDT-PC on Export Processing Zones* issued by the State Committee for Cooperation and Investment on 20 August 1992, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at X-265, art. I(II) [hereinafter *Circular 1126-HTDT-PC*].

⁵⁰⁴ See *infra* note 518 and accompanying text for some of the incentives offered to investors in export processing zones. For the tax incentives offered in industrial zones, see *infra* note 553.

⁵⁰⁵ *Country Reference*, *supra* note 89 at 15.

⁵⁰⁶ *Regulations on Special Export Processing Zones in Vietnam* issued in conjunction with *Decree 322-HDBT* of the Council of Ministers dated 18 October 1991, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-63, art. 5 [hereinafter *Regulations 322-HDBT*] and *Circular 1126-HTDT-PC*, art. I(VI). Note that both these articles specify that overseas Vietnamese may invest in EPZs. See also *Regulations on Industrial Zones* issued with *Decree 192-CP* of the Government dated 28 December 1994, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at X-753, art. 3(1) [hereinafter *Regulations 192-CP*].

Thus, one of the most important advantages of setting up a business within a special zone is that access to land is not an issue.⁵⁰⁷ However, authorities admit that the special zones' investment environment can still be perfected, particularly in terms of post-licensing procedures.⁵⁰⁸

While goods produced in EPZs are intended exclusively for export,⁵⁰⁹ those manufactured in IZs are aimed at both the export and domestic markets.⁵¹⁰ Although enterprises are granted better incentives in export processing zones than in industrial zones, the organization of EPZs has not run as smoothly as initially anticipated: Vietnamese authorities now favor investment in industrial zones⁵¹¹ and plan to merge the separate pieces of legislation governing export processing zones and industrial zones.⁵¹² There are also reports that a third group of special investment areas, high technology zones (HTZs), could soon be set up in Vietnam specifically for foreign investors operating in advanced technology industries.⁵¹³ In addition, legislation is also expected to be passed in the coming months on the establishment of free trade zones.⁵¹⁴

⁵⁰⁷ Interview with Mr. Tran Hong Ky, Expert at the Industrial Estates Department of the Ministry of Planning and Investment in Hanoi, on July 5, 1996. Especially in view of how time-consuming settling land-use rights can be outside the zones. *Ibid.* Furthermore, the fact that access to land is of no concern should account for a greater number of wholly foreign-owned enterprises within the special zones. *Country Reference*, *supra* note 89 at 15.

⁵⁰⁸ According to Zhinong Lin, Deputy General Director of Linh Trung EPZ, "there are still plenty of things that need to be done to make this environment propitious since the investor needs not only an investment license but also permits to construct the factory, import raw materials and equipment, manufacture and export the product". T. Duc, "Big Challenges Ahead" *The Saigon Times* (2-8 March 1996) 16 at 17.

⁵⁰⁹ *Regulations 322-HDBT*, arts. 1 and 4 and *Circular 1126-HTDT-PC*, art. I(I).

⁵¹⁰ *Regulations 192-CP*, art. 4(2).

⁵¹¹ Mr. Do Quoc Sam, [former] Minister of Planning and Investment, had very few praises for Vietnam's export processing zones during a seminar in HCMC. He stated that EPZs "generally had been failures" and that the emphasis must now be put on industrial zones within the country. "Industrial zones are Vietnam's priority" (1996) 7:8 *Vietnam Commerce & Industry* 13.

⁵¹² N.X. Hung, "Laws on special zones may merge" *Vietnam Investment Review* (6-12 May 1996) 30.

⁵¹³ A draft of the *Regulations on High Technology Zones* was reportedly submitted to the Government in November 1995 by the Ministry of Science, Technology and the Environment (MoSTE). Baker & McKenzie, "Vietnam - Export Processing and Industrial Zones" (1996) 5:1 *Indochina Law Quarterly* 37.

⁵¹⁴ F. Burke, "Industrial Zones: Special Opportunities" (August 1996) 4:4 *The Vietnam Business Journal* 40.

1.- Export Processing Zones

The amendments brought to the *Foreign Investment Law* in 1992 included definitions of the then newly created export processing zones⁵¹⁵ and export processing enterprises (EPEs)⁵¹⁶ and specified that foreign organizations and individuals could invest in EPZs through business cooperation contracts, joint ventures and wholly foreign-owned enterprises.⁵¹⁷ Article 35(a) of the FIL provides for exemptions on customs duties and for preferential tax rates in favor of export processing enterprises.⁵¹⁸ So far, five export processing zones have been established in Vietnam.⁵¹⁹ However, only one of these, the Tan Thuan EPZ near Ho Chi Minh City, is now operating.⁵²⁰ The first export processing

⁵¹⁵ FIL, art. 2(14): "Export Processing Zone means an industrial zone with specific boundaries established by the Government and containing one or more enterprises specializing in production of goods for export and in provision of services in relation to export oriented production and other export activities."

⁵¹⁶ FIL, art. 2(15): "Export Processing Enterprise means an enterprise established and operating within an Export Processing Zone." An export processing enterprise is established in the form of a limited liability company (*Regulations 322-HDBT*, art. 10) for a maximum duration of fifty years with possible extension (*Regulations 322-HDBT*, art. 13).

⁵¹⁷ FIL, art. 19(a) and *Regulations 322-HDBT*, art. 9. Vietnamese business enterprises, for their part, are permitted to invest in EPZs on their own and with foreign enterprises through business cooperation contracts and joint ventures. FIL, art. 19(a). However, joint ventures between foreign and local partners are the Vietnamese government's preferred vehicles of investment for infrastructure development within the EPZs. *Decree 18-CP*, art. 54, *Regulations 322-HDBT*, art. 7 and *Circular 1126-HTDT-PC*, art. IV(II)(1). Approval for the construction of infrastructure projects in export processing zones and industrial zones is granted by the Prime Minister. *Regulations 191-CP* (see *infra* note 588), art. 6(1). Furthermore, for these projects, investment licenses are issued by the SCCI [Ministry of Planning and Investment], not by the management committees of export processing zones as in other cases. *Circular 1126-HTDT-PC*, art. II(III)(1).

⁵¹⁸ See *Circular 1126-HTDT-PC*, art. III(V)(1) on export and import duties exemptions; art. III(V)(2) on profits tax holidays and breaks (manufacturing enterprises benefit from a profits tax holiday of four years, beginning the first year they register a profit, and are subject to a 10% profits tax thereafter. After a two year profits tax holiday, service enterprises are subject to a profits tax rate of 15%. The profits tax can also be refunded to enterprises reinvesting their profits under certain conditions); and art. III(V)(3) on the withholding tax (5% of the profits transferred abroad).

⁵¹⁹ The five export processing zones licensed in Vietnam are: the Linh Trung EPZ in Ho Chi Minh City, the Danang EPZ, the Can Tho EPZ, the Noi Bai EPZ near Hanoi, and the Tan Thuan EPZ near Ho Chi Minh City. A sixth zone, the Haiphong EPZ, licensed in January 1993, was unable to develop its infrastructure due to a lack of capital and was eventually dissolved in September 1995 for failing to meet its investment commitments. *Country Report 4th quarter 1995*, *supra* note 73 at 22-23. The Can Tho EPZ and the Noi Bai EPZ have both recently received approval from the MPI for their (partial) conversion into industrial zones. "Deux zones franchises en zones industrielles" *Le courrier du Vietnam* (6 June 1996) 1. See also *infra* note 547.

⁵²⁰ *Country Report 4th quarter 1995*, *ibid.* By the end of June 1995, forty-nine projects had been licensed in the Tan Thuan EPZ, for a total value of \$183 million. Of the total number of projects licensed, eleven are now operating and twenty-one are presently under construction. By contrast, only four investments have been approved in the Linh Trung EPZ, for a value of \$5.3 million; land transfer reportedly remains problematic. The Danang EPZ, for its account, has succeeded to attract only one investment of \$1.5

zone to be licensed in Vietnam, it began exporting goods in December 1993.⁵²¹ In creating its network of export processing zones, Vietnam wanted to emulate countries like Taiwan and South Korea where EPZs proved to be very instrumental in developing their national economies.⁵²² There are a number of reasons accounting for the disappointing record of EPZs in Vietnam. Among these, the fact that their promised infrastructure was just not in place has played an important part.⁵²³ Another factor contributing to the relative lack of success of the zones is that EPEs are barred from accessing Vietnam's potential market of 74 million people.⁵²⁴ Also, with Vietnam still not a member of the WTO, exporters from that country (regardless of their nationalities) can be faced with very high tariffs.⁵²⁵

The management committee of an export processing zone is the body responsible for the general administration of the zone.⁵²⁶ More specifically, one of its duties consists in

million from a candle company; its development is said to be hindered by inadequate water and electricity supplies. Similarly, the Can Tho EPZ has only attracted one company, with an investment of \$23.5 million. Finally, the Noi Bai EPZ has just recently been allocated land. *Ibid.*

⁵²¹ J. Swiggett, "Foreign Investment in Vietnam: CT&D's Development Strategy" (May 1994) E. Asian Exec. Rep. 23 at 24. The Tan Thuan EPZ is a joint venture between CT&D (a Taiwanese company involved in global trade and investment, with a particular emphasis on Vietnam) and the Ho Chi Minh City People's Committee, with CT&D holding a 70% share in the venture. *Ibid.*

⁵²² Connor, *supra* note 241 at 484. See also *Country Report 2nd quarter 1995*, *supra* note 88 at 20 raising the question as to whether EPZs in Vietnam will be as successful as they have been in China, where they have spurred export-led manufacturing growth, or whether their development will be hindered by stifling bureaucracy and inadequate infrastructure, as was the case in India.

⁵²³ "The provision of transportation and other infrastructure such as water and electricity, the choice of the right partner and better coordination between central and local management were described as the key lessons to be learnt from the poor performance of all the EPZs except Tan Thuan, according to an interview with the vice chairman of the [former] SCCI with responsibility for management of the Ho Chi Minh City EPZs." *Country Report 4th quarter 1995*, *supra* note 73 at 23.

⁵²⁴ Interview with Mr. Ky, *supra* note 507. See also *Country Reference*, *supra* note 89 at 15 reporting that authorities admitted that Vietnam was perhaps not ready for EPZs because of the lack of infrastructure development and due to the fact that foreign investors are more interested in the import-substitution sector.

⁵²⁵ Interview with Mr. Pham Manh Hung of the Foreign Investment Department of the MPI, in Hanoi, on June 22, 1996.

⁵²⁶ *Regulations 322-HDBT*, art. 6 and *Circular 1126-HTDT-PC*, art. IV(I)(1). Management bodies seem to have a lot of leeway in the administration of their zones. For instance, the Ho Chi Minh City's Export Processing Zone Authority reportedly attracted foreign firms by promising them tax-free status and later imposed an 8% business tax. F. Gibney Jr., "Back in Business" *Time* (24 April 1995) 31 at 34. It is unclear from the reading of the article whether this "business tax" is the profits tax pursuant to article III(V)(2) of *Circular 1126-HTDT-PC*, in which case manufacturing enterprises would be deprived of their four-year tax holiday and service enterprises, of their two-year tax holiday (see *supra* note 518), or whether this tax is in lieu of the fees that management committees are entitled to charge EPEs for

examining investment applications for certain projects within the zones.⁵²⁷ A simplified and expeditious application process was supposedly another important advantage offered by the export processing zones. Yet, whether the management committee is truly a "one-stop shop" for investment approvals remains doubtful. To begin with, one must differentiate between investment projects by operators in the special investment areas and infrastructure construction projects undertaken in the zones by developers. Applications for business licenses to operate within an EPZ are indeed filed with the management committee of that zone.⁵²⁸ However, it seems that this is as far as centralization goes in terms of investment approvals. Firstly, as noted, approvals for the construction of infrastructure projects in export processing zones are granted to developers by the Prime Minister.⁵²⁹ Secondly, management committees of EPZs are only responsible for the evaluation of smaller projects, leaving the review of the more important projects to be conducted in accordance with the general evaluation process.⁵³⁰ Article 11 of *Regulations 322-HDBT* and article II(II)(3) of *Circular 1126-HTDT-PC* provide for the evaluation

managing and operating the zones pursuant to article 57(4) of *Regulations 322-HDBT* and article IV(I)(1)(g) of *Circular 1126-HTDT-PC*, in which case, it would be a hefty fee.

⁵²⁷ *Regulations 322-HDBT*, art. 57(3) and *Circular 1126-HTDT-PC*, art. IV(I)(1)(c). The management committee of an EPZ is also in charge of issuing business licenses for projects within the zone, except in the case of infrastructure development (see also *supra* note 517) and banking projects. *Regulations 322-HDBT*, art. 57(3) and *Circular 1126-HTDT-PC*, art. II(III)(1).

⁵²⁸ *Circular 1126-HTDT-PC*, art. II(III)(3).

⁵²⁹ *Supra* note 517. Thus, pursuant to article 6(1) of *Regulations 191-CP*, construction of infrastructure in both industrial and export processing zones is a Group A project which must be approved by the Prime Minister.

⁵³⁰ As per article II(II)(1) of *Circular 1126-HTDT-PC*, the evaluation of Group C projects (pursuant to *Regulations 366-HDBT*) is to be carried out by the management committee of the export processing zone, while other projects are to be evaluated in accordance with the general provisions on the evaluation of foreign investment projects. Since the issue of *Circular 1126-HTDT-PC*, *Regulations 366-HDBT* have been repealed by *Decree 191-CP* (see *infra* note 587) whose regulations only provide for two categories of projects, Group A and Group B. While *Circular 1126-HTDT-PC* itself has not been revised to reflect the change, *Decision 76/UB-KCX* has been issued on May 23, 1995 by the chairman on the former SCCI, along with the *Regulations on the System of Appraising and Granting Business Licences to Investment Projects in Export Processing Zones in Vietnam* [hereinafter *Regulations 76/UB-KCX*]. Thus, pursuant to article 5 of *Regulations 76/UB-KCX*, management committees of EPZs are in charge of evaluating and issuing licenses for Group B projects. As far as Group A projects are concerned, in accordance with *Regulations 191-CP* (see *infra* note 588), evaluation is conducted by the MPI whose decision must be approved by the Prime Minister; as in the case of Group B projects, licenses are then issued by the EPZ's management committees (*Regulations 76/UB-KCX*, art. 6), except for infrastructure projects whose licenses are issued by the MPI (see *supra* note 517).

process to be carried out within three months after the management committee has received the application.⁵³¹

In Vietnam, where trade barriers are still present, EPZs can provide free trade status to exporters, allowing them to be competitive in the world market.⁵³² However, the World Bank estimates that the benefits flowing from export processing zones are not very substantial for the country itself.⁵³³ Due to their "enclave nature",⁵³⁴ export processing zones only have a minor impact on some of the stated objectives for their establishment, such as job creation,⁵³⁵ transfer of technology⁵³⁶ and foreign currency earnings⁵³⁷ at the national level.⁵³⁸ Furthermore, the fact that transactions between EPEs and domestic enterprises are regarded as import-export activities⁵³⁹ has also been criticized since procedures for such transactions are complicated, time-consuming and expensive.⁵⁴⁰ The

⁵³¹ *Regulations 76/UB-KCX* provide for more specific deadlines for project evaluation. Article 7 specifies that the management committee must communicate its decision to the investor within 10 days after receiving a complete project application. Pursuant to article 8, it must forward Group A project applications to the SCCI [MPI] for evaluation within two days after receiving them.

⁵³² *Viet Nam - Transition to the Market*, supra note 66 at 76. It should be noted, however, that efforts have been made toward trade liberalization. For instance, Vietnam has virtually abolished its import quotas and has started to liberalize its system of import permits and licenses. *Ibid.* at 71.

⁵³³ *Ibid.* at 76.

⁵³⁴ *Ibid.* "Even if an EPZ is successful, its success is limited to an area or one part of the economy if the rest of the economy continues to be controlled and inward-looking. The central point to be made is that while the EPZ is a convenient and efficient instrument to attract foreign investment and promote export industries in the absence of a liberalized trade policy, a major export development drive will depend on a larger, overall strategy to establish free trade status for all exporters inside and outside EPZs." *Ibid.* at 76-77.

⁵³⁵ *Circular 1126-HTDT-PC*, art. I(II)(2).

⁵³⁶ *Ibid.*, art. I(II)(4).

⁵³⁷ *Ibid.*, art. I(II)(5).

⁵³⁸ *Viet Nam - Transition to the Market*, supra note 66 at 76. Thus, an average 30,000 people work in a large EPZ of about 150 factories, clearly not enough to significantly lower the very high level of unemployment Vietnam faces. Moreover, the foreign currency earnings from the exports of foreign-owned EPEs may only stand at ten percent of the total value of exports. The World Bank adds that while approximately ninety EPZs are operating worldwide, only 25% of these are considered successful. *Ibid.*

⁵³⁹ FIL, art. 19(a) and *Circular 1126-HTDT-PC*, art. III(V)(1)(c). Mr. Hoang Phuoc Hiep, Deputy Director of the Department of International Law and International Cooperation of the Ministry of Justice, actually assimilated EPZs to foreign territory, describing them as "states within a state". Interview with Mr. Hiep in Hanoi on July 9, 1996. Notice that article 18 of the 1996 FIL is also very specific on this: "(...) The trading relations between an enterprise in the Vietnamese market with an export processing enterprise is considered an import-export relation. Therefore, it must observe the law on import and export. (...)"

⁵⁴⁰ N. Huong, "A Long Story of Legal Mechanism - Hurdles to transactions between EPZs and the domestic market" *The Saigon Times* (6-12 April 1996) 26.

World Bank insists that EPZs are transitional instruments, which should be part of a comprehensive export development program, pending complete trade liberalization.⁵⁴¹ Actually, Vietnam might just fall in with the World Bank's stance: not only is it now backing away from EPZs, but it has also agreed, after joining ASEAN in July 1995, to reduce its tariffs in order to eventually form the ASEAN Free Trade Area (Afta) with other Southeast Asian countries.⁵⁴²

2.- Industrial Zones

On December 28 1994, the government issued *Decree 192-CP* and its implementing regulations, providing for the creation of industrial zones⁵⁴³ in an effort to generate favorable investment conditions for both foreign and local firms.⁵⁴⁴ The activities permitted in industrial zones are the construction and operation of infrastructure facilities,⁵⁴⁵ the manufacturing, processing and assembly of goods for both the export and domestic markets, and the provision of services in support of industrial production.⁵⁴⁶ Vietnamese authorities plan to establish a total of ten industrial zones within the

⁵⁴¹ *Viet Nam - Transition to the Market*, *supra* note 66 at 77.

⁵⁴² On the implementation of the Afta, see *supra* notes 256 and 257 and accompanying text.

⁵⁴³ "An industrial zone referred to in these Regulations means a concentrated industrial zone established pursuant to a decision of the Government with fixed geographical boundaries, specifically used for industrial production and related support services." *Regulations 192-CP* (*supra* note 506), art. 2. Export processing zones may be established within industrial zones. *Ibid.*, art. 3(2). Note that the reverse is also possible as it has been reported that an industrial zone will be permitted within the Tan Thuan EPZ. *Country Reference*, *supra* note 89 at 15.

⁵⁴⁴ Preamble of *Decree 192-CP* (*supra* note 502). However, it should be pointed out that foreign and domestic enterprises in industrial zones are not treated the same. "Even though these businesses operate in the same location, they are regulated by different laws, so procedures, benefits and obligations also vary." Hung, *supra* note 512. For instance, foreign enterprises are granted tax advantages not available to Vietnamese enterprises. In fact, the difference in treatment between foreign and domestic enterprises has been cited as one of the major shortfalls of the regulations on industrial zones. *Ibid.*

⁵⁴⁵ Chapter III of *Regulations 192-CP* deals exclusively with the construction and operation of infrastructure in industrial zones. Whereas the company constructing and operating an infrastructure facility in an EPZ must be an enterprise with foreign-owned capital pursuant to article IV(II)(1) of *Circular 1126-HTDT-PC*, there is no such requirement for the construction and operation of infrastructure facilities in industrial zones, where both foreign and domestic companies are encouraged to undertake infrastructure development. *Regulations 192-CP*, art. 8. In both industrial and export processing zones, construction of infrastructure is a Group A project which must be approved by the Prime Minister. *Regulations 191-CP*, art. 6(1).

⁵⁴⁶ *Regulations 192-CP*, art. 4.

country.⁵⁴⁷ Construction of the first industrial zone, the Haiphong IZ, was undertaken through a joint venture with a Japanese partner, Nomura/JAFECO Investment Ltd.,⁵⁴⁸ on February 24, 1995 and should be completed within two years.⁵⁴⁹ Nomura is said to have the wherewithal to attract reputable investors, which indeed bodes well for the future of the zone.⁵⁵⁰

Surprisingly, boards of management of industrial zones have no decision-making power in the approval of investment applications. While management committees of export processing zones take some part in the evaluation process,⁵⁵¹ the role of the boards of management of industrial zones is limited to receiving and forwarding investment applications to the competent authorities.⁵⁵² In addition, foreign enterprises in IZs are

⁵⁴⁷ *Country Report - Vietnam: 1st quarter 1995* (London: The Economist Intelligence Unit, 1995) at 15 [hereinafter *Country Report 1st quarter 1995*]. Already, in 1994, two industrial zones were approved. *Ibid.* As noted, *supra* note 511 and accompanying text, authorities are now favoring industrial zones over export processing zones. Article 25 of *Regulations 192-CP* even provides for the possibility of converting export processing zones into industrial zones. As stated, *supra* note 519, two EPZs (Can Tho and Noi Bai) have already been partially converted into industrial zones.

⁵⁴⁸ H. Anh, "Vietnam: \$120.5 M Industrial Zone in Hai Phong" *Vietnam Investment Review* (2 January 1995). Nomura/JAFECO Investment Ltd. holds a seventy-percent share in the fifty-year joint venture. According to Kanji Oka, chairman of the board of the venture, forty Japanese businesses have already registered to invest in the Haiphong IZ. The partners would like the zone to reach full occupancy within ten years. *Ibid.*

⁵⁴⁹ *Country Report 2nd quarter 1995*, *supra* note 88 at 21. The zone should accommodate 125 factories. *Ibid.*

⁵⁵⁰ *Ibid.* A second industrial zone is also ready to receive investors in Dong Nai. *Country Report 4th quarter 1995*, *supra* note 73 at 23. On October 11, 1995, Daewoo of South Korea signed a contract to develop a \$152 million industrial zone near Hanoi; Daewoo Electronics intends to build a \$300 million electrical appliance factory in the zone over the next three years. *Ibid.* The Vietnam-Singapore Industrial Park in Song Be province was established in February 1996 and is slated to open in 1997. The foreign partners in the project, a consortium of major Singaporean companies, intend to invest \$200 million in the infrastructure of the park alone. C. Zesiger, "Odd Bedfellows - A little piece of Singapore in Vietnam" (April 25, 1996) *Far E. Econ. Rev.* 62.

⁵⁵¹ See *supra* note 530 and accompanying text. According to Mr. Pham Manh Hung of the Foreign Investment Department at the MPI, while members of the management committees of EPZs are chosen by the MPI, those sitting on the boards of management of industrial zones are officials from the local People's Committees. This would explain why only the former have some decision-making power in the investment approval process. Interview with Mr. Hung, *supra* note 525.

⁵⁵² *Regulations 192-CP*, art. 20(3) and *Regulations on Procedures for Appraisal and Issuance of Investment Licenses to Foreign Investment Projects in Industrial Zones*, promulgated with *Decision 77/UB-KCX* dated 23 May 1995 and issued by the chairman of the former SCCI, art. 3 [hereinafter *Regulations 77/UB-KCX*]. "Since applications for licenses to invest in IP [industrial parks] must be filed with the MPI, investors have to wait much longer than for projects invested in EPZ. Hence, Huynh Phi Dung [general manager of Thanh Le Co.] proposed that the Government give a statute of IP similar to EPZs. Duc, *supra* note 508 at 17. Incidentally, this suggestion might very well be implemented in the

more heavily taxed than export processing enterprises.⁵⁵³ The reason for this is that, while EPEs are only allowed to export the goods they manufacture, enterprises operating in industrial zones can take advantage of the Vietnamese market.⁵⁵⁴ Land clearance has also been cited as problematic by infrastructure developers in IZs, with land prices quickly rising after they had been granted their licenses.⁵⁵⁵ Yet, industrial zones are still more successful than export processing zones.⁵⁵⁶ The chairman of the former SCCI even predicted that they will form the backbone of the country's future economy.⁵⁵⁷ It is still too early to say whether industrial zones will live up to the current expectations, but it will inevitably depend on the authorities' ability to deliver on their promises.

future as the government is currently contemplating granting IZs' management boards the same powers as the EPZs' management committees presently enjoy in terms of project approval. Interview with Mr. Hung, *ibid.*

⁵⁵³ See *supra* note 518 and accompanying text for the various incentives offered in EPZs. Thus, pursuant to article 15(1) of *Regulations 192-CP*, Vietnamese enterprises are granted preferential tax rates in accordance with current regulations (in the case of EPZs, foreign and domestic enterprises enjoy the same incentives). Pursuant to article 15(2) of *Regulations 192-CP*, the profits tax rates for foreign enterprises are as follows: 18% for production enterprises and 12% for enterprises which export at least 80% of their goods (both are granted a profits tax holiday of two years, starting with the first year of profits); and 22% for service enterprises (service enterprises are granted a profits tax holiday of only one year, the first year they make a profit). Other taxes are to be paid in accordance with current regulations (for instance, article 70 of *Decree 18-CP* stipulates that the withholding tax rate for a contribution of over \$10 million to a BCC is 5% of the profits transferred abroad and for a contribution of over \$5 million to a BCC, 7% of the profits transferred abroad; in all other cases, 10% of the profits transferred abroad, compared with a 5% withholding tax rate for EPEs). Export processing enterprises operating in industrial zones pay taxes in accordance with *Regulations 322-HDBT. Regulations 192-CP*, art. 15(3). Finally, infrastructure development companies within industrial zones are eligible for preferential tax treatment under current tax legislation. *Regulations 192-CP*, art. 15(4). It should also be noted that while enterprises in EPZs enjoy certain export and import duties exemptions (*supra* note 518), article 15 of *Regulations 192-CP* provides for no such exemption in industrial zones.

⁵⁵⁴ Interview with Mr. Ky, *supra* note 507.

⁵⁵⁵ Duc, *supra* note 508 at 17. To solve this problem, it has been suggested that authorities clear the land themselves before auctioning it to developers. *Ibid.*

⁵⁵⁶ *Country Report 4th quarter 1995*, *supra* note 73 at 23. For some of the reasons for the poor record of export processing zones, see text accompanying notes 523 to 525.

⁵⁵⁷ *Country Report 2nd quarter 1995*, *supra* note 88 at 21. The establishment of about ten industrial zones where small and mid-scale enterprises would manufacture consumer products appeared on the list of priority investments issued by the SCCI in late 1994. There are reportedly thirty-one proposals for industrial zones currently pending. *Ibid.*

III.- Vietnam's Legal Framework for Foreign Investment: Control or Promotion?

According to Mrs. Ngo Ba Thanh, former chairperson of the National Assembly's legal commission, "modernization and industrialization under rule of law" is Vietnam's new slogan.⁵⁵⁸ Yet, in spite of the great strides made in the ten years since the inception of *doi moi*, much remains to be done before Vietnam can fully live up to its new slogan. For instance, the mere fact that the Vietnamese government acts simultaneously as the regulator of foreign investment and the major business owner in the country is in itself problematic. Indeed, the dualistic role played by governmental authorities can sometimes lead them to use their regulatory powers to facilitate the realization of their business objectives to the detriment of foreign investors.⁵⁵⁹ No matter how significant Vietnam's comparative advantages may be, its labor force and its natural resources alone will not suffice to attract the level of foreign capital still needed to rebuild the national economy. Vietnam must also be able to offer a fair and efficient legal environment conducive to business that will incite foreign investors to enter its market.⁵⁶⁰

⁵⁵⁸ A. Schwarz, "Nation Builders - Assembly lays foundation for rule of law" (November 16, 1995) *Far E. Econ. Rev.* 22 [hereinafter "Nation Builders"]. The reader will find an earlier outlook of Mrs. Thanh's on her country's legal and political reforms in N.B. Thanh, *Vietnam's Economic Renovation and the Development of Law* (Hanoi: Law Commission of the National Assembly - Socialist Republic of Vietnam, 1991). See also N.B. Thanh "The 1992 Constitution and the Rule of Law" in Thayer & Marr, eds., *supra* note 103 at 81 [hereinafter "The 1992 Constitution and the Rule of Law"].

⁵⁵⁹ "By allowing local authorities the right to participate in the market place, the impartiality of their regulatory and administrative functions may be compromised. The regulatory system furnishes many opportunities for a people's committee to use its regulatory powers in a self-serving manner to exclude or disadvantage competitors." J. Gillespie, "The Evolution of Private Commercial Freedoms in Vietnam" in Thayer & Marr, eds., *ibid.*, 129 at 142. See also M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) at 55 stressing that the practice of resorting to legislative intervention to favor state entities is not the preserve of third world countries. But see W.A.W. Neilson, "Vietnam's *Doi Moi* Legal System: Pushing the Limits of Rapid Legal Change" in B. Duffield, ed., *Japanese Investment and Aid Strategies in Vietnam: Implications for Development Directions* (Victoria, B.C.: Uvic Centre for Asia-Pacific Initiatives, 1995) 41 at 54 reporting that the Vietnamese government is now showing signs that it wants to keep ministries and People's Committees from engaging into direct business activities in the future.

⁵⁶⁰ "The development of an efficient and fair legal and regulatory regime is a particularly important element of an attractive investment climate, especially in those countries undergoing a transition from centrally planned to market economies." I.F.I. Shihata, *Legal Treatment of Foreign Investment: "The World Bank Guidelines"* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1993) at 24.

After the adoption of its *Foreign Investment Law* in 1987, Vietnam has continued to try and improve its investment framework in order to always attract more and more foreign capital. However, notwithstanding all the steps taken by Vietnamese authorities, the level of project implementation in Vietnam is relatively low, with estimates ranging from about only one fifth⁵⁶¹ to one third⁵⁶² of approved projects being actually realized.⁵⁶³ Moreover, there are now signs that foreign investors' initial interest in Vietnam is on the decline. Indeed, during the first eight months of 1996, the Ministry of Planning and Investment approved \$3.58 billion worth of projects, 34% less than it did during the same period in 1995.⁵⁶⁴ Why is Vietnam experiencing such a low rate of project implementation?⁵⁶⁵ And why, after a very promising start, has Vietnam been unable to sustain the enthusiasm it initially stirred amongst foreign investors?

Undeniably, Vietnam's legal framework for foreign investment remains to be perfected⁵⁶⁶ in order to meet the requirements of a market economy. Much has been said about the "regulatory miasma"⁵⁶⁷ awaiting foreign investors in Vietnam. For instance, not only do they find themselves having to cope with rapid changes in the law,⁵⁶⁸ making it hard for them to predict the consequences of their actions, but they are also sometimes faced with conflicting regulations or varying interpretations on the part of independent-

⁵⁶¹ Cooke & Grant, *supra* note 95.

⁵⁶² A. Schwarz, "Promises, Promises - Vietnam's leaders come under pressure to speed up reforms" (October 24, 1996) *Far E. Econ. Rev.* 46 at 49 [hereinafter "Promises, Promises"].

⁵⁶³ The government itself has recognized that the investment implementation rate in Vietnam is too low. "Vietnam - Like Wildfire", *supra* note 233 at 96.

⁵⁶⁴ A. Schwarz, "Economic Monitor - Mind the Gap" (October 17, 1996) *Far E. Econ. Rev.* 98 [hereinafter "Mind the Gap"]. While foreign investors blame Vietnam's decrease in project approvals on bureaucratic and regulatory impediments, Vietnamese authorities claim that it is rather due to a now more selective approach to project approval on their part. *Ibid.*

⁵⁶⁵ "Investment drop-off is common in developing countries, but a level this high is unusual for a country whose economy is growing 8%-9% each year." M.J. Scown, "Laying Down the Law" (October 5, 1995) *Far E. Econ. Rev.* 31.

⁵⁶⁶ According to a recent report issued by the Beta Vietnam Fund, listed in Dublin, Ireland: "Vietnam is widely recognized as being one of the world's most difficult investment environments - enormously complex, frustrating and expensive". "Promises, Promises", *supra* note 562 at 49.

⁵⁶⁷ "Mind the Gap", *supra* note 564.

⁵⁶⁸ A. Schwarz, "Vietnam Syndrome" (March 28, 1996) *Far E. Econ. Rev.* 50 at 50-51 [hereinafter "Vietnam Syndrome"].

minded local authorities pursuing their own agenda.⁵⁶⁹ Yet, one should keep in mind that, even though the Vietnamese regulatory framework is admittedly perplexed, some of its shortcomings are clearly due to the very fact that the country is currently undergoing legal reform. In time, legal process in Vietnam should become more transparent. Thus, fully aware of the need to revamp its body of laws, the National Assembly has adopted a law building program⁵⁷⁰ and recently enacted various important pieces of legislation,⁵⁷¹ most notably a Civil Code.⁵⁷²

The Vietnamese foreign investment legislation is too strongly geared toward the monitoring of both the entry and operations of foreign businesses. We submit that this propensity to control foreign enterprises can actually be just as detrimental to the flow of foreign investment in the country as the problems associated with Vietnam's deficient legal system.⁵⁷³ The control mechanisms required to monitor foreign investment contribute to an already overregulated business environment, a problem itself compounded by the decentralized nature of the Vietnamese polity.⁵⁷⁴ Moreover, to exercise such a high level of control, the government needs to rely on a huge bureaucratic apparatus, a perfect breeding ground for corruption.⁵⁷⁵ We suggest that Vietnam's strong desire to control

⁵⁶⁹ "Every province and district interprets legislation differently than or contrary to the national agenda." McGrath, *supra* note 65 at 2132.

⁵⁷⁰ Thus, on October 28, 1995, the National Assembly adopted the *Resolution on the Law Building Program of the National Assembly, Legislature IX* establishing various laws and ordinances to be adopted during the ninth legislature. Baker & McKenzie, "Vietnam - Legislation", *supra* note 3 at 55-56.

⁵⁷¹ Among others, the *Land Law*, the *Bankruptcy Law*, the *Labor Code*, the *Domestic Investment Law*. *Country Profile - Vietnam* (London: The Economist Intelligence Unit, 1995-1996) at 14 [hereinafter *Country Profile 1995-1996*].

⁵⁷² Adopted during the eighth session of the ninth legislature of the National Assembly on October 28, 1995, Vietnam's Civil Code came into effect on July 1st, 1996. *The Civil Code of the Socialist Republic of Vietnam* (Hanoi: Vietnam Law & Legal Forum, 1996) [hereinafter *Civil Code*].

⁵⁷³ For instance, gaps in the legislation can be provided for contractually. Interview with Mr. Trinh Dinh Ban, *supra* note 495. Indeed, one should not forget that, for all the disadvantages it presents, an incomplete legal system also allows for more flexibility. See Golin, *supra* note 210 at 64.

⁵⁷⁴ "The job of governance is further complicated by Hanoi's weak administrative control over the provinces. Decades of war left Vietnam with a highly decentralized decision-making process and, in many provinces, powerful party and government bosses continue to act more like feudal lords than mid-level civil servants." A. Schwarz, "The Problems of Progress - Modernization's changes bring disturbing new realities" (October 26, 1995) *Far E. Econ. Rev.* 48 at 50 [hereinafter "The Problems of Progress"].

⁵⁷⁵ "Next to bureaucratic bottlenecks and stifling red tape, both foreign and domestic business people rank corruption as the most serious legal problem in Vietnam." Neilson in Duffield, ed., *supra* note 559 at 56.

stems from its fear of seeing outside forces challenging its legitimacy through the so-called peaceful evolution.

A successful market economy requires a balance between state and private rights. As long as Vietnam will view foreign investment as a necessary evil posing a threat to its hegemony and continues to treat private interests (whether foreign or domestic) with suspicion, the nation's economic development will suffer, for Vietnam cannot afford to act as an autarky. We would like to emphasize right from the start that we do not purport to question Vietnam's sovereign right to monitor the entry of foreign investment within its boundaries. However, we do propose to demonstrate that Vietnam's control of foreign businesses is far too extensive and becomes eventually counteractive in that it ends up driving away foreign investors, discouraged by an overwhelming regulatory environment.⁵⁷⁶ We suggest that once Vietnam has made the decision to accept foreign enterprises within its boundaries, it then has at least the moral obligation (if not legal⁵⁷⁷) to insure that they are treated fairly and that they can operate in an environment free from undue bureaucratic hassle and widespread corruption.

The task of overseeing foreign investment in Vietnam is performed by the Ministry of Planning and Investment which assumes the dual function of screening the entry of foreign enterprises in the country and supervising their activities once they have been licensed. In the first part of this chapter, we will review Vietnam's foreign investment control mechanisms both before and after foreign businesses are established in the country, thus beginning with the project approval process and the licensing procedures in the first section,⁵⁷⁸ followed by the monitoring of the activities of foreign enterprises in the second

⁵⁷⁶ "Finally, the myriad troubles foreign investors are having setting up their operations have resulted in a longer lead time between importing equipment and producing the first exportable item. 'We are finally seeing the effects of the regulatory and licensing nightmare show up on the balance of payments', says the head of a European bank in Hanoi." "Promises, Promises", *supra* note 562 at 48.

⁵⁷⁷ Brierly refers to a "certain standard of decent treatment" that host countries must observe with regards to foreign businesses established within their boundaries. Quoted in Sornarajah, *supra* note 559 at 83. Although recognized in international law, the precise nature of this right remains controversial. *Ibid.*

⁵⁷⁸ Procedures to submit investment applications in special zones vary slightly. See Part C.- Special Investment Areas of Chapter II, on page 81, above.

section. In the second part of this chapter, we will examine, on the one hand, some of the incentives Vietnam offers to foreign investors, namely its investment protection guarantees, and, on the other hand, the major disincentive to investing in Vietnam: the country's land legislation. Finally, the last part will be devoted to underlying issues affecting the investment climate in Vietnam: the situation of private rights, the political risk to foreign investment and the Vietnamese legal framework with regards to the principle of the rule of law.

A.- Foreign Investment Control Measures

1.- Pre-Establishment Control: Investment Approval and Licensing Procedures

The entry of foreign investment in Vietnam is very closely monitored. No matter which form of investment is chosen, prior approval from the Vietnamese authorities must be secured before any project can be implemented. The evaluation process itself has been the target of heavy criticism on the part of foreign investors, especially with regards to the length of time required to obtain project approval.⁵⁷⁹ Although measures have been taken to centralize and speed up the approval process, we doubt whether these will prove to be enough. Firstly, the Ministry of Planning and Investment is a long way from a one-stop shop for project approval: foreign investors must still approach the various ministries and local authorities involved in the review process if their projects are to stand a chance of being granted approval.⁵⁸⁰ Secondly, the new time limits set for project evaluation are simply not enforced, thereby leaving unaffected the problem of long delays.⁵⁸¹

⁵⁷⁹ An early 1994 survey revealed that while the licensing of joint ventures took about one year, that of wholly foreign-owned enterprises could take as long as two years. J.R. Dodsworth *et al.*, *Vietnam - Transition to a Market Economy - Occasional Paper 135* (Washington, D.C.: International Monetary Fund, March 1996) at 16 [hereinafter IMF Occasional Paper].

⁵⁸⁰ "Companies have to deal with a 'huge number of separate agencies' to pursue projects. Property is controlled by local Communist committees who approve requests for land use permits and companies often need the approval of more than 20 agencies, including business or labor ministries, or unions, to proceed with a deal." D. Bencivenga, "Vietnam on Hold - Investors Wait for Trade and Legal Developments" (20 July 1995) 214:13 *New York Law Journal* 5. See also text accompanying note 622.

⁵⁸¹ See *infra* note 614 and accompanying text.

a) Creation of the Ministry of Planning and Investment

Pursuant to article 37 of the *Foreign Investment Law*, applications for business or investment licenses in Vietnam are to be submitted to the State body in charge of foreign investment.⁵⁸² From 1988 to 1995, the agency in charge of foreign investment activities in Vietnam was the State Committee for Cooperation and Investment.⁵⁸³ At its October 1995 session, the National Assembly approved the merger of the State Planning Committee with the State Committee for Cooperation and Investment, thus creating the Ministry of Planning and Investment (MPI) with the former chairman of the State Planning Committee, Do Quoc Sam, at the head of the ministry.⁵⁸⁴ Mr. Sam has, since then, been replaced by Tran Xuan Gia in a cabinet reshuffle endorsed by the National Assembly on November 6, 1996.⁵⁸⁵ The establishment of the Ministry of Planning and Investment was in keeping with an effort to streamline the structure of the government by amalgamating agencies with overlapping functions and was also designed to make investment planning more efficient.⁵⁸⁶

⁵⁸² As per article 36 of the FIL, the State body in charge of foreign investment (now the MPI, see *supra* note 261) is responsible for: lending assistance to individuals and organizations establishing businesses in Vietnam; approving investment projects [more precisely, pursuant to *Notice 01/BKH/VP of the Ministry of Planning and Investment on the procedures for issuing investment licenses*, dated January 2, 1996, it is the Department of Foreign Investment of the MPI which is in charge of receiving all foreign investment applications in Vietnam]; granting preferential treatment in the appropriate cases; monitoring the operations of foreign enterprises in Vietnam; and analyzing the activities of enterprises with foreign-owned capital.

⁵⁸³ The SCCI was established by *Decree 31-HDBT on the Functions, Powers, and Organization of the State Committee for Cooperation and Investment* of the Council of Ministers, dated 25 March 1989 (on the basis of a decision of the State Council dated 6 August 1988, ratified by the National Assembly and approving the establishment of the SCCI), reprinted in *Foreign Investment Laws of Vietnam* (1992), *supra* note 325 at 21. *Decree 31-HDBT* was repealed by *Decree 39-CP on the Functions, Duties, Powers and Organization of the State Committee for Co-Operation and Investment* of the Government, dated 9 June 1993, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at I-203.

⁵⁸⁴ *Supra* note 261. The former chairman of the SCCI, Dau Ngoc Xuan, is now president of the State Evaluation Council for Investment Projects, a cabinet-level position. *Decision No. 784-TTg of December 2, 1995 of the Prime Minister on the Establishment of the State Evaluation Council for Investment Projects*, reprinted in *Official Gazette* No. 5 (15-3-1996) at 33 [hereinafter *Decision 784-TTg*], art. 1. *Decree No. 75-CP of November 1st, 1995 of the Government on the Functions, Tasks, Powers and Organizational Structure of the Ministry of Planning and Investment*, reprinted in *Official Gazette* No. 2 (31-1-1996) at 28 [hereinafter *Decree 75-CP*] enumerates the principal functions of the new ministry which comprises, *inter alia*, eighteen departments and a number of research institutions. The weekly *Vietnam Investment Review* is also published through the MPI. *Decree 75-CP*, art. 3.

⁵⁸⁵ "Eight New Cabinet Members" *The Saigon Times Daily* (8 November 1996) 1.

⁵⁸⁶ *Country Report 4th quarter 1995*, *supra* note 73 at 6 and 12. According to Minister Le Xuan Trinh, head of the Government Office, "by combining planning and investment and responsibility for investment, there is only one agency responsible for all foreign and domestic development and investment projects.

b) Regulations 191-CP: Group A and Group B Projects

On December 28, 1994, Prime Minister Vo Van Kiet, on behalf of the Government, issued *Decree 191-CP*⁵⁸⁷ promulgating the *Regulations on Formulation, Evaluation and Implementation of Foreign Direct Investment Projects*.⁵⁸⁸ *Decree 191-CP* was then heralded as an important step in creating the one-stop approval procedure requested by foreign investors.⁵⁸⁹ Essentially, *Regulations 191-CP* divide investment projects into two categories, Group A and Group B,⁵⁹⁰ and set fixed time limits for their evaluation.⁵⁹¹ All applications must be submitted to the SCCI [Ministry of Planning and

Therefore, the handling process will be streamlined. In the past, the SCCI had to consult with the SPC on the scale, types, modes and sites for any foreign investment project. Today, consultation becomes unnecessary as there is only one body: the MPI. Consequently, the time taken for a foreign investment project to be granted a licence is much shorter." "Development encourages Reform" (February 1996) 22 Vietnam Economic Times 12 at 13.

⁵⁸⁷ *Decree 191-CP on Formulation, Evaluation and Implementation of Foreign Direct Investment Projects* issued by the Government on 28 December 1994, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at I-401 [hereinafter *Decree 191-CP*]. *Decree 191-CP* repealed the *Regulations on Evaluation of Projects with Foreign Owned Capital* issued with *Decision 366-HDBT* of the Council of Ministers, dated 7 November 1991, reprinted in *Foreign Investment Laws of Vietnam* (1992), *supra* note 325 at 125 [hereinafter *Regulations 366-HDBT*]. *Decree 191-CP*, art. 2.

⁵⁸⁸ *Regulations on Formulation, Evaluation and Implementation of Foreign Direct Investment Projects* issued in conjunction with *Decree 191-CP*, dated December 28, 1994, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at I-403, art. 18 [hereinafter *Regulations 191-CP*]. The new regulations came into effect on January 1, 1995. *Regulations 191-CP*, art. 21.

⁵⁸⁹ *Country Reference*, *supra* note 89 at 8-9. Illustrating the struggle between the central government and the provinces over the degree of centralization of the investment approval process, the People's Committee of Ho Chi Minh City asked to be granted the authority to review the applications of projects of less than \$5 million. The SCCI refused to comply with this request for fear that all other People's Committees would also want to approve smaller projects, thereby jeopardizing the centralization of investment approvals. *Ibid.* at 9. Article 58 of the 1996 FTL is thus all the more surprising since it provides for local People's Committees to henceforth consider and license certain projects. This is indeed a complete reversal of opinion as Vietnamese authorities have over and over again pledged to centralize the approval process. See *e.g. infra* note 610.

⁵⁹⁰ *Regulations 191-CP*, art. 6. Group A comprises: infrastructure construction projects for industrial zones and export processing zones and BOTs; projects worth \$40 million or more in electricity, mining, oil and gas, metallurgy, cement, chemicals, engineering, electronics, seaports, airports, telecommunications, trade centers, cultural and tourist areas, and real estate; cultural press and publishing projects; national defense and security projects; and projects necessitating five hectares or more of urban land or fifty hectares or more of land in other categories. All other projects fall into Group B. *Regulations 191-CP*, art. 6(1) and (2). Projects were formerly divided into three categories, with the Prime Minister ratifying decisions on Group A and Group B projects and the SCCI, in consultation with the relevant ministries, making the final decision on Group C projects. *Regulations 366-HDBT*, art. 4.

⁵⁹¹ *Regulations 191-CP*, arts. 8-9. *Regulations 191-CP* also set time limits for the granting of various licenses required for the project once it has been approved: land leases (article 10), construction permits (article 12), and import licenses (article 14). See Paragraph d) on page 98, below, for a discussion of the time limits for project evaluation.

Investment].⁵⁹² Group A projects are approved by the Prime Minister and Group B projects, by the chairman of the SCCI [Minister of Planning and Investment].⁵⁹³ However, whether approval is granted by the Prime Minister or the chairman of the SCCI [Minister of Planning and Investment], the opinions of other ministries and of the local People's Committees must always be considered in the final decision.⁵⁹⁴

c) Criteria for Project Approval

The evaluation of investment projects must include a review of the following matters: the legal status and financial standing of both the foreign and Vietnamese investors; the objectives of the project in relation to the country's socio-economic development; the benefits Vietnam and the Vietnamese party will gain from the project, *e.g.* whether new products and jobs will be created; transfer of technology and environmental impact of the project; the efficient use of land, the compensation paid for site clearance and the value of the assets (if any) contributed by the Vietnamese party; and tax rates, rents for the use of land, water or sea, as well as any preferential treatment granted to the project.⁵⁹⁵ For their part, the local People's Committees will examine the legal status of the foreign and Vietnamese parties; the location and objectives of the project in relation to the socio-economic development of the locality; the land-use rights of the Vietnamese party, the land used for the project and the compensation paid for site

⁵⁹² FIL, art. 37 and *Circular 215/UB-LXT*, art. 9.1. Applications are submitted in twelve copies with one original set. *Circular 215/UB-LXT*, art. 9.1(f). For the actual content of the investment application, see "Application for an Investment License" in the section on joint venture enterprises in Chapter II, on page 50, above.

⁵⁹³ *Regulations 191-CP*, art. 7 and *Circular 215/UB-LXT*, art. 9.2. Note that the SCCI [Ministry of Planning and Investment] is nonetheless involved in the assessment of the application of Group A projects insofar as the chairman of the SCCI [Minister of Planning and Investment] submits his recommendation (based on the opinions of the relevant ministries) to the Prime Minister. In the case of Group B projects, the chairman of the SCCI [Minister of Planning and Investment] takes into consideration the opinions of the relevant ministries when making his decision. *Ibid.* The approval of BOT projects is subject to particular procedures. See page 70, above, for a discussion of the awarding of BOT contracts. Furthermore, pursuant to article 16 of the *Law on Petroleum*, dated 6 July 1993, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-451, projects in the oil sector are subject to bidding or other special approval procedures as determined by the Government.

⁵⁹⁴ Although pursuant to articles 8 and 9 of *Regulations 191-CP*, ministries and People's Committees must send their opinions to the SCCI [Ministry of Planning and Investment] within set time limits, these are not always respected. See *infra* note 614 and accompanying text.

⁵⁹⁵ *Regulations 191-CP*, art. 5.

clearance; and the value of the assets (if any) contributed by the Vietnamese party.⁵⁹⁶ Although these are the only matters the People's Committees are required to examine, in practice, projects will often be evaluated in their entirety by local authorities.⁵⁹⁷ Deploring the duplicate evaluation conducted at both the provincial and central levels, the World Bank has recommended that local authorities concentrate their review on matters that directly concern them, such as land-use rights.⁵⁹⁸ Finally, it should be pointed out that particular evaluation criteria are also applicable in certain industries pursuant to *Circular 215/UB-LXT*.⁵⁹⁹

d) Time Limits for Project Evaluation

- Group A Projects

As far as Group A projects are concerned, the chairman of the SCCI [Minister of Planning and Investment] must submit his recommendation to the Prime Minister within fifty days after receiving all project documentation.⁶⁰⁰ Within five days after the project documents have been submitted to him, the chairman of the SCCI [Minister of Planning and Investment] must forward them to the relevant ministries and the local People's Committee,⁶⁰¹ as he must take into consideration their opinions before making his recommendation to the Prime Minister.⁶⁰² The ministries and the People's Committees

⁵⁹⁶ *Ibid.*, art. 9.

⁵⁹⁷ Hayward & Lay, *supra* note 262 at 12. See also *supra* note 317 and accompanying text on the pre-approval of projects by the local People's Committees.

⁵⁹⁸ *Viet Nam - Transition to the Market*, *supra* note 66 at 90-91. "Other aspects of project evaluation, such as economic evaluation, financial appraisal, etc. should be done only once, at the central level or at the local SCCI, (...). Thus, a major constraint in the approval process can be removed by taking away the evaluation role of the local governments as a separate step of the process." *Ibid.* at 91.

⁵⁹⁹ Consumer and electronic products (Appendix 1); assembly and manufacture of automobiles and motorcycles (Appendix 2); construction of hotels, apartments, offices and investment in restaurant businesses (Appendix 3); garment and footwear (Appendix 4); technical and design consulting (Appendix 5); importation of motor vehicles (Appendix 6).

⁶⁰⁰ *Regulations 191-CP*, art. 8(2) and *Circular 215/UB-LXT*, art. 9.2(a). The fifty-day time limit excludes any period of time the investor might need to bring changes to his documents or to provide additional information on the project. *Circular 215/UB-LXT*, *ibid.*

⁶⁰¹ *Circular 215/UB-LXT*, *ibid.* In addition to the relevant ministries, the Ministry of Trade, the Ministry of Science, Technology and Environment, the Ministry of Construction, the ministry in charge of the economic-technical branch and the General Cadastral Department are to be forwarded the project documentation. *Ibid.*

⁶⁰² *Regulations 191-CP*, art. 7 and *Circular 215/UB-LXT*, art. 9.2(a). When the relevant ministries disagree on important aspects of a project, the chairman of the SCCI [Minister of Planning and

have twenty days after they receive the project documentation to send their written opinions to the SCCI [Ministry of Planning and Investment]. Theoretically, if they fail to respond in the prescribed time, they will be deemed to have approved the project.⁶⁰³ However, in practice, the MPI will not issue any license without the approval of the ministries most relevant to the project (e.g. the Ministry of Construction for a real estate project) and of the People's Committee where the investment will be located, since local authorities are the ones in charge of granting land-use rights.⁶⁰⁴

The chairman of the SCCI [Minister of Planning and Investment] must notify the investor of the Prime Minister's decision within seven days.⁶⁰⁵ It should be noted that the Prime Minister himself is under no obligation to render his decision within a certain period of time. We believe that ascribing a deadline (an enforceable one) to the Prime Minister's decision would demonstrate an even greater commitment to the expeditiousness of approval procedures on the part of Vietnamese authorities, especially in view of the fact that the Prime Minister gives final approval to the bigger investment projects.

- Group B Projects

With respect to Group B projects, the chairman of the SCCI [Minister of Planning and Investment] must inform the investor of his decision within forty-five days after he has received the project documentation.⁶⁰⁶ Five days after receiving the project documents, the

Investment] establishes a consultative committee made up of representatives of the Ministry of Finance, the Ministry of Trade, the Ministry of Science, Technology and Environment, the Ministry of Construction, the Office of the Government, the General Cadastral Department, relevant branches, and local and foreign experts. *Ibid.* The Prime Minister, for his part, may ask for a study to be carried out by the State Evaluation Committee before making his decision. *Regulations 191-CP*, art. 7.

⁶⁰³ *Regulations 191-CP*, arts. 8(1) and 9 and *Circular 215/UB-LXT*, art. 9.2(a).

⁶⁰⁴ Interview with Mr. Hung of the Foreign Investment Department at the MPI, *supra* note 551. As far as the other ministries involved in the evaluation process are concerned, their approval will be presumed if they do not reply within the imparted time. *Ibid.*

⁶⁰⁵ *Regulations 191-CP*, art. 8(2) and *Circular 215/UB-LXT*, art. 9.2(a). "Approval shall be communicated by the issue of an investment license." FIL, art. 38. Note that there is no provision allowing for the appeal of a decision denying the issue of an investment [business] license.

⁶⁰⁶ *Circular 215/UB-LXT*, art. 9.2(b). The forty-five-day time limit excludes any period of time the investor might need to bring changes to his documents or to provide additional information on the project. *Ibid.* Note that there seems to be an error in article 8(3) of *Regulations 191-CP* which reads as follows: "In respect of projects in Group B: within forty five days from the date of receipt of the decision of the Prime Minister, the Chairman of the State Committee for Co-operation and Investment shall notify

chairman of the SCCI [Minister of Planning and Investment] must send them to the Ministry of Finance, the Ministry of Trade, the Ministry of Science, Technology and Environment, the Ministry of Construction, as well as to any other relevant ministries, and to the local People's Committee.⁶⁰⁷ As in the case of Group A projects, the ministries and the local authorities have twenty days after they receive the project documentation to send their written opinions to the SCCI [Ministry of Planning and Investment], otherwise they will be deemed to have approved the project,⁶⁰⁸ except for the most relevant ministries and local authorities whose opinions are essential to the issue of a license.⁶⁰⁹

e) Merger of SCCI with SPC: Centralization... but for Whom?

The merger of the State Committee for Cooperation and Investment with the State Planning Committee to form the Ministry of Planning and Investment was supposed to be a step toward the establishment of the one-stop approval procedures long promised to foreign investors. We submit that the consolidation of the two former state agencies, if anything, reinforces government screening of foreign investment and does not present any substantial benefit to foreign investors themselves, as they must still lobby the various government agencies reviewing their applications.⁶¹⁰

The State Planning Committee was responsible for processing foreign aid and for planning the economic development of all regions of the country. The principal objective behind the merger of the SCCI with the SPC was to better coordinate foreign investment projects with the country's development needs by making the former SPC actually part of the new foreign investment approval body.⁶¹¹ Indeed, although article 7 of *Regulations*

investors of its decision." As already mentioned, pursuant to article 6(2) of *Regulations 191-CP*, it is the chairman of the SCCI [Minister of Planning and Investment], not the Prime Minister, who makes the final decision concerning Group B projects.

⁶⁰⁷ *Circular 215/UB-LXT*, *ibid.*

⁶⁰⁸ *Regulations 191-CP*, arts. 8(1) and 9 and *Circular 215/UB-LXT*, *ibid.*

⁶⁰⁹ See *supra* note 604 and accompanying text.

⁶¹⁰ See *infra* note 622 and accompanying text. The Minister of Planning and Investment himself conceded that the one-stop approval procedure was not yet a reality, stating that its implementation was one of the changes that were contemplated in the foreign investment legislative framework. *Country Report 4th quarter 1995*, *supra* note 73 at 6.

⁶¹¹ Interview with Dr. Nguyen Tien Thuan, Vice Director General, Ministry of Planning and Investment, in Hanoi on June 21, 1996.

191-CP required the chairman of the SCCI to always consult with the State Planning Committee before making his recommendation (Group A projects) or granting his approval (Group B projects), the SCCI, in its eagerness to increase the flow of foreign direct investment in the country, would sometimes fail to heed the SPC's recommendations before issuing licenses.⁶¹² Hence the establishment of the Ministry of Planning and Investment to rectify the situation and to insure a more equal distribution of foreign investment projects within the country.

Although it has been suggested that the consolidation of the two former state agencies would also account for a more expeditious review of foreign investment applications,⁶¹³ we submit that its effect in that regard will only be minimal. Indeed, the involvement of the ministries and People's Committees in the approval process remains unaffected by the merger. All applications for foreign investment approval, whether granted by the Prime Minister or the Ministry of Planning and Investment, must still be reviewed by a host of ministries vying to see their own interests put at the forefront of the national agenda, which obviously results into longer approval procedures.⁶¹⁴ Moreover, one should not forget that the major source of delays in the approval process is the review conducted at the local level.⁶¹⁵ This problem can hardly be solved by the merger of two central agencies.

f) "No Approval Necessary Policy": the Solution for Vietnam?

It has been propounded that Vietnam adopt the "no approval necessary policy" of Thailand's *Investment Promotion Act*, on the ground that its current approval process actually hampers foreign investment, fosters corruption and is nothing but an attempt by Vietnamese authorities to keep a firm grip on the economy by policing foreign investment.⁶¹⁶ Unquestionably, Vietnam's approval process is overly scrutinizing and

⁶¹² *Ibid.*

⁶¹³ See Minister Le Xuan Trinh's statement on the merger of the former state agencies, *supra* note 586.

⁶¹⁴ With ministries most often disagreeing on various issues, the evaluation process can be stretched indefinitely. Hayward, *supra* note 301 at 504.

⁶¹⁵ *Viet Nam - Transition to the Market*, *supra* note 66 at 91.

⁶¹⁶ Ngo, *supra* note 74 at 97-98.

certainly gives rise to the above-mentioned problems. However, we would like to reemphasize that it is Vietnam's sovereign right to monitor the use of its natural resources and its labor force by foreigners. Moreover, while acknowledging that delays in the investment review process are detrimental to the level of foreign investment in the country, we submit that doing away altogether with the approval process would be premature at this point in time and could prove more harmful than beneficial to foreign investment in Vietnam.

Firstly, for all its faults, the foreign investment application process presents the non negligible advantage of giving foreign investors a foretaste of Vietnam's investment environment before making important financial commitments in the country. Secondly, while Thailand's efforts to attract foreign investment date back to 1954, with the *Industrial Promotion Act* as the basis for its current legislation,⁶¹⁷ Vietnam has only actively sought foreign investment since 1987. Its investment framework, including its approval process, though admittedly in need of improvements, nevertheless provides foreign investors with much needed guidelines to find their way in this not so long ago uncharted territory. Thirdly, the approval process also allows for the screening out of projects which, in any case, might be doomed to failure in a particular locality. Since the success of a project depends largely on the support it can gather from the local People's Committee,⁶¹⁸ the review procedures permit foreign investors to test the ground as to whether or not they can count on this support. Thus, while the "no approval policy" may translate into a greater number of foreign enterprises in Vietnam, the number of failed businesses (failures that could be avoided) could also rise.

g) Streamlining the Entry Screening Process is Imperative

While we believe that Vietnam's investment framework is not yet ready for the "no approval necessary policy", we submit that some of the problems currently stemming from

⁶¹⁷ *Ibid.* at 69.

⁶¹⁸ "(...) but most investors learn that subsequent success or failure depends in large part on the local administration, whether as partner, intermediary, or protector against rivals and predators." D.G. Marr, *Vietnam Strives to Catch Up* (New York: The Asia Society, February 1995) at 19.

the investment review procedures, such as delays, bureaucracy and corruption, could at least be alleviated through a streamlining of the investment screening process. By calling for more centralized review procedures, we do not necessarily suggest that other ministries and local authorities should be totally excluded from the decision-making process (although the issue of local governments' overlapping authority with the MPI still needs to be addressed⁶¹⁹). The establishment of a real one-stop shop for investment approval in Vietnam entails that foreign investors deal solely with the MPI to get approval for their projects. At this point in time, it is hardly the case.⁶²⁰

Although there is no requirement for pre-approval in the foreign investment legislation, foreign investors would be well-advised to have memoranda of understanding with both the MPI and the local People's Committee before formally applying for a business or investment license.⁶²¹ Moreover, foreign investors still have to lobby the various ministerial and local authorities involved in the review of their investment applications in order to secure approval for their projects, a very time-consuming process.⁶²² The problem of long delays in investment approval is very serious and should be dealt with imminently. An easy solution would be to shut all other ministries and the local People's Committees out of the review process, leaving the MPI sole authority to screen investment projects. Yet, in the long run, this could prove detrimental to foreign investors: while concentrating all decision-making power into the MPI would certainly expedite the approval process itself, it might also alienate local authorities whose cooperation is essential during and after the implementation phase of investment projects.⁶²³ For, in view of the traditionally independent-minded local authorities,⁶²⁴ it is

⁶¹⁹ *Viet Nam - Transition to the Market*, *supra* note 66 at 90. See also *supra* note 598 and accompanying text.

⁶²⁰ The former SCCI was described as a "house with many doors". Neilson in Duffield, ed., *supra* note 559 at 52. The same description can now be applied to the MPI.

⁶²¹ Interview with Ms. Susan Hutton, lawyer with Stikeman, Elliott, in Singapore, on August 2, 1996. According to Mr. Hung of the Foreign Investment Department at the MPI, a visit at the local People's Committee is actually the first step foreign investors should take. Conversation with Mr. Hung, *supra* note 551. See also *supra* note 317 and accompanying text.

⁶²² Interview with Ms. Hutton, *ibid.*

⁶²³ See *supra* note 618.

⁶²⁴ The Vietnamese have an old saying according to which the emperor's laws stop at the village gate. "Vietnam's Code of the Lê Dynasty (1428-1788)", *supra* note 24 at 552.

doubtful whether a decision imposed by a central approval body would eventually be supported at the provincial level.⁶²⁵

One way to accelerate investment approval would be, first of all, to limit to a strict minimum the other ministries involved in the decision-making process. The problem of long delays is due to an overly scrutinizing approval process: so many governmental approvals are required that the review of applications becomes inevitably stalled at some point in the evaluation process, in spite of the time limits set for project approval.⁶²⁶ Secondly, the status of the MPI as a one-stop shop for project approval should be reaffirmed, thus putting an end to the necessity of lobbying every agency involved in the review process. The MPI needs to assert much greater leadership in that respect. Thirdly, the prescribed time limits to render decisions should be strictly enforced. To that end, the central government could offer budgetary incentives to the ministerial and local authorities involved in the evaluation procedures to insure that they comply with the fixed time limits and to guarantee that once a project has been approved, it is not thwarted at the local level.

h) Post-Approval Licensing: Yet More Delays...

Once project approval has been granted, foreign investors must then comply with post-approval licensing procedures.⁶²⁷ According to a foreign lawyer in Vietnam, it is actually the licensing process, even more so than the application review itself, that is the major cause of delays in project implementation.⁶²⁸ Even in special investment zones,

⁶²⁵ "As they [the People's Committees] have proven in the past, it takes more than Hanoi's approval to push a project through in Vietnam's provinces." *Country Reference*, *supra* note 89 at 13.

⁶²⁶ See *supra* note 614.

⁶²⁷ Chapter III of *Regulations 191-CP* provides for some of the post-approval licensing requirements. See *supra* note 591.

⁶²⁸ "Investment - Opportunity's Costs", *supra* note 294 at 57. Note that it has been reported that, from now on, the deadlines stipulated in *Regulations 191-CP* for decisions on land leasing and construction permits would be enforced. Thus, decisions on land leases are to be made during the project approval procedures [as already provided for by article 6(3) of *Regulations 191-CP*] to ensure that leases are approved and land-use rights certificates are issued within the thirty-day deadline [as stipulated by article 10 of *Regulations 191-CP*] after the investment license has been granted. However, according to the *Vietnam Investment Review*, the thirty-day time limit was not yet applied as of the end of May 1995. *Country Report 2nd quarter 1995*, *supra* note 88 at 10. As far as construction licenses are concerned, the Hoang

which are supposed to provide an hassle-free investment environment, licensing procedures can still be problematic.⁶²⁹ The plethora of licenses and permits required in the actual implementation stage accounts for a bureaucratic nightmare and pervasive corruption. In the words of Singapore's Senior Minister Lee Kuan Yew, foreign investment projects "are being held to ransom" by unscrupulous officials.⁶³⁰

It is absolutely crucial for Vietnam to address the issue of long delays in post-approval licensing procedures. And it will take no less than a tremendous effort on the part of the authorities to tackle this problem as it originates from the decentralized nature of their country's polity. The various ministries and (especially) People's Committees play indeed a very important role in the implementation and inspection⁶³¹ of foreign investment projects. Fortunately, Vietnamese leaders are aware of the predicaments awaiting foreign investors during the licensing process and recognize that adjustments are required.⁶³² In a rare display of public squabbling, the former SCCI even harshly admonished local authorities for their handling of post-approval licensing procedures.⁶³³

The most effective solution would call for all post-approval licensing to be conducted under the authority of the MPI. However, as this would entail no less than a reorganization of Vietnam's political structure, this is very unlikely to happen.⁶³⁴ There

Gia Hotel in Hanoi is a dire example of the situation: the project was licensed in 1992 and has yet to receive its construction permit. *Country Report 3rd quarter 1995*, *supra* note 69 at 18.

⁶²⁹ See *supra* note 508 and accompanying text.

⁶³⁰ Gibney Jr., *supra* note 526 at 32.

⁶³¹ "Ministries and provincial people's committees shall co-ordinate with the State Committee for Co-operation and Investment [Ministry of Planning and Investment] in conducting inspections and examinations of the operations of enterprises in order to ensure that the law is strictly observed. (...)" *Regulations 191-CP*, art. 18.

⁶³² Mr. Nguyen Xuan Chuan, first Vice-Minister responsible for foreign economic relations at the Ministry of Industry was quoted as saying during an interview that "even though Vietnam is making efforts to improve its bureaucracy, cumbersome licensing procedures are still creating difficulties for investors". "Cumbersome licensing procedures' still blocking foreign investment" *Vietnam Investment Review* (17-23 June 1996) 14.

⁶³³ "In November 1993, the SCCI criticized local authorities for setting too onerous conditions for foreign investors, such as exorbitant land-leasing rates, excessive wage levels, or 'too many doors on which to knock'. 'We have to stop this messy situation', it warned." Marr, *supra* note 618 at 19.

⁶³⁴ "Provincial, city, and district administrations constantly look for ways to retain and perhaps expand their political space. Local authorities still control most of the land, deciding who will use it, for how long, and at what cost." *Ibid.* See also *supra* note 574 and accompanying text.

remain, however, ways to improve the situation. First and foremost, post-licensing procedures should be reduced to a strict minimum. Once again, it all boils down to the necessity of lessening control mechanisms on foreign investment in order to insure a higher rate of project implementation. Secondly, the central government should use both budgetary incentives and penalties to insure that the relevant authorities do not unduly delay or deny the issue of licenses and permits. Thirdly, an impartial review board should be set up to promptly examine irregularities in the licensing process. Finally, it is vital that allegations of graft be quickly dealt with and corrupt officials severely punished in order to impart badly needed confidence in the licensing process.

2.- Post-Establishment Control: Close Monitoring of the Activities of Foreign Enterprises

The screening of investment applications is only the first form of foreign investment control mechanisms in Vietnam. Article 36(4) of the *Foreign Investment Law* also provides for the on-going supervision of the operations of foreign businesses established in the country to make sure that they carry out their activities in accordance with their business or investment licenses as well as with Vietnamese law. The most obvious way for Vietnamese authorities to monitor foreign investment activities is by conducting periodical, specific and unannounced inspections at the offices of foreign enterprises.⁶³⁵ Additionally, Vietnam also polices the activities of foreign businesses through various requirements contained in its foreign investment legislation. Indeed, our analysis of the Vietnamese legal framework in the previous chapter made clear that foreign businesses operate in a very highly regulated environment.

Although we fully understand the need for Vietnam to exercise a certain degree of control over the operations of foreign businesses after they are established in the country, we submit that some of the control measures chosen by Vietnamese authorities actually hinder the smooth running of foreign enterprises, make project financing harder to obtain

⁶³⁵ Circular 215/UB-LXT, art. 14.

and, consequently, hurt the development of the country's economy. As it has been observed, it seems that the Vietnamese have difficulty to discriminate between foreign aid and foreign investment.⁶³⁶ Legal requirements pertaining to the actual operations of foreign firms should be eased, not only to facilitate the conduct of business in Vietnam, but also to boost confidence in the country's investment climate. The conditions currently imposed on the operations of foreign enterprises are only more evidence of the distrust Vietnamese officials entertain toward foreigners⁶³⁷ and serve to reinforce the widely-held belief that the presence of foreign businesses in Vietnam is but a temporary solution⁶³⁸ to help reconstruct the national economy. That might very well be the case, but, in the meantime, Vietnamese authorities must understand that foreign enterprises need some leeway in the running of their operations and that government interference should be kept to a minimum.

a) Inspections at the Offices of Foreign Businesses

Foreign firms in Vietnam are only allowed to conduct business in accordance with the operational objectives set forth in their licenses. Due to the grave consequences that await a breach, these objectives should be stated as broadly as possible. Indeed, the MPI has the power to withdraw the licenses of foreign enterprises if it finds that their operations are in violation of Vietnamese law or contravene the terms of their business or investment licenses.⁶³⁹ The foreign investment legislation provides for three different kinds of inspections. The first ones are the periodical inspections carried out once a year by the SCCI [Ministry of Planning and Investment] in conjunction with the relevant ministries and local People's Committees to establish whether foreign enterprises comply with the

⁶³⁶ "Investment - Opportunity's Costs", *supra* note 294 at 57.

⁶³⁷ "Another aspect of fear is that while Vietnam is very keen to develop a market economy, they fear being 'taken down' by foreigners". C.A. Thayer, "Introduction" in Thayer & Marr, eds., *supra* note 103, 1 at 17.

⁶³⁸ Ruderman, *supra* note 290 at 18.

⁶³⁹ As per article 38 of *Decree 18-CP*, the SCCI [Ministry of Planning and Investment] is given the power to "dissolve a joint venture enterprise prior to the expiration of its term where the activities of the joint venture violate the law or deviate from the objectives and responsibilities stated in its charter and investment license." There are similar provisions for business cooperation contracts (*Decree 18-CP*, art. 15(3)) and wholly foreign-owned enterprises (*Decree 18-CP*, art. 52).

terms of their licenses.⁶⁴⁰ The second ones are the inspections on specific matters conducted by the relevant ministries and provincial People's Committees; these inspections are carried out when necessary, once a year.⁶⁴¹ Finally, *Circular 215/UB-LXT* also provides for unannounced inspections when an enterprise is suspected of breaking the law or encounters difficulties.⁶⁴²

These various inspections allow Vietnamese authorities to maintain a close supervision over the activities of foreign businesses after their establishment. Thus, government monitoring of foreign investment extends way beyond the initial application procedure. Such inspections need not necessarily be perceived as a threat to the smooth running of enterprises, but can also be justifiable, particularly in the context of a developing economy, to insure that foreign businesses conduct their operations legally and in the nation's best interests.⁶⁴³ However, one must concede that Vietnam's guarantee against improper inspections is so vaguely phrased, especially in the case of unannounced inspections, that the protection it affords against illegal inspections is rendered illusive. Indeed, the broad wording of article 14 of *Circular 215/UB-LXT* basically allows authorities to perform unannounced inspections at will ("where an enterprise shows signs of breaching the law or is encountering problems") and does not impose any restriction on the number of such inspections that may be made in the course of the year. Moreover, although unannounced inspections are to be "carried out in accordance with the procedures stipulated by law", article 14 gives no indication as to which law actually states

⁶⁴⁰ *Circular 215/UB-LXT*, art. 14. Such inspections are carried out whenever deemed necessary, but no more than once a year. *Ibid.*

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.* All inspections must be carried out legally and must not be conducted as a means of disrupting the operations of the enterprise. Anyone performing an illegal inspection can be held liable for the damages incurred by the enterprise. *Ibid.* "It is strictly prohibited to conduct any illegal, random examinations which disrupt the operations of enterprises." *Regulations 191-CP*, art. 18.

⁶⁴³ The recent raid of the offices of Peregrine Capital Vietnam, a joint venture between overseas Vietnamese Nguyen Trung Truc and Hong Kong's Peregrine Investment Holdings, is a reminder that authorities will not hesitate to come down on foreign investors when they suspect a breach of law. A Peregrine lawyer confirmed that the inspection was unannounced and that tax and licensing records were seized from the company's offices. Peregrine Capital, one of Vietnam's most important foreign investor, used front companies to engage in the distribution business, a sector off-limits to foreign investors. A. Schwarz, "Trading Places - Vietnamese authorities raid once-favoured foreign firm" (June 20, 1996) *Far E. Econ. Rev.* 61 [hereinafter "Trading Places"]. See also *infra* note 778 and accompanying text.

the procedures to be followed. Unannounced inspections by Vietnamese authorities can not only take up a lot of time and disturb the activities of foreign enterprises,⁶⁴⁴ but, psychologically, they are also detrimental to the general investment climate in Vietnam. In fact, with that kind of unchecked administrative discretion as their basis, they amount to no less than a Damocles sword hanging over foreign businesses.

b) Legal Requirements Pertaining to the Organization and Operations of Joint Venture Enterprises

- The Unanimous Vote Requirement: Control on the Important Issues

Amongst the various provisions in the foreign investment legislation relative to the actual operations of foreign businesses in Vietnam, the most contentious of them all is certainly the one calling for a unanimous vote of the board of management on the "principal matters which relate to the organization and operation of the joint venture, namely its business objectives, business planning, and key personnel".⁶⁴⁵ Indeed, this is a very efficient (yet subtle) way to exert control over the majority of foreign businesses in Vietnam.⁶⁴⁶ As stated, joint ventures are the authorities' preferred vehicle for foreign investment⁶⁴⁷ and, *ipso facto*, account for the vast majority of foreign investment projects in the country.⁶⁴⁸ Since local partners in joint venture are almost always state-owned enterprises,⁶⁴⁹ it is therefore safe to say that the government retains a firm grip on the operations of most foreign businesses.⁶⁵⁰ Thus, in order to see PetroVietnam enjoy an

⁶⁴⁴ The police [no less] recently paid a visit to the offices of IBM in Vietnam. During their unannounced inspection, they demanded to see employee visas and residence permits. "Vietnam Syndrome", *supra* note 568 at 50.

⁶⁴⁵ FIL, art. 13. The important issues are the following: a) annual and long-term production and business plans, budget matters and plans to borrow; b) any amendments to the charter of the joint venture; c) appointment and dismissal of the chairman of the board, the general director, the first deputy general director and the chief accountant of the enterprise. *Decree 18-CP*, art. 33.

⁶⁴⁶ See "Government Control from Within" on page 48, above, and "Managerial Control of the Enterprise: Imbalance in Favor of the Vietnamese Partner" on page 55, above.

⁶⁴⁷ See *supra* note 285.

⁶⁴⁸ See *supra* note 267.

⁶⁴⁹ In fact, in 97% of the cases. See *supra* note 300 and accompanying text.

⁶⁵⁰ "It was a pattern in the states of Eastern Europe, prior to the fall of communism, and in many developing countries to permit foreign investment only in collaboration with a state entity of the host state. This enabled the socialist states which saw the advantages of foreign investment to marry socialist

enhanced managerial role (not to mention a veto power in the boardroom) and as a means of raising its status, Vietnamese authorities are now encouraging the state enterprise to carry out its very important investments in oil projects⁶⁵¹ under joint venture agreements, as opposed to under production sharing contracts (PSCs), which are standard in the oil and gas industry.⁶⁵²

A very serious disadvantage of the unanimity requirement is that it makes project financing more difficult. Obviously, foreign banks will be extremely reluctant to lend to a joint venture whose minority local partner holds a veto power on the important decisions affecting the enterprise. In addition, with such a requirement, the prospect of deadlocks on managerial issues is constantly looming over the enterprise. What is more, the solutions stipulated under the foreign investment legislation to resolve potential stalemates are clearly unsatisfactory, basically leaving it up to the MPI to make a decision or, else, allowing the parties the "option" of dissolving their enterprise.⁶⁵³ Yet, in spite of all the controversy it has whipped up, the unanimity requirement will remain part of the foreign investment framework.

Indeed, if anything, the *1996 Foreign Investment Law* reaffirms the unanimous vote requirement on important decisions taken by the board: only the appointment and dismissal of the chairman of the board and the long-term production and business plans are

ideology with the admission of foreign investment on the grounds that ultimate control over the investment was still with the state. The rationalisation was that state policy was constantly implemented through the presence of the state entity's nominees on the board of the venture." Sornarajah, *supra* note 559 at 104.

⁶⁵¹ "In terms of national development, it would be difficult to exaggerate the importance of the petroleum sector to Vietnam. It is Vietnam's biggest hard currency earner and is regarded as the prime mover of development overall." Brown in Kim, ed., *supra* note 163 at 91.

⁶⁵² "Shift in Investment Structure Concerns Oil Prospectors" (August 1996) 4:4 *The Vietnam Business Journal* 30.

⁶⁵³ Article 33(3) of *Decree 18-CP* and article 1.3(d) of *Circular 215/UB-LXT* provide for the following three options that board members can choose from (presumably by a majority vote) when unanimity on key issues cannot be reached, thereby adversely affecting the operation of the enterprise: a mediation council made up of an equal number of representatives of each party and headed by the SCCI [Ministry of Planning and Investment] will reach a decision which will have to be approved a majority vote of the council members and which will then be binding on the partners; the SCCI [Ministry of Planning and Investment] will act as a conciliator and will make a final decision on the contentious issue; or the parties can elect to dissolve the joint venture.

no longer subject to unanimous approval by the board of management.⁶⁵⁴ Thus, far from doing away with the requirement altogether, the new law now even specifies that the parties may add in the charter of the enterprise other matters requiring unanimous approval.⁶⁵⁵ Earlier in January 1996, Communist Party General Secretary Do Muoi went so far as to declare that without control of the joint ventures, there can be no socialism in Vietnam.⁶⁵⁶ Echoing this stand, the Politburo recently issued a directive calling for the establishment of Communist Party cells in all foreign-owned enterprises "to make them more healthy".⁶⁵⁷

- ...And on the Day-to-Day Operations of the Venture

The general director and the deputy general director(s) of the joint venture are responsible for the management and conduct of the day-to-day activities of the enterprise.⁶⁵⁸ The general director and the first deputy general director are both appointed by a unanimous vote of the board of management of the joint venture.⁶⁵⁹ Either the general director or the first deputy general director must be a Vietnamese citizen residing in Vietnam and at the employment of the local partner⁶⁶⁰ which, as stated, is almost always a state-owned corporation. Consequently, it is possible for the government, which already has a *de facto* veto on the important decisions taken by the board, to also keep a close watch on the day-to-day operations of the venture. Although a foreign general director

⁶⁵⁴ "The board of management makes decision, on the principle of unanimous agreement of the members present at the meeting, for the most important matters related to organization and operation of the joint venture enterprise such as: appointment and dismissal of the director general, first deputy director general, and chief accountant; adjustments and additions to the enterprise statutes; ratification of the annual financial income-expenditure statement; decisions on project finance; and the obtaining of loans for investment. (...)" 1996 FIL, art. 14.

⁶⁵⁵ "(...) Parties to a joint venture can agree to put down in the enterprise statutes other matters that they think necessary to be agreed on by the principle of unanimous agreement. (...)" *Ibid.*

⁶⁵⁶ "Bonfire of the Vanities", *supra* note 311 at 15.

⁶⁵⁷ "Vietnam - Party Cells" (December 19, 1996) *Far E. Econ. Rev.* 13. According to the official *Nhan Dan* newspaper, "[t]he aim is to help foreign enterprises, particularly those showing 'certain weaknesses and negative aspects', to pursue the 'right direction'." *Ibid.*

⁶⁵⁸ FIL, art. 12, *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.1. "Where the joint venture enterprise has more than one deputy general director, the executive board shall appoint one of them as the first deputy general director." *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.1. See also "The Chairman of the Board and the Directors of the Joint Venture" on page 57, in Chapter II, above.

⁶⁵⁹ *Decree 18-CP*, art. 33 and *Circular 215/UB-LXT*, art. 2.1.

⁶⁶⁰ FIL, art. 12, *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.1.

would ultimately be the one making the final decisions concerning the daily operations of the enterprise,⁶⁶¹ a Vietnamese first deputy general director, with whom the former must confer on issues directly affecting the implementation of decisions of the board and on other important issues,⁶⁶² must certainly be reckoned with.⁶⁶³

In addition, there are also a number of provisions in the foreign investment legislation designed to direct the activities of foreign enterprises. For instance, article 7 of the *Foreign Investment Law* provides for the foreign party to a joint venture to make his contribution to the enterprise, *inter alia*, in foreign currency, whereas the local partner has the choice of contributing cash in Vietnamese or foreign currency. Clearly, this is a way for Vietnam, strapped for hard currency, to increase its foreign currency earnings. Another such provision is the export requirement pursuant to article 11 of the FIL: joint ventures are required to export goods from Vietnam in order to meet their foreign currency needs.⁶⁶⁴ It has been noted that such a requirement can potentially drive away foreign investors interested in taking advantage of Vietnam's huge potential as a consumer market.⁶⁶⁵ Even foreign enterprises already established in Vietnam are starting to complain about export requirements imposed on them by the government.⁶⁶⁶ In spite of obvious signs that foreign investors are growing impatient with being told how to run their businesses, Vietnamese authorities seem relentless. As a matter of fact, to address the country's trade-deficit problem, measures are now being contemplated to compel foreign

⁶⁶¹ *Decree 18-CP*, art. 34 and *Circular 215/UB-LXT*, art. 2.3.

⁶⁶² *Circular 215/UB-LXT*, art. 2.3. These other important issues are the following: "organizational structure, personnel, salaries and bonuses of the enterprise; appointment and dismissal of key personnel of divisions of the enterprise; periodical and annual financial statements of the enterprise; entering into economic contracts." *Ibid.*

⁶⁶³ "One of the loudest complaints from investors concerns rules that limit majority shareholders from exercising management control of their companies. Vietnamese law gives wide powers to a joint venture's deputy director, almost always a Vietnamese." "Investment - Opportunity's Costs", *supra* note 294 at 57. See also *supra* note 360 and accompanying text.

⁶⁶⁴ (...) All foreign currency earned from exports and other sources shall, at least, be sufficient to meet all foreign currency requirements of the joint venture enterprise so as to ensure its normal operation and to protect the interests of the foreign party." FIL, art. 11.

⁶⁶⁵ Vause, *supra* note 205 at 281.

⁶⁶⁶ "The government is trying to make foreign investors export more of their production, but is encountering resistance. In September, Indonesia's Salim Group objected publicly to a government order mandating that its \$133 million food-processing joint venture export more than 20% of its production." "Promises, Promises", *supra* note 562 at 49.

firms to buy locally the materials that are available in Vietnam instead of importing them from abroad.⁶⁶⁷

B.- The Vietnamese Investment Climate: the "Carrot and Stick Method"

In the second part of this chapter, we will turn our attention to other issues affecting the general investment climate in Vietnam. We will first review the investment guarantees found in the *1992 Constitution* as well as in the foreign investment legislation. Such guarantees, along with other advantages,⁶⁶⁸ form part of the wider incentive package designed to attract foreign investors.⁶⁶⁹ Vietnam's approach to foreign investment is essentially what has been dubbed the "carrot and stick method", which consists in enticing outside capital by offering various incentives while exerting a high level of control on foreign enterprises.⁶⁷⁰ However, as will be demonstrated, Vietnam's investment guarantees are simply too vaguely worded and can too easily be shunned through other provisions to present a truly reliable protection. After having examined these investment incentives, we will then bring our attention to the major regulatory disincentive to investing in Vietnam: the country's land legislation.⁶⁷¹

1.- Investment Protection

Investment guarantees offered by the host country are meant as tools to bolster foreign investment.⁶⁷² Understandably, foreign investors want to be reassured that their

⁶⁶⁷ *Ibid.* at 48. Such measures evidently included article 31 of the 1996 FIL which makes it compulsory for foreign business to "give priority to the purchase of their equipment, machinery, materials, and means of transportation in Vietnam, provided these goods have the same technological and commercial qualities."

⁶⁶⁸ For instance, joint ventures and wholly foreign-owned enterprises are, in certain cases, granted preferential tax rates as well as profits tax exemptions and profits tax holiday. FIL, arts. 27-28 and *Decree 18-CP*, arts. 67 to 71. See Subsection d) Guarantees and Incentives for the Foreign Investor on page 71, above, for the incentives granted with BOT contracts. See also *supra* note 518 and accompanying text for the various incentives offered in EPZs and *supra* note 553 for those offered in industrial zones.

⁶⁶⁹ It has been noted, however, that a favorable general investment climate plays an even more important role than incentive packages in attracting foreign investors. *Viet Nam - Transition to the Market*, *supra* note 66 at 87. See also *infra* note 719 and accompanying text.

⁶⁷⁰ Sornarajah, *supra* note 559 at 86.

⁶⁷¹ Land-use rights and the mortgage issue have been qualified as the biggest restraints on investment in Vietnam. Thayer in Thayer & Marr, eds., *supra* note 637 at 17.

⁶⁷² "Such guarantees are usually given by high risk countries in the hope that risk perceptions arising from past nationalisations will be counteracted by the guarantees. Low risk states obviously have little need to issue such guarantees." Sornarajah, *supra* note 559 at 95.

investment will be protected as far as possible against state action. Thus, Vietnamese authorities have taken pains to enact certain investment guarantees, not only in the country's foreign investment legislation, but also in its Constitution.⁶⁷³ In addition, Vietnam has entered into twenty-five agreements on investment encouragement and protection⁶⁷⁴ and is a party to ten agreements on the avoidance of double taxation.⁶⁷⁵ It actually portends well for the future that Vietnam has signed that many bilateral investment treaties (BITs). Even more so than the investment guarantees under its Constitution and its foreign investment legislation, the BITs Vietnam has concluded demonstrate a genuine commitment to protect the interests of foreign investors. Indeed, BITs present a much more reliable protection because they are binding upon the parties under international law and cannot be unilaterally modified as is the case with the investment protections granted under domestic laws. In another very positive move, Vietnam became a member of the Multilateral Investment Guarantee Agency (MIGA) in September 1994.⁶⁷⁶ It is also presently holding discussions with other members of ASEAN on a convention on the protection of foreign investment.⁶⁷⁷ In this section, we will examine Vietnam's investment protection guarantees. While it is, needless to say, very

⁶⁷³ As noted, article 25 of the 1992 Constitution provides for investment guarantees in favor of foreign investors. See *supra* note 202 and accompanying text. "(...) The state shall guarantee the right of ownership of the legitimate capital, property, and other interests of foreign organizations and individuals. Business enterprises with foreign invested capital shall not be subject to nationalization. (...)." 1992 Constitution, art. 25.

⁶⁷⁴ "SRV To 'Streamline' Foreign Investment Process" FBIS-EAS (28 February 1995) 81. For their part, Canada and Vietnam have concluded their bilateral trade agreement in November 1995. See *supra* note 246. Some of the other countries having signed BITs with Vietnam include the Netherlands (March 10, 1994), China (December 2, 1992), Switzerland (July 3, 1992), Australia (March 5, 1991) and Belgium (January 24, 1991). International Centre for the Settlement of Investment Disputes (ICSID), *Investment Promotion and Protection Treaties* (Dobbs Ferry, N.Y.: Oceana Publications, 1996). For a review of the most important features of the BIT between Singapore and Vietnam, see Foo Kim Boon, "The Singapore-Vietnam Bilateral Investment Agreement 1992" (1993) Singapore Journal of Legal Studies 318 [the Agreement itself can be found at 292].

⁶⁷⁵ Baker & McKenzie, *The Concise Tax Guide - Selected Corporate Tax Aspects in the Asia Pacific* (Hong Kong: Baker & McKenzie, 1996) at 44-46. The tax treaties in force are with the following countries: Australia, France, India, Japan, Poland, Singapore, South Korea, Sweden, Thailand and the United Kingdom. Vietnam has also initialed tax treaties (not yet in force) with China, Germany, Hungary, Malaysia, The Netherlands, Norway and Switzerland; and it is currently conducting negotiations with Belgium, Denmark, the Philippines, Romania and Taiwan. *Ibid.*

⁶⁷⁶ A. Foster, "Banking and Finance" in *An Investor's Guide to Vietnam*, *supra* note 262, 3 at 4. "MIGA offers insurance cover in Vietnam against the risks of expropriation, war and civil disorder and currency transfer (though not currency convertibility)." *Ibid.*

⁶⁷⁷ Interview with Mr. Hiep, *supra* note 539.

commendable for Vietnam to offer such guarantees, these must also be effective enough to adequately preserve foreign interests. Otherwise, they simply fail to fulfill their primary function of enhancing the confidence of foreign investors in the country's investment environment.

In addition to its constitutional protection of foreign investment, Vietnam also provides for investment guarantee measures in Chapter III of its *Foreign Investment Law*. Firstly, the Vietnamese government makes a general commitment to treat foreign investors in a fair and equitable manner.⁶⁷⁸ It is clear that such a broad guarantee is nothing more than a show of good intentions and could hardly form the basis of a claim a foreign investor could have against the government. Article 21 of the FIL, for its part, provides for specific guarantees against expropriation, nationalization and adverse legislative changes.⁶⁷⁹ The FIL also offers guarantees on repatriation of profits⁶⁸⁰ and the transfer abroad of income earned by foreign workers.⁶⁸¹ The provision on currency conversion in article 24 of the FIL, in the chapter on the investment guarantee measures, is somewhat misleading⁶⁸² since, in practice, the Vietnamese dong is not convertible.⁶⁸³ In effect, this

⁶⁷⁸ "The Government of the Socialist Republic of Vietnam guarantees that any foreign organization which, or individual who, invests in Vietnam shall be treated fairly and equitably." FIL, art. 20. This guarantee is reiterated in article 99 of *Decree 18-CP* which also specifies that when a bilateral investment treaty has been signed between Vietnam and another country, its provisions take precedence.

⁶⁷⁹ "The capital and assets invested in Vietnam by foreign organizations or individuals shall not be requisitioned or expropriated through administrative measures. An enterprise with foreign owned capital shall not be nationalized. In cases where the benefits of the parties to a licensed business co-operation or to a licensed enterprise with foreign owned capital are reduced due to any change in the law of Vietnam the State shall take appropriate measures to protect the interest of the investors." FIL, art. 21. Article 1 of the FIL also "guarantees the ownership of invested capital and other rights of foreign organizations and individuals".

⁶⁸⁰ "Foreign organizations and individuals investing in Vietnam shall have the right to transfer abroad: 1. Their share of profits derived from business operations. 2. Any payments due as a result of provision of technology or services. 3. The principal of any loan made in the course of a business operation together with interest thereon. 4. Their invested capital. 5. Other sums of money and assets lawfully owned by them." *Ibid.*, art. 22.

⁶⁸¹ Subject to foreign exchange control regulations. *Ibid.*, art. 23.

⁶⁸² Incidentally, the reader will note that this has been corrected in the new FIL: the provision on currency conversion is no longer to be found in the chapter "Investment Guarantee Measures" (chapter III), but rather in the chapter "Rights and Obligations of Foreign Investors and Foreign Invested Enterprises" (chapter IV). 1996 FIL, art. 36.

⁶⁸³ "Another problem is that the government will not grant exchange-rate guarantees. Foreign investors are allowed to convert revenues in local currency into foreign currencies - provided they can get it." Thornton, *supra* note 422.

means that foreigners must, for instance, buy products in Vietnam and sell them abroad in order to convert their dong-denominated earnings into foreign currencies for the purposes of profits repatriation.⁶⁸⁴

a) The Guarantee against Expropriation: Reliable Protection?

Article 21 of the FIL gives an all-out guarantee that the assets and capital of foreign investors will not be nationalized or otherwise expropriated by the State,⁶⁸⁵ thereby granting an even better protection than the Hull formula of "prompt, adequate and effective" compensation in case of expropriation.⁶⁸⁶ However, while article 21 grants complete protection against state requisition of foreign assets and capital, other provisions are hardly reconcilable with such unequivocal wording. For instance, article 23 of the *1992 Constitution* allows the government, when it deems it necessary for national security reasons, to purchase at market value the property of individuals or organizations.⁶⁸⁷ Although article 23 seems to be aimed at Vietnamese entities (and article 25 at foreign organizations and individuals⁶⁸⁸), one cannot help but wonder if it could be used to requisition the share a local party holds in a joint venture or a business cooperation contract.

Also, it is important to bear in mind that land rights are not protected against expropriation by the state. Indeed, the FIL's guarantee against expropriation only covers

⁶⁸⁴ Castelli, *supra* note 63 at 323.

⁶⁸⁵ "Existing and erstwhile communist states are keen to give such guarantees [against expropriation] in their legislation to dispel any idea that they still have ideological predispositions towards expropriation." Sornarajah, *supra* note 559 at 95.

⁶⁸⁶ The expression Hull formula was coined after U.S. Secretary of State Cordell Hull who, in a letter sent to the Mexican government in 1938, stated that "prompt, adequate and effective" compensation was due in the case of expropriation. The full compensation under the Hull formula is held as an "international minimum standard". In complete opposition to the Hull formula, the Calvo doctrine, followed by many Latin American countries, holds that compensation for expropriation is a matter governed by national laws, not international law. Thus, in case of expropriation, foreign investors are entitled to no more than the compensation received by nationals under domestic laws. "Protection of Foreign Direct Investment in a New World Order: Vietnam - A Case Study", *supra* note 266 at 1996-1997.

⁶⁸⁷ "Legal property of individuals and organizations shall not be subjected to nationalization. The state may, when it deems it absolutely necessary to serve national defense and security goals as well as national interests, purchase or requisition with compensation the property of individuals or organizations based on current market prices. Procedures for purchase or requisitions shall be defined by law."

⁶⁸⁸ See *supra* note 673.

capital and assets and not the land since, in any case, it belongs to the Vietnamese people under the well-entrenched principle of collective land ownership.⁶⁸⁹ Furthermore, article 27 of the *Law on Land* allows the state to recover possession of the land from those who are using it on very broad grounds ("for the purposes of national defense, security, national or public interest"). Although article 27 provides for some form of compensation to be awarded in such cases, it does not specify that the indemnity paid should be based on market value prices.⁶⁹⁰ In the end, one can only ask what is the use of a guarantee that the assets will not be expropriated when the land where these assets are located can be requisitioned by the state.

Moreover, since foreign enterprises are only allowed to rent the land they use for their projects,⁶⁹¹ the question to be asked is whether the guarantee against expropriation still applies to the assets built on the land upon expiry of the lease or, for that matter, what will happen to those assets at such time. According to Dr. Doan Nang, Vice Director of the Legal Department of the Office of the Government, the answer to this question is quite simple: upon expiry of their leases (which will coincide with the expiry of their investment or business licenses), foreign investors may no longer own real property in Vietnam: "[i]n such cases, they have to deal with their real property by assigning them to the Vietnamese party or by other way in accordance with provisions of the Vietnamese law".⁶⁹² In other words, the right of ownership of foreign investors (and therefore the guarantee against

⁶⁸⁹ 1992 Constitution, art. 17 and *Law on Land*, dated 14 July 1993, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at X-1, art. 1: "Land is the property of the people, and is subject to exclusive administration by the State. (...)"

⁶⁹⁰ "When necessary, the State, shall for the purposes of national defence, security, national or public interest, recover possession of land which is currently being used. In such cases, the land user shall be entitled to payment of compensation in respect of the recovery of possession by the State." See also *Ordinance on Rights and Obligations of Foreign Individuals and Organizations Leasing Land in Vietnam*, issued by the Standing Committee of the National Assembly, dated 14 October 1994, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at III-31, art. 5 [hereinafter *Ordinance on Leasing Land in Vietnam*]: "In cases where the Government, for the purposes of national interest or national defence or security, appropriates the land leased to a foreign individual or organization (...) prior to the expiry of the lease period, such individual or organization shall be compensated in accordance with the provisions of the laws of Vietnam (...)"

⁶⁹¹ See the following section on Vietnam's land legislation.

⁶⁹² D. Nang, "Vietnamese Law and the Question of Ownership of Foreign Investors in Vietnam" (May 1996) *Vietnam Law & Legal Forum* 9 at 10.

expropriation) is subordinate to the term of their investment or business licenses. Flowing from this, the guarantee against expropriation can very easily be circumvented by simply withdrawing foreign investors their business or investment licenses. Indeed, pursuant to articles 15(3), 38 and 52 of *Decree 18-CP*, the SCCI [MPI] has the right to withdraw business or investment licenses of parties to business cooperation contracts or foreign-owned enterprises if they break the law or do not conduct their operations in accordance with the objectives stated in their licenses. Furthermore, the MPI enjoys complete discretion in determining whether there is sufficient ground to withdraw a license and foreign enterprises have no effective right of appeal should the MPI decide against them.⁶⁹³ Thus, under scrutiny, the guarantee afforded by article 21 of the FIL reveals a few weaknesses. Ultimately, the only true protection foreign investors might have against expropriation in Vietnam is the negative impact that it could have on the flow of foreign investment in the country. Also, in the case of the investors whose home states have concluded bilateral investment treaties with Vietnam, political pressure could at least insure that they are awarded the compensation they are entitled to under these treaties.⁶⁹⁴

b) A Protection Against (Creeping) Nationalization?

As stated, both article 25 of the *1992 Constitution* and article 21 of the *Foreign Investment Law* provide that enterprises with foreign-owned capital will not be subject to nationalization. The question as to whether the guarantee against nationalization was even going to be included in the Constitution was vigorously debated by lawmakers in Vietnam.⁶⁹⁵ The argument of those opposing its inclusion in the *1992 Constitution* was that although it might have the immediate effect of reassuring foreign investors, it would also equate to Vietnam tying its own hands on this matter in the future; proponents of the

⁶⁹³ On the issue of administrative discretion, see subsections b), c) and d) of Section 3.- Foreign Investment and the Rule of Law in this chapter, on pp. 149ff, below.

⁶⁹⁴ For instance, the compensation to be paid in case of expropriation under the Singapore-Vietnam Agreement on the Promotion and Protection of Investments is analogous to the Hull formula of "prompt, adequate and effective". Moreover, the Agreement stipulates that the compensation is to be freely convertible and transferable. However, no payment of interest is due from the time of the expropriation to the time of payment, as is the case in the Australia-Vietnam bilateral investment treaty. Foo, *supra* note 674 at 320 and 322.

⁶⁹⁵ "The 1992 Constitution and the Rule of Law", *supra* note 558 at 96.

guarantee, for their part, argued that this "self-restraint" in the exercise of national sovereignty was not only based on reciprocity, but was also a means to achieve development of the national economy and greater prosperity.⁶⁹⁶

Protection against nationalization was indeed a very controversial issue in Vietnam at the time of the adoption of the *1992 Constitution*. While the proponents of the constitutional guarantee eventually prevailed, its opponents may not have completely lost either. Thus, it might not be just coincidental that the provisions on the gradual increase of the Vietnamese party's share in a joint venture and on the conversion of wholly foreign-owned enterprises into joint ventures were introduced that same year with the *1992 Amendments to the Foreign Investment Law*. We submit that both provisions are not only contrary to the spirit of the guarantee against nationalization, but are also equivalent to creeping nationalization.

- Gradual Increase of the Vietnamese Party's Share in a Joint Venture Enterprise

Article 8 of the *Foreign Investment Law* stipulates that in the case of "important economic establishments determined by the Government",⁶⁹⁷ the parties must agree on an increase in the local party's contribution to the prescribed capital of the joint venture.⁶⁹⁸ Now, this provision for a gradual increase of the Vietnamese party's share in the joint venture would not necessarily be tantamount to disguised nationalization if not for the fact that, as mentioned, almost all local partners in joint ventures are state-owned enterprises.⁶⁹⁹ While pursuant to article 27 of *Decree 18-CP*, the parties are "permitted" to

⁶⁹⁶ *Ibid.* at 96-97. "The issue of immunity from nationalization for foreign investment in Vietnam being expressly guaranteed by the constitution of the SRV is highly significant, because for the first time Vietnam has departed from the traditional practice of socialist countries, where no such express provisions have been made." *Ibid.* at 97.

⁶⁹⁷ Pursuant to article 27 of *Decree 18-CP*, the determination as to whether a project is of economic significance is in fact made by the SCCI [Ministry of Planning and Investment].

⁶⁹⁸ "It is clear that the Vietnamese government is seeking to utilize foreign investment as a means of strengthening its domestic enterprises by allowing for a gradual 'hand-over' of assets, machinery and know-how." Chapman, *supra* note 270 at 361. However, this situation is not unique to Vietnam, as provisions allowing increase in the local partner's share are also to be found in other developing socialist markets. *Ibid.*

⁶⁹⁹ See *supra* note 300 and accompanying text.

specify in the joint venture contract the timing and the rate according to which the Vietnamese party will increase his contribution to the prescribed capital of the joint venture, article 5.1 of *Circular 215/UB-LXT* uses stronger wording as it makes it mandatory for the parties to include in the joint venture contract not only the timing and proportion of the increase, but also the amount of the compensation due to the foreign partner,⁷⁰⁰ which can prove very risky for the foreign investor if the joint venture fares better than anticipated.

As noted, it is entirely up to the SCCI [Ministry of Planning and Investment] to determine whether a particular joint venture is an important economic establishment, as the law does not give any definition of such an enterprise: article 8 of the FIL basically allows the government to pick and choose the joint ventures where it wants to see its share increased. Incidentally, it should be noted that article 8 is also quite vague as to the exact degree of the increase: are foreign investors potentially facing a complete buy-out? This question can only be answered on a case-by-case basis, at the time of application for the investment license, since the joint venture contract stating the timing and the proportion of the increase of the local partner's share in the enterprise is part of the documents that must be approved (and eventually modified) by the Ministry of Planning and Investment during the review process.⁷⁰¹

Thus, the government's complete discretion in determining those enterprises which are of important economic significance as well as the actual degree of the increase of the local partner's share in the joint venture means, in effect, that it is quite conceivable that the granting of the investment license could be made conditional upon an (important) increase of the Vietnamese partner's share in the enterprise. The limited duration of joint ventures, combined with the provision allowing for an increase of the local party's share in the venture, leaves no doubt that the Vietnamese government has no intention of seeing

⁷⁰⁰ Article 5.2 provides for a similar requirement in the case of the conversion of wholly foreign-owned enterprises into joint ventures. See *infra* note 709 and accompanying text.

⁷⁰¹ *Decree 18-CP*, art. 20.

foreign investors take control of the country's economy.⁷⁰² Even more so, article 8 of the FIL serves as a reminder of the Vietnamese authorities' distrust of foreign businesses and insures that, through state-owned enterprises as local partners, the government can increase its stake into joint venture enterprises before taking them over at the expiration of the term of their licenses.

- Conversion of WFOEs into Joint Venture Enterprises

The fact that Vietnam imposes no limit on the percentage of foreign ownership in enterprises operating within its borders has often been cited as an indication of its receptiveness to foreign investment.⁷⁰³ However, one must not forget that although wholly foreign-owned enterprises are indeed allowed in Vietnam, they are clearly not Vietnamese authorities' favorite form of investment.⁷⁰⁴ Indeed, approval for 100% foreign-owned businesses is, in practice, harder to obtain than for joint venture enterprises and it is only granted in certain sectors of the economy while other sectors remain simply off-limits to wholly foreign-owned enterprises.⁷⁰⁵ In view of the government's already tepid disposition toward wholly foreign-owned enterprises, it is therefore not surprising to find the counterpart of article 8 of the *Foreign Investment Law*, providing for the gradual increase of local partners' shares in joint ventures, in article 14 of the FIL. Thus, article 14 requires the owner of a WFOE in an important economic sector to sell his capital in the enterprise "part by part" to a Vietnamese enterprise. Whereas article 14 seems to imply that the Vietnamese business enterprise will gradually buy out the foreign investor,⁷⁰⁶ both *Decree*

⁷⁰² "The transitory nature of joint venture companies and their projects has been defended to ensure that the means of production are not permanently controlled by foreign investors. One commentator has even remarked that the government views foreign investment only as an officially-sanctioned temporary phenomenon intended to accelerate the pace of economic development over the next few years." Ruderman, *supra* note 290 at 18.

⁷⁰³ See e.g. "Protection of Foreign Direct Investment in a New World Order: Vietnam - A Case Study", *supra* note 266 at 2004.

⁷⁰⁴ See generally Subsection b) A Halfhearted Encouragement from the Government in the section on wholly foreign-owned enterprises of Chapter II, on page 63, above.

⁷⁰⁵ See *supra* notes 404 and 405 and accompanying text.

⁷⁰⁶ "(...) Vietnamese business enterprises will be permitted to purchase part by part the capital of enterprises in important economic sectors". Emphasis added.

18-CP and *Circular 215/UB-LXT* stipulate that the Vietnamese enterprise is buying only part of the capital of the WFOE in order to turn it into a joint venture.⁷⁰⁷

Article 47 of *Decree 18-CP* states that after determination by the SCCI [Ministry of Planning and Investment] that his project is "of economic importance", the foreign investor will indicate in his investment application that he agrees to sell part of the capital of his WFOE to a Vietnamese party in order to eventually transform it into a joint venture. Once again, complete discretion is left to the SCCI [Ministry of Planning and Investment] as to the determination of the economic importance of the enterprise.⁷⁰⁸ In addition, we suggest that the requirement that the investment application must indicate "the proportion of capital to be assigned, and the time and the consideration for assignment",⁷⁰⁹ is here again tantamount to ascribing a value to the enterprise in advance and is potentially unfair to the foreign investor, as it will have the effect of putting a ceiling on the amount owed to him, regardless of the actual value of his enterprise at the time of its conversion into a joint venture.

The implication in the relevant provisions that the foreign investor willingly sells part of his enterprise is deceptive. Indeed, when a foreign investor opts for a wholly foreign-owned enterprise as the vehicle for his investment, he expresses a clear desire to conduct business on his own, with all the advantages and disadvantages inherent to his choice. However, once determination of economic importance has been made by the SCCI [Ministry of Planning and Investment], not only does he have no choice but to state in his

⁷⁰⁷ *Decree 18-CP*, art. 47 and *Circular 215/UB-LXT*, art. 5.2. Article 15 of the 1996 FIL corrects this discrepancy by specifying that "(...) a Vietnamese state enterprise can negotiate with the owner of the establishment to purchase a part of the ownership to set up a joint venture." Our emphasis.

⁷⁰⁸ The counterpart provision allowing for the increase of the Vietnamese partner's share in a joint venture also involves the discretionary appraisal of the SCCI [Ministry of Planning and Investment] that the project is of "economic significance". See *supra* note 697 and accompanying text. The SCCI reportedly stated that conversion of WFOEs into joint ventures will only take place in important economic sectors, namely power and energy, and only with the consent of the foreign investor. Still, there is no guarantee that these important economic sectors will not be extended in the future. *Succeeding in Vietnam - Part I*, *supra* note 281 at 24.

⁷⁰⁹ *Circular 215/UB-LXT*, art. 5.2. The same requirement applies to the gradual increase of the local partner's share in a joint venture. *Circular 215/UB-LXT*, art. 5.1. See *supra* note 700 and accompanying text.

investment application that he will "consent" to the conversion of his enterprise into a joint venture, but neither can he freely choose his "new partner".⁷¹⁰ If his new partner turns out to be, as can most likely be expected, a state-owned enterprise,⁷¹¹ we submit that the conversion of his WFOE into a joint venture amounts to a disguised partial nationalization contrary to the protection granted by article 21 of the *Foreign Investment Law*.

c) Adverse Legislative Changes

Understandably, foreigners doing business in evolving legal environments harbor particular concerns over potential changes in the legal frameworks of their host states. Thus, Vietnam has commendably taken steps to address such worries by granting foreign investors a protection against adverse legislative changes.⁷¹² Article 21 of its *Foreign Investment Law* purports to offer foreign investors a very broad protection, referring to "any change in the law" adversely affecting their interests.⁷¹³ However, it should be stressed that article 99 of *Decree 18-CP* has the effect of considerably restricting the scope of article 21. Indeed, it specifies that the protection awarded to foreign investors relates to the terms of their investment or business licenses.⁷¹⁴ In other words, the guarantee against adverse legislative changes applies exclusively to the investment conditions granted to foreign investors in their investment or business licenses and not to the legislative framework as it stood at the time their projects received approval.⁷¹⁵ Under

⁷¹⁰ "The State Committee for Co-operation and Investment [MPI] shall determine the Vietnamese enterprises permitted to purchase the assigned capital." *Circular 215/UB-LXT*, art. 5.2.

⁷¹¹ Incidentally, article 15 of the 1996 FIL (see *supra* note 707) now specifically states that the conversion is indeed operated in favor of a state enterprise.

⁷¹² Furthermore, it has been noted that such a guarantee against adverse legislative changes is not very common. "Protection of Foreign Direct Investment in a New World Order: Vietnam - A Case Study", *supra* note 266 at 2006.

⁷¹³ "(...) In cases where the benefits of the parties to a licensed business co-operation or to a licensed enterprise with foreign owned capital are reduced due to *any change in the law of Vietnam*, the State shall take appropriate measures to protect the interest of the investors." Our emphasis.

⁷¹⁴ "In the event that a change in the laws of Vietnam adversely affects the interests of foreign economic organizations and individuals investing in Vietnam *which are stated in their investment licenses or business operation licenses*, the State Committee for Cooperation and Investment [Ministry of Planning and Investment] shall, on the basis of mutual agreement, take one of the following measures to protect the interests of the foreign investors (...)." Our emphasis.

⁷¹⁵ "This stabilization formula matches that in China's foreign investment law, but is less favorable than recent formulations adopted by several countries that allow *all* laws in effect at the time of the registration of a foreign investment - not just those terms expressly captured in the investment licence - to be

these circumstances, investment or business licenses should always be as comprehensive as possible and mention all relevant pieces of legislation, since any issue left out of the license will not be susceptible of grandfathering.

Pursuant to article 99 of *Decree 18-CP*, one of four measures can be taken to protect the interests of foreign investors in case of legislative changes having a negative impact on their enterprises.⁷¹⁶ The second measure, *i.e.* to "reduce or exempt from tax in accordance with the law", is of particular interest since there has been a lot of complaints on the part of foreign investors concerning frequent changes in taxation rules. Yet, it does not appear to be of great use in such cases. Firstly, to offer a guarantee that foreign investors will be exempted from tax or that their tax rate will be reduced "in accordance with the law" simply amounts to leaving the decision to grant an exemption or a reduction to the authority making the taxation change or enacting the new rule: it is not a guarantee that a reduction or an exemption will be granted.⁷¹⁷ Secondly, there is ample evidence suggesting that taxation rules not only change very often in Vietnam, but that foreign investors must indeed comply with the changes in the taxation scheme.⁷¹⁸

The fourth measure allows a foreign enterprise to continue to operate under the terms of its license in spite of a change in the law, as long as the *status quo* is "deemed to

grandfathered." "Protection of Foreign Direct Investment in a New World Order: Vietnam - A Case Study", *supra* note 266 at 2006.

⁷¹⁶ "(...) the State Committee for Cooperation and Investment [Ministry of Planning and Investment] shall, on the basis of mutual agreement, take one of the following appropriate measures to protect the interests of the investors: 1. change the stated objectives of the project. 2. reduce or exempt from tax in accordance with the law. 3. deem the adverse effect on the investor to be a loss and set off the loss in accordance with the provisions in paragraph 2 of Article 27 of the Law on Foreign Investment. 4. permit the operations to continue in accordance with the provisions stated in the investment license issued, where such continued operation of the project is deemed to have no significant impact on the national interest."

⁷¹⁷ On a bright note, it has been reported that the Ministry of Finance, which intends to introduce a 33% across the board tax rate applicable to all foreign and domestic companies, will, in this case, give foreign investors a break: the new tax rate will not be retroactive and foreign enterprises already established in Vietnam will continue to enjoy the tax rate they were granted in their business or investment licenses (between 10% and 25%). *Country Report 3rd quarter 1996*, *supra* note 422 at 18.

⁷¹⁸ "An aggressive tax office is adding to costs in unexpected ways. Earlier this year, the tax office slapped a 5% tax on the value of all foreign construction projects. The tax office is now considering obliging foreign investors to contribute a percentage of their after-tax profits to a new infrastructure fund." "Promises, Promises", *supra* note 562 at 49.

have no significant impact on the national interest". Interestingly, article 99 specifies that the choice of the remedial measure must be made on the basis of mutual agreement between the SCCI [Ministry of Planning and Investment] and the foreign investor. Nevertheless, it is safe to assume that, in case of disagreement between the two, the MPI will have the final say as to the appropriate measure to be taken. Since the Ministry of Planning and Investment could always theoretically opt for the fourth measure, but then reject its application on the ground that to permit the *status quo* would be against national interest, we submit that this measure has the effect of ultimately giving the MPI the opportunity to deny any remedy to foreign investors. Indeed, whether or not the *status quo* will be permitted depends on a vague criterion left to the sole appreciation of the MPI. The objective behind the enactment of a guarantee against adverse legislative changes is primarily to reassure foreign investors. Vietnam's protection, as it currently stands, can more or less be awarded on a discretionary basis and thus simply fails to serve its purpose.

2.- And Now for a Disincentive: Vietnam's Land Legislation

Studies suggest that an environment framework free from unnecessary regulation on ownership will play an even bigger part in attracting foreign investment than any particular investment incentives.⁷¹⁹ Hence the importance for host countries of enacting land regulations that facilitate the conduct of business activities. Unfortunately, the Vietnamese land legislation is far from being adapted to the needs of a market economy. There is no private land ownership in Vietnam: while domestic land users are either granted land-use rights or leases,⁷²⁰ foreign organizations and individuals are only permitted to rent the land they use.⁷²¹ In addition, pursuant to a decree issued in early

⁷¹⁹ United Nations Conference on Trade and Development, *Incentives and Foreign Direct Investment* (New York: United Nations, 1996) at 42 [hereinafter *Incentives and Foreign Direct Investment*].

⁷²⁰ *Law on Land*, *supra* note 689, art. 1.

⁷²¹ *Law on Land*, art. 1 and *Ordinance on Leasing Land in Vietnam*, *supra* note 690, art. 1(3). The procedures for renting land are spelled out in *Circular 1124-TT-DC on Foreign Organizations and Individuals Leasing Land in Vietnam and Vietnamese Parties Leasing Land on Behalf of Joint Ventures with Foreign Parties*, issued by the General Department of Land Administration on September 8, 1995, reprinted in *Foreign Investment Laws of Vietnam*, *supra* note 258 at III-101 [hereinafter *Circular 1124-TT-DC*].

1995, land-use rights previously granted to local partners in joint ventures with foreigners had to be converted into leases with rents to be paid to the Vietnamese state.⁷²² This latest move only further reasserted government control over land and foreign enterprises. Restrictions on land use in Vietnam make it extremely difficult for foreign investors to obtain project financing.⁷²³ The Vietnamese land legislation is simply not in keeping with the authorities' efforts to attract foreign investment and actually poses an impediment to the flow of foreign investment in the country.⁷²⁴

a) Collective Ownership of Land under State Administration

Land has a very special significance in Vietnam. Feudalism and colonialism both exerted a heavy toll on the Vietnamese people⁷²⁵ and have left indelible marks on modern Vietnam. Thus, the principle of collective ownership of the land is now at the fulcrum of the Vietnamese land regulation and, as such, is included in the *1992 Constitution*⁷²⁶ as well as in the country's new Civil Code.⁷²⁷ The state administers the land in the name of the entire people: it allots its use to organizations and individuals on a long-term basis.⁷²⁸ Collective ownership of the land is not completely new in Vietnam as it was also known to prevail in the rural communes of traditional Vietnamese society.⁷²⁹ In those days, the

⁷²² *Decree 18-CP on Rights and Obligations of Domestic Organizations with Land Allocated or Leased from the State*, issued by the Government, dated 13 February 1995, reprinted in *Foreign Investment Laws of Vietnam*, *ibid.* at X-851, art. 6(2) [hereinafter *Decree 18-CP*, dated 13 February 1995].

⁷²³ "The system of land use rights is simply not of sufficient transparency for significant comfort to be obtained in this regard [granting security over land through mortgage]". I. Arstall & D. Platt, "Project Finance" in *An Investor's Guide to Vietnam*, *supra* note 262, 27 at 30.

⁷²⁴ "According to a foreign lawyer active in advising investor clients in Vietnam, the inability of would-be investors to get loans on their joint venture land rights is a major explanation for the threefold gap between approved investment projects and actual, realized projects." Neilson in Duffield, ed., *supra* note 559 at 50.

⁷²⁵ M. Maclear, *The Ten Thousand Day War - Vietnam: 1945-1975* (Toronto: Methuen, 1981) at 23.

⁷²⁶ Article 17. See also article 1 of the *Law on Land*. The principle was already included in the *1959 Constitution* (article 12) and in the *1980 Constitution* (article 19).

⁷²⁷ *Supra* note 572, art. 690. Part V of the Civil Code contains provisions on the transfer of land-use rights.

⁷²⁸ *1992 Constitution*, art. 18. More precisely, it is the government, on behalf of the state, which uniformly administers the land. *Law on Land*, art. 8. The Constitution guarantees the right to transfer land-use rights in accordance with the law. *1992 Constitution*, art. 18.

⁷²⁹ A. Fforde & S. de Vylder, *From Plan to Market - The Economic Transition in Vietnam* (Boulder, Colo.: Westview Press, 1996) at 49-50.

communal land actually contributed to the power of the various localities.⁷³⁰ More contemporarily, collective ownership of the land is one of the basic tenets of the Vietnamese legal system and will remain the guiding principle of the country's land regulation in the future.⁷³¹

b) (Over)Valuation of Land-Use Rights: Greater Contribution

The valuation of land-use rights has important repercussions for the partners in a joint venture. Indeed, land is a very prized commodity in Vietnam and, as stated, is typically the principal asset the local partner will contribute to the enterprise.⁷³² Local People's Committees are the ones responsible for allocating land use in Vietnam.⁷³³ Similarly, they determine the value to be attributed to the land in accordance with the rates stipulated in *Decision 1417-TC/TCDN* of the Ministry of Finance, dated 31 December, 1994.⁷³⁴ However, it has been noted that the price ranges established by the Ministry of Finance are not always viewed as reliable indicators of the value the land will be granted in a particular project.⁷³⁵ In fact, foreign investors consider the valuation of the land to often be inflated as a way to increase the local partner's contribution to the project.⁷³⁶

⁷³⁰ *Ibid.* at 50. "The commune allocated this land to its members in order to meet communal needs, and also to help those who lacked land. It averaged over one-fourth of the land area and was often highly valued by the peasantry as a support to the collective and an insurance against risk." *Ibid.*

⁷³¹ Second interview with Mr. Nguyen Thang Tri, Associate Doctor of Law, Legal Advisor at the Institute of Law Research of the Ministry of Justice, in Hanoi, on July 16, 1996.

⁷³² See *supra* note 333 and accompanying text. The local partner contributing land to the joint venture must be a state-owned enterprise, an enterprise belonging to political and social organizations or a national defense or a security enterprise. *Decree 18-CP*, dated 13 February 1995, art. 10. The fact that only SOEs may contribute land to joint ventures is discussed in the next subsection.

⁷³³ "(...) The people's committees at all levels shall, on behalf of the State, administer land within their respective local areas and within the scope of their respective authority, as stated in this Law. (...)" *Law on Land*, art. 8. State administration of the land includes its allocation. *Ibid.* art. 13(4).

⁷³⁴ *Decree 18-CP*, dated February 13, 1995, arts. 3(4) and 10. *Decision 1417-TC/TCDN* of the Ministry of Finance, dated 31 December, 1994 reprinted in *Legal Documents on Foreign Investment and Protection of Investment in Vietnam*, t. 2 (Hanoi: National Politics Publishers, 1995).

⁷³⁵ Ruderman, *supra* note 290 at 19.

⁷³⁶ Chang, *supra* note 298 at 37-38. See also *Vietnam - Guide de l'investissement*, *supra* note 211 at 53. Article 26 of *Decree 18-CP* stipulates that the SCCI [MPI] has the power to review the agreement the parties have reached on the value of their capital contribution and to require the enterprise and the joint venture parties to reassess the attributed values of the prescribed capital. Furthermore, the MPI can delegate its power to review the agreement between the parties to a specialized organization. "Land values, then, are not usually fixed upon professional land valuation techniques, but are strongly influenced by the total capital of the project and the share which the Vietnamese partner will hold. This results in

Vietnamese authorities are given too much leeway in the appraisal of land-use rights. The rates stipulated in *Decision 1417-TC/TCDN* should be strictly enforced, as the uncertainty over land value can be a strong disincentive for foreign investors. Most importantly, this would also make for a more predictable investment environment in Vietnam.

c) Only SOEs may Contribute Land to a Joint Venture

Pursuant to article 10 of *Decree 18-CP*, dated 13 February 1995, only state-owned enterprises may contribute land to a joint venture with domestic or foreign investors.⁷³⁷ This provision clearly stems from Vietnamese authorities' fear of relinquishing land in the hands of foreign investors. With only SOEs allowed to contribute land to joint ventures, the government can retain direct control over the land used in most foreign investment projects in the country. Interestingly, pursuant to article 7 of the *Foreign Investment Law* and article 26 of *Decree 18-CP*, the Vietnamese party (without restriction) to a joint venture may contribute the value of its land-use rights to the enterprise, in accordance with government regulations. Thus, the *Law on Land*, along with its ordinances and decrees, restrains the application of not only both the FIL and its implementing decree, but also of article 22 of the *1992 Constitution* which guarantees equality before the law for all business organizations.⁷³⁸

This should be avoided. If Vietnam is to be perceived as a receptive market for investment, authorities should refrain from altering the scope of their foreign investment legislation on such important issues as the rights and obligations of the parties through other laws and regulations. A draft decree reportedly issued by the government in July 1995 would allow private Vietnamese enterprises to contribute the value of their land-use

widely differing values placed on similar parcels of land." "Vietnam: Joint Venture Agreements", *supra* note 318 at 27.

⁷³⁷ Note, however, that private enterprises which have been allocated land from the State for the purposes of agriculture, forestry, aquaculture or salt production are permitted to contribute their right to use land to joint ventures. *Decree 18-CP*, dated February 13, 1995, art. 6.

⁷³⁸ "The Constitution of the SRV is the basic state law and has supreme legal force. All other legal documents must be consistent with the Constitution." *1992 Constitution*, art. 146. Our emphasis.

rights to joint ventures with foreign investors.⁷³⁹ Meanwhile, article 7 of the *1996 Foreign Investment Law* still specifies that contributions of land-use rights to joint ventures are to be made in accordance with the *Law on Land* and its implementing regulations, which means that Vietnamese private enterprises will still not be permitted to contribute the value of their land-use rights to joint ventures unless the decree replacing *Decree 18-CP*, dated 13 February 1995 is effectively enacted.

d) A Collateral on Leased Land-Use Rights: Few Takers

Decree 18-CP, dated 13 February 1995 whipped up a lot of controversy at the time it was issued by the government.⁷⁴⁰ As noted, its article 6(2) made it compulsory for state enterprises contributing land to joint ventures with foreign parties to convert their granted land-use rights into leases with rents owed to the state, thus further reinforcing government control over the enterprises' land.⁷⁴¹ We submit that the enactment of this provision has the effect of contravening the guarantee against adverse legislative changes afforded to foreign investors under article 21 of the *Foreign Investment Law*. The long-term leases granted to foreign-owned businesses make their land titles more precarious and, as they currently stand, constitute an hindrance to project financing. Firstly, the fact that it is the Vietnamese partner in the joint venture or in the business cooperation contract who is the holder of the lease⁷⁴² poses in itself a problem to potential financiers.⁷⁴³ Secondly, while enterprises with foreign-owned capital and parties to a business cooperation contract may mortgage the value of the land they lease as well as the assets

⁷³⁹ The Decree Stipulating in Detail the Implementation of the Ordinance on the Rights and Obligations of Domestic Organisations to Which the State Allocates or Leases Land (the draft decree) is slated to replace *Decree 18-CP*, dated 13 February 1995. Baker & McKenzie, "Vietnam - Real Estate" (1995) 4:3 *Indochina Law Quarterly* 57 at 62.

⁷⁴⁰ "Economic Minefield", *supra* note 178 at 68.

⁷⁴¹ According to Bill Magennis, a lawyer with the firm Phillips Fox, "[t]he decree [*Decree 18-CP*, dated 13 February 1995] puts the major asset of state enterprises under stricter control of the government". *Ibid.* at 69.

⁷⁴² *Decree No. 11-CP on the 24th of January 1995 of the Government Stipulating Detailed Provisions for the Implementation of the Ordinance on the Rights and Obligations of Foreign Organizations and Individuals Renting Land in Vietnam*, reprinted in *Official Gazette* No. 6 (31-3-1995) at 19, art. 2(3) [hereinafter *Decree 11-CP*].

⁷⁴³ "For one thing, title to the land went to the local partner of the joint venture, which complicated efforts to finance the project." "Vietnam Syndrome", *supra* note 568 at 50.

thereon, the security can only be granted to a Vietnamese bank.⁷⁴⁴ Although the relevant regulations do not specify whether a branch of a foreign bank in Vietnam can be assimilated to a Vietnamese bank for mortgaging purposes,⁷⁴⁵ it remains doubtful whether, in any case, they would accept leased land-use rights as collaterals for loans under the present conditions.⁷⁴⁶ As a matter of fact, with *Decree 18-CP*, dated 13 February 1995 converting land-use rights into leases and thereby considerably weakening their security, even Vietnamese banks are not comfortable with taking mortgages on land used in joint venture enterprises.⁷⁴⁷ Thirdly, foreign enterprises' ability to mortgage is yet further weakened by article 13 of *Decree 11-CP* which stipulates that in the event that the bank realizes its security and sell the property, the buyer will have the right to rent the land, but he will have to use it in accordance with its prescribed purpose. In a way, this provision is analogous to article 6(2) of the *Regulations on BOT Contracts* pursuant to which the "mortgaged rights and assets [must] continue to be employed in the implementation of the objectives of the project as stipulated in the BOT contract".⁷⁴⁸ And, similarly, it has the effect of rendering the security thus granted even less attractive to prospective mortgagees.⁷⁴⁹ Finally, to make matter worse, foreclosing on a mortgage involves daunting proceedings, including a leave from the state to seize the secured assets upon default.⁷⁵⁰

⁷⁴⁴ *Ordinance on Leasing Land in Vietnam*, *supra* note 690, art. 7(2), *Decree 11-CP*, *supra* note 742, art. 13 and *Decree 18-CP*, dated 13 February 1995, *supra* note 722, art. 9.

⁷⁴⁵ According to Mr. Nguyen Thang Tri of the Institute of Law Research of the Ministry of Justice, branches of foreign banks in Vietnam could be mortgagees in such cases. Second interview with Mr. Tri, *supra* note 731.

⁷⁴⁶ "Economic Minefield", *supra* note 178 at 69.

⁷⁴⁷ According to a credit officer at one of Vietnam's state-owned banks, very much alarmed at the situation created by the enactment of *Decree 18-CP*, dated 13 February 1995, if state-owned enterprises "are unable to pay their loans, their leases will be transferred to banks and then banks will have to pay rent on the land". "Economic Minefield", *ibid*.

⁷⁴⁸ See the subsection on the mortgaging of the assets and rights of BOT companies in Chapter II, on page 72, above.

⁷⁴⁹ "Further uncertainties arise out of provisions of allowing the buyer to lease the land while restricting his or her use to the stipulated land use purpose. In the case of a loss-making venture, this condition would affect the lender's chances to recover the mortgage." *Vietnam - Business Law Guide*, *supra* note 262 at 40,321.

⁷⁵⁰ F. Balfour, "Banking - Cash and Carry" (October 24, 1996) *Far E. Econ. Rev.* 49 at 50 [hereinafter "Cash and Carry"].

e) Precarious Rights are no Incentives to Foreign Investment

To say the least, the precarious rights granted to foreign enterprises under the Vietnamese land legislation are counteractive to the authorities' efforts to create a favorable investment environment in their country. In fact, the difficulty encountered by foreign investors to finance their projects due to their inability to obtain secured lending is considered Vietnam's most important impediment to foreign investment.⁷⁵¹ Since private ownership of land is very unlikely to be allowed in Vietnam in the short (or long) term,⁷⁵² certain measures should be taken to at least increase the stability of land-use rights in the country and thus make the granting of security more practicable. As noted, Vietnam has issued a draft decree to replace *Decree 18-CP*, dated 13 February 1995.⁷⁵³ Under the draft decree, the requirement for domestic land users to convert land-use rights into leases is made less imperative, as land users will be able to apply for an exemption from converting their granted land-use rights into leased ones. However, an important limitation remains: in certain cases, the conversion will still be compulsory in order to contribute land-use rights to the capital of a joint venture.

The current uncertainty over the land issue in Vietnam requires bolder steps than the ones presently contemplated. For starters, foreign enterprises should be granted land-use rights as opposed to the more precarious leases.⁷⁵⁴ But, most importantly, the

⁷⁵¹ "Secured lending in Vietnam is still impracticable, because foreign banks may not take a mortgage on real property. Magennis [an Australian lawyer with Phillips Fox] sees this gap as 'the No. 1 missing item' deterring foreign investment. But even if mortgages were permitted, there is no land registry, and property rights in this socialist society, where in theory all land is owned by the state, remain problematic. According to Eric Sedlack, an American attorney with Deacons Graham & James, 'True project finance is impossible, because for true project finance you need to be able to take over the project lock, stock and barrel, and you can't do that.'" Golin, *supra* note 210 at 64-65.

⁷⁵² Any move to relinquish state control over land ownership is strongly opposed by conservatives in the Communist party. A. Schwarz, "Unfinished Journey - Regime has yet to win full sympathy in the south" (May 18, 1995) *Far E. Econ. Rev.* 34 [hereinafter "Unfinished Journey"]. "The idea of state ownership of land is consistent with Vietnam's political principles as a socialist country. Furthermore, under Socialist legal principles, real property cannot be individually owned." H.-A. Tran, "An Assessment of the Vietnamese Land Law and Regulation" (1995) 13:2 *Wisconsin Int'l L.J.* 585 at 600-601. See also text accompanying note 731.

⁷⁵³ Baker & McKenzie, "Vietnam - Real Estate", *supra* note 739 at 61-62.

⁷⁵⁴ Under the draft decree replacing *Decree 18-CP*, dated 13 February 1995, domestic land users, for their part, will be able to obtain land-use rights in more cases. The draft decree also provides for both the grant

country's land legislation as a whole must be better suited to the requirements of project financing. To that end, it must definitely provide for stable and long-standing land-use rights with reliable protection against state expropriation. As noted, Vietnam's guarantees against expropriation in its Constitution and its *Foreign Investment Law* do not apply to the land leased to foreign enterprises.⁷⁵⁵ not only are the grounds for land expropriation very broadly stated, but there is no indication as to the value of the compensation to be awarded in such cases.⁷⁵⁶ Long-term land-use rights backed by effective guarantees against state recovery of the land would certainly help to bolster foreign investors' (and their bankers') confidence in the Vietnamese market.

C.- A Socialist Market Economy Under Tight Control: the Vietnamese Way

Although Vietnam is said to have one of the most liberal foreign investment laws of any country,⁷⁵⁷ foreign investment projects, as demonstrated in the first two parts of this chapter, remain hindered by Vietnamese authorities' impulse to control. At first glance, it appears somewhat paradoxical for Vietnam to offer a liberal investment framework, while nonetheless insisting on exercising such a high level of control on both the entry of foreign investment within its borders and the operations of foreign businesses. However, we submit that this stance is entirely consistent with the prevailing suspicion of foreign investment in the country, which is regarded as a necessary (albeit temporary⁷⁵⁸) evil to rebuild the nation's reeling economy. In fact, Vietnam's leaders feel that they have

and the lease of land-use rights for certain purposes in export processing zones, industrial zones and residential areas. Currently, only leased land-use rights are available in the special zones. *Ibid.* at 62.

⁷⁵⁵ See text accompanying note 689.

⁷⁵⁶ "In cases where the Government, for the purposes of national interest or national defence or security, appropriates the land leased to a foreign individual or organization (...) prior to the expiry of the lease period, such individual or organization shall be compensated in accordance with the provisions of the laws of Vietnam (...)." *Ordinance on Leasing Land in Vietnam*, *supra* note 690, art. 5. Our emphasis.

⁷⁵⁷ Thompson, *supra* note 258 at 1. "One measure of the extent to which international commerce has been liberalized in Vietnam is the fact that the country allows the establishment of companies with 100% foreign capital and those that are wholly owned and managed by the foreign investor." Robinson, *supra* note 296 at 64. See also *supra* note 396 and accompanying text.

⁷⁵⁸ See *supra* note 702.

no choice but to exert control over foreign enterprises to insure their very own survival.⁷⁵⁹ Political factors are indeed at the basis of this urge to control.

In all fairness, however, it should be mentioned that laws controlling foreign investment are increasingly common everywhere.⁷⁶⁰ Although for different reasons, both developed and developing countries enact laws to monitor foreign investment within their boundaries.⁷⁶¹ Interestingly, there is now a move spearheaded by some members of the World Trade Organization, namely Canada and the European Union, to see the WTO adopt tougher rules on foreign investment.⁷⁶² Supporting those members, in a rare public stand, the organization's secretariat maintains that WTO rules on investment would be beneficial to both rich and poor countries because they would make investment and, consequently, trade more secure.⁷⁶³ Even so, many developing countries are against the idea lest WTO rules should lower the level of control they can exert on foreign investment within their borders.⁷⁶⁴

At any rate, the problem is not so much that control is exercised,⁷⁶⁵ the right to control the entry of foreign investment being undeniably an attribute of sovereignty. The problem is, in Vietnam's case, that its control devices are such that they actually hinder foreign investment in the country. But there again, "the route of government control" needs not necessarily lead to such results: Singapore has achieved remarkable growth following this road.⁷⁶⁶ Yet, of crucial importance is the fact that Singapore was willing to

⁷⁵⁹ A communist party draft policy paper issued in April 1996 stated that "leadership without control is tantamount to no leadership". "Safety First", *supra* note 97 at 14.

⁷⁶⁰ Sornarajah, *supra* note 559 at 87.

⁷⁶¹ *Ibid.* at 88.

⁷⁶² "The World Trade Organisation - Unruly" *The Economist* (19 October 1996) 77 at 78.

⁷⁶³ *Ibid.*

⁷⁶⁴ "They [developing countries] are not opposed to foreign capital, they say: indeed, they are desperate for it. But they want the right to pick and choose which foreigners they let in, and to impose conditions on them - for instance, that they export most of their output." *Ibid.*

⁷⁶⁵ "No state maintains an entirely open door policy to all foreign investment. (...) Developed states are inclined towards the adoption of a more open policy. States of the developing world as well as those of Eastern Europe have administrative controls over the influx of foreign investment." Sornarajah, *supra* note 559 at 100.

⁷⁶⁶ B. Barber, "Southeast Asian Economic Experience and Prospects: A Summary" in Kim, ed., *supra* note 163, 243 at 246. "Yet Singapore chose a different route to success than Hong Kong's laissez-faire

amend its policies to make them more conducive to business.⁷⁶⁷ Needless to say, this position contrasts with the situation in Vietnam where the legal framework is indeed required to uphold the country's shift toward market economy, but must also serve, at the same time, "as a continuing tool to maintain the political authority of the Party and the state apparatus it has created and reinforced".⁷⁶⁸ Moreover, the private sector in Vietnam is confronted to ideological hostility.⁷⁶⁹ in the words of Politburo member, Pham The Duet, "a communist cannot be a capitalist".⁷⁷⁰ Thus, foreign investors must contend with commercial rights geared chiefly toward social goals as opposed to individual prerogatives.⁷⁷¹ The last part of this chapter will be devoted to some of the underlying elements affecting the general business climate in Vietnam, beginning with the country's stance on private rights. We will then briefly review the political risk at play for foreign investors. Finally, we will examine the Vietnamese investment framework with regards to principle of the rule of law.

1.- Private Rights in Vietnam

A balanced treatment of state and private interests is essential to the success of a market economy. Vietnam's suspicion of foreign enterprises stems, *inter alia*, from its own conception of private rights. Traditionally, private rights in Vietnam were not very highly regarded by state authorities.⁷⁷² Historical and cultural factors have indeed greatly

capitalism: the route of government control. Even social policy was directed by the government, which required that people buy their apartments and live in racially mixed housing. Singapore also pioneered the shift to export-oriented, free-trade strategy, followed by Malaysia. But then Singapore's government remained strongly involved, intervening to maintain the pre-eminence of exports and pushing towards increasingly higher levels of technology in services and value-added production." *Ibid.*

⁷⁶⁷ Koh Buck Song, "In the wooing of investors, even trees matter - Keeping ahead on the technology curve" *The Straits Times* (1 August 1996) 2.

⁷⁶⁸ Sidel, *supra* note 174 at 221-222.

⁷⁶⁹ "Communist ideology is opposed to private capital and private means of production." Sornarajah, *supra* note 559 at 57.

⁷⁷⁰ "Safety First", *supra* note 97 at 16.

⁷⁷¹ "Private Commercial Rights", *supra* note 192 at 336. "The state would usually protect private interests only when they coincided with a favored state policy." *Ibid.* Furthermore, article 21 of the 1992 Constitution makes it clear that private rights are to be exercised in ways which are "beneficial to the nation and to the people" and article 22 refers to production and business organizations' obligations toward the state.

⁷⁷² "Private Commercial Rights", *ibid.* at 326.

contributed to Vietnam's present handling of private rights.⁷⁷³ To this day, the distinction between moral and legal rights remains fuzzy.⁷⁷⁴ While Vietnamese authorities understand the importance of granting reliable commercial rights in order to develop a strong market economy,⁷⁷⁵ they are nonetheless apprehensive of the impact private rights may have on the public good and, for that matter, on their own agenda.⁷⁷⁶ Indeed, pursuant to a Confucian and Marxist principle, the good of society takes precedence over the good of the individual ("and all other self-interested entities, such as the family, the village, or the business enterprise"),⁷⁷⁷ therefore effectively relegating private rights to a position of secondary importance. Also, it is commonly believed in Vietnam that for a business activity to be legal, it must be specifically permitted by law,⁷⁷⁸ which not only allows for greater control of private enterprises, but also leads to the formidable maze of regulations and daunting red tape awaiting foreign investors doing business in Vietnam. The private sector being the cornerstone of a strong market economy, a study of the Vietnamese foreign investment climate must therefore also review the current handling of private rights in the country. In this section, we will examine Vietnam's stance toward private entities and how the private sector really fares in comparison to the powerful (and favored) state sector.

⁷⁷³ "Revolutionary suspicion of unbridled commercial profit seeking and Confucian contempt for it together constitute a formidable obstacle to overcome." Elliott in Turley & Selden, eds., *supra* note 175 at 92.

⁷⁷⁴ "In Vietnam, the division between moral and legal rights is blurred because private legal rights have traditionally been subordinated to and fused with an overriding moral obligation owed to the central political authority and the family." "Private Commercial Rights", *supra* note 192 at 325-326.

⁷⁷⁵ Gillespie in Thayer & Marr, eds., *supra* note 559 at 130.

⁷⁷⁶ "Lawmakers must somehow devise a legal system that fosters and protects private rights without jeopardizing state planning objectives. (...) Whatever the outcome, it would be naive to assume that private rights in Vietnam will eventually resemble those of the West." "Private Commercial Rights", *supra* note 192 at 374.

⁷⁷⁷ Marr, *supra* note 618 at 13. "This will not please Western advocates of the notion that individual rights are, at least in legal theory, equal to state rights." *Ibid*.

⁷⁷⁸ Gillespie in Thayer & Marr, eds., *supra* note 559 at 144-145. The practical impact of this belief on the conduct of business activities in Vietnam should certainly not be ignored, as Peregrine Capital Vietnam can testify. On May 30, 1996, its offices were raided by Ho Chi Minh City officials investigating allegations that the joint venture was using front companies to engage in distribution, an activity restricted to Vietnamese entities. According to a foreign attorney in Hanoi, such arrangements are 'neither specifically prohibited nor specifically allowed'. "Trading Places", *supra* note 643 at 61.

a) Official Recognition of the Private Sector

At the same time the private sector gained official recognition in the *1992 Constitution*,⁷⁷⁹ the definition of "Vietnamese party" in the *Foreign Investment Law* was extended with the *1992 Amendments* to include enterprises from any sector of the economy.⁷⁸⁰ This particular amendment to the FIL is hailed as a fundamental change in the spirit of the law as well as a very significant step in the establishment of a genuine market economy in Vietnam.⁷⁸¹ This strategic move was designed to make Vietnam a more attractive place of investment by heralding to foreign investors the authorities' positive attitude toward the private sector.⁷⁸²

b) The State Sector: "Leading Role in the National Economy"

There is no question that these legislative changes have given the private sector a well-needed boost.⁷⁸³ However, although the state and the private sectors are both theoretically equal before the law, in practice, state enterprises are still enjoying considerable advantages over private Vietnamese firms.⁷⁸⁴ In a way, this should not be surprising as article 19 of the *1992 Constitution* made clear that the state sector was to continue to "assume a leading role in the national economy".⁷⁸⁵ Moreover, Vietnam's leaders feel absolutely no qualms about admitting their preference for the state sector.⁷⁸⁶

⁷⁷⁹ See generally the subsection on the constitutional recognition of the private sector in Chapter I on page 30, above, and see especially notes 196 and 197 and accompanying text.

⁷⁸⁰ FIL, art. 2(2) and *1992 Amendments*, *supra* note 213, art. 1(a).

⁷⁸¹ First interview with Mr. Nguyen Thang Tri, Associate Doctor of Law, Legal Advisor at the Institute of Law Research of the Ministry of Justice, in Hanoi, on July 11, 1996.

⁷⁸² *Ibid.* For a detailed discussion of the important laws and regulations affecting the private sector in Vietnam, see P.V. Thuyet, "Legal Framework and Private Sector Development in Transitional Economies: the Case of Viet-Nam" (1996) 27:3 *Law & Pol'y Int'l Bus.* 541.

⁷⁸³ The creation of joint stock banks and the adoption of the *Company Law* are also credited as having contributed to the growth of the private sector. *Country Profile 1995-1996*, *supra* note 571 at 15.

⁷⁸⁴ "What the party says about the private sector is one thing; what it does is another", complains Vu Duy Thai, vice-chairman of the Hanoi Association of Industry and Commerce, a private-sector lobbying group. "Safety First", *supra* note 97 at 16.

⁷⁸⁵ "The state economy shall be consolidated and developed, especially in key sectors and areas of activity so that it can assume a leading role in the national economy. (...)" *1992 Constitution*, art. 19. Our emphasis.

⁷⁸⁶ In an interview at the end of 1995, Central Committee member Ha Dang stated that, although both the private sector and the state sector were equal before the law, the latter "represents a more advanced

They are, in fact, very uneasy about the prospect of unrestrained private sector growth.⁷⁸⁷ Before its June 1996 congress, the Communist Party issued a draft political report calling for a large increase in the state sector's share of the economy from its present 40%-45% to 60% by the year 2020.⁷⁸⁸ The draft report whipped up a storm of criticism from donor countries and although the final report to the party congress made no mention of the 60% target, it nonetheless reasserted the leading role of the state sector in the nation's economy.⁷⁸⁹

c) Private Enterprises: Theoretical Equality... Difficult Reality

Private firms are indeed waging an uphill battle against the favored state-owned enterprises. To begin with, they must operate in accordance with a cat's cradle of government regulations designed to keep them small-scale.⁷⁹⁰ In a market "very skewed towards the public sector",⁷⁹¹ they are practically shut out of the two most promising areas of the economy, foreign enterprises and foreign trade.⁷⁹² Thus, state-owned enterprises are local partners in joint ventures with foreigners in 97% of the cases.⁷⁹³ The primary reason for this is the fact that state-owned enterprises not only enjoy much easier access to land, but they are actually the only ones which may contribute land-use rights to a joint venture.⁷⁹⁴ As far as their involvement in the trade sector is concerned, private Vietnamese firms are confronted with a system of trade quotas and licenses clearly tilted in favor of state enterprises.⁷⁹⁵ Moreover, while SOEs can count on governmental backing to obtain bank loans,⁷⁹⁶ private firms are left to their own devices and, when they do manage to get

production mode" and also added that state-owned enterprises have "more socialist elements". "Safety First", *supra* note 97 at 16.

⁷⁸⁷ F. Balfour, "Damsels in No Distress - In Vietnam, IFC gives private sector the short shrift" (November 28, 1996) *Far E. Econ. Rev.* 78 [hereinafter "Damsels in No Distress"].

⁷⁸⁸ A. Schwarz, "State Enterprises - Questions of Control" (October 24, 1996) *Far E. Econ. Rev.* 51.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ "Reality Check", *supra* note 300 at 45.

⁷⁹¹ "Damsels in No Distress", *supra* note 787 at 79.

⁷⁹² *Country Profile 1995-1996*, *supra* note 571 at 15.

⁷⁹³ See *supra* note 300 and accompanying text. See also generally "Almost Always a State-Owned Enterprise (SOE)" on the local partners in joint ventures in Chapter II, on page 47, above.

⁷⁹⁴ *Decree 18-CP*, dated 13 February 1995, art. 10. See also generally Subsection c) Only SOEs may Contribute Land to a Joint Venture in the second part of this chapter, on page 128, above.

⁷⁹⁵ "Reality Check", *supra* note 300 at 45.

⁷⁹⁶ Second interview with Mr. Tri, *supra* note 731.

credit, they are charged usurious interest rates - 20% compared to 8.5%-9% for state firms.⁷⁹⁷ Finally, while private firms have to grant mortgages worth one and a half times the value of the loans they obtain from Vietnamese banks,⁷⁹⁸ making it much harder for them to expand their businesses, the State Bank has reportedly issued a decision allowing the General Directors of Vietnam's commercial banks to grant unsecured loans to state-owned enterprises.⁷⁹⁹

d) Pervasive Suspicion of Private Interests

Conservatives within the Communist Party adamantly oppose any move to subject state-owned enterprises to greater competition from the private sector.⁸⁰⁰ Indeed, many senior party officials remain very suspicious of private enterprises, often resorting to the media to voice their complaints that private companies commonly engage into tax evasion and land speculation.⁸⁰¹ Apparently, the allegations did not go unheeded: it was recently announced that Vietnam's 26,654 non-state enterprises will have to reregister, a measure reportedly taken to clamp down on tax evaders.⁸⁰² Thus, not only do private Vietnamese firms grapple with an extremely difficult business and regulatory environment, but they must also contend with the negative impression they produce on the authorities, which might just be their most formidable obstacle in a country where government connections are essential to succeed in business.⁸⁰³

e) Equitization - Privatization: More Competition?

In 1992, Vietnam launched its equitization program in an effort to sell shares from 21 state enterprises to their employees and other buyers, keeping a 30% stake in them.⁸⁰⁴

⁷⁹⁷ "Reality Check", *supra* note 300 at 45.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ Baker & McKenzie, "Vietnam - Banking and Finance" (1996) 5:1 Indochina Law Quarterly 19 at 27.

⁸⁰⁰ "Unfinished Journey", *supra* note 752 at 34.

⁸⁰¹ "Reality Check", *supra* note 300 at 45.

⁸⁰² "New Private Company Hurdle" (August 1996) 4:4 The Vietnam Business Journal 4.

⁸⁰³ While some of his competitors argue that his company effectively acts on behalf of party and government interests, Vietnam's most successful businessman, Le Van Kiem, insists that his company is privately owned, but nonetheless admits that he has "good relations with the Vietnamese government". A. Schwarz, "Entrepreneurs - Capitalist Cadre" (February 29, 1996) *Far E. Econ. Rev.* 42 at 43.

⁸⁰⁴ "The Way We Were", *supra* note 91 at 58.

Since then, amidst criticism that equitization was a "charade" allowing the government to effectively retain control, the program itself has run through various problems, ranging from political and ideological obstacles to a lack of potential buyers.⁸⁰⁵ To date, only five enterprises have been sold off, with negotiations under way in three other cases.⁸⁰⁶ In view of this poor record, two measures were recently taken to improve the 1992 pilot program: a decree was issued in May 1996 to enable local authorities to proceed themselves with the equitization of certain small enterprises⁸⁰⁷ and Prime Minister Vo Van Kiet recently set up a system of equitization boards and committees to speed up the process.⁸⁰⁸

Begun in the early 1990's, Vietnam's SOE reform is aimed at separating state enterprises from the ministries that own them.⁸⁰⁹ Here again, the government is facing opposition from many ministries in its bid to transfer ownership of most of the state firms to a new department in the Ministry of Finance.⁸¹⁰ What is more, the recent creation of eighteen state corporations with a potential for monopoly powers might also affect the SOE reform.⁸¹¹ If anything, recent experiences should have convinced Vietnamese officials that they need to allow more competition.⁸¹² For all the talk about equitization and reform in the state sector, party officials have made it clear that they have no intention to embark upon a major privatization program.⁸¹³ In fact, Vietnam seems altogether averse to the notion that "[t]he private sector is the driving force of any competitive and successful economy".⁸¹⁴

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Country Report 3rd quarter 1996, supra* note 422 at 19.

⁸⁰⁷ *Ibid.* "The importance of the decree is that the state will now determine which enterprises are to be equitised, where previously it had only been done on a voluntary basis by the enterprises themselves."
Ibid.

⁸⁰⁸ *Country Report 4th quarter 1996, supra* note 6 at 24.

⁸⁰⁹ Ryan & Wandel, *supra* note 146 at 15.

⁸¹⁰ A. Schwarz, "Economy - Steps in the Dark" (October 26, 1995) *Far E. Econ. Rev.* 51 at 53 [hereinafter "Steps in the Dark"].

⁸¹¹ Ryan & Wandel, *supra* note 146 at 15-16.

⁸¹² "Cracks in Vietnam's Cement - More competition would mean less collusion" (November 23, 1995) *Far E. Econ. Rev.* 7.

⁸¹³ "Safety First", *supra* note 97 at 16.

⁸¹⁴ United Nations Development Programme, *Viet Nam - Technical Assistance in Transition* (Hanoi: UNDP, October 1994) at 21 [hereinafter *Technical Assistance in Transition*].

2.- The Political Risk to Foreign Investment in Vietnam

Foreign investors are well aware that political factors can be the impetus behind policies directly affecting their interests in the host country. As evidence of its receptiveness to foreign investment, a country's favorable political climate will thus play a determinant part in enticing foreign capital. Long-term political stability, a crucial element of a reliable political environment,⁸¹⁵ is a top priority for Vietnamese officials who perfectly understand the critical role it has to play if their country is to achieve greater economic development.⁸¹⁶ In a sense, this is reassuring to foreign investors. However, one should not forget that, in Vietnam, political stability "in practice means the continued hegemony of the Communist Party".⁸¹⁷ The need to provide a politically stable environment to induce foreign investment contributes to further solidify the Communist Party's position as the dominant political force in the country, thus vindicating its resistance to pluralism or, for that matter, to any form of opposition. It also translates into tighter control over foreign enterprises in order to thwart the so-called peaceful evolution brought about by outside forces allegedly threatening the very survival of communism in Vietnam. Paradoxically, flowing from the political stability required to provide a favorable investment climate is the maintenance of the existing rule in the country which, in turn, renders the investment environment more difficult because of the level of control exercised over foreign firms as a result of communism's doctrinal hostility toward capitalism.⁸¹⁸ Indeed, the political risk to foreign investment in Vietnam does not rest as much with the threat of political instability, as with the possibility of adverse state policies on foreign investment (whether or not such policies are enacted into laws⁸¹⁹), as exemplified by the

⁸¹⁵ "From an investor's point of view, a stable political and cultural environment translates into an expectation of long-term political stability, and a confident belief that the domestic policy and public opinion of the host country towards the private sector in general and FDI in particular will remain favorable." Shihata, *supra* note 560 at 22.

⁸¹⁶ Since the late 1980's, the party's first priority has been the combination of economic reform and political stability. *Country Report 3rd quarter 1996*, *supra* note 422 at 7.

⁸¹⁷ "The Problems of Progress", *supra* note 574 at 51. See also *supra* note 174 and accompanying text.

⁸¹⁸ See text accompanying notes 769 and 770.

⁸¹⁹ "State policy is just as important as formal laws; as soon as a right imbedded in a license or law conflicts with policy, it loses its validity and ceases to be a true right." "Private Commercial Rights", *supra* note 192 at 361.

foreign-language advertising issue and the current restrictions imposed on foreign law firms.⁸²⁰

a) The Threat of Peaceful Evolution

Peaceful evolution refers to a strategy designed by outside forces to promote political pluralism through insidious means in order to destabilize the Vietnamese leadership and thus eliminate socialism as well as undermine Vietnam's national sovereignty.⁸²¹ While many authoritarian countries have adopted market economies, suggesting that economic development does not necessarily bring about political democratization, it has often been propounded that market economy nevertheless leads to greater political opening.⁸²² In a country where promoting political pluralism is a criminal offense,⁸²³ such discourse is indeed very discordant to the ears of Vietnam's leaders. When President Clinton, announcing the reestablishment of diplomatic relations between the United States and Vietnam, stated that "increased contact between Americans and Vietnamese will advance the cause of freedom in Vietnam just as it did in Eastern Europe and the former Soviet Union", Vietnamese officials were incensed at his remark.⁸²⁴ In December 1995, the official army paper, *Quan Doi Nhan Dan*, targeted the United States as the author of a strategy to implement peaceful evolution in Vietnam, reflecting annoyance at the U.S. bid to link the human rights issue to further ties between the two countries.⁸²⁵

⁸²⁰ "Although Hanoi's rhetoric welcomes U.S. investment, many businessmen are sceptical, especially in light of recent efforts to restrict foreign law firms and the rise of a "social evils" campaign that has resulted in many English-language ads being painted over or removed." "Vietnam Syndrome", *supra* note 568 at 51.

⁸²¹ B.T. Ngo, "Protecting National Security in the New Situation" (September 1992) 9 *Tap Chi Cong San* 3 in JPRS Report - East Asia: Southeast Asia, Vietnam (5 January 1993) at 1.

⁸²² C.D. Neher & R. Marlay, *Democracy and Development in Southeast Asia - The Winds of Change* (Boulder, Colo.: Westview Press, 1995) at 8. See also *supra* note 170 and accompanying text.

⁸²³ Pursuant to Party Directive 135. Neher & Marlay, *ibid.* at 157.

⁸²⁴ "The Problems of Progress", *supra* note 574 at 48. Late French President François Mitterand drew the same reaction from his Vietnamese hosts when he declared during a visit in Hanoi that "[t]here cannot be economic opening without political opening, and it's an illusion to think otherwise". Neher & Marlay, *ibid.* at 162.

⁸²⁵ *Country Report 1st quarter 1996*, *supra* note 98 at 9. The expression "peaceful evolution" has actually come to be used as a roundabout way of criticizing the United States. *Country Report 3rd quarter 1996*,

b) Foreign Investment... Ideally without Foreign Investors⁸²⁶

While Vietnam officially welcomes foreign investment, many conservatives within the Communist Party remain wary of the influence a massive arrival of foreigners might have on Vietnamese society, repeatedly warning against the looming dangers of peaceful evolution.⁸²⁷ Thus, the various transformations under Vietnam's reform program have left conservative leaders very uneasy as they fear they are losing control over the population in the face of "hostile forces".⁸²⁸ While these hostile forces are often left unidentified, foreigners are regularly accused in party and military papers of various ills, such as corrupting young people, advocating political pluralism, exploiting the country's natural resources and evading taxes.⁸²⁹ For their part, foreign investors have been singled out, as party hard-liners warned against the dangers they pose to the country.⁸³⁰ This anti-foreigner mood has definitely taken its toll: based on a survey it recently conducted in fourteen countries, the firm Political and Economic Risk Consultancy (PERC) of Hong Kong rated Vietnam as the most stressful place for foreign business managers.⁸³¹ Moreover, PERC also identified Vietnam as the riskiest country in Asia in its Comparative Country Risk Report.⁸³²

supra note 422 at 11. "Or as some Vietnamese commentators have suggested, the United States is still trying to win the Vietnam War, this time with consumer goods instead of B-52s." S. Mydans, "Vietnamese move to blot out 'evil' of foreign names" *The [Toronto] Globe and Mail* (11 April 1996) A15.

⁸²⁶ "Foreign investment, to the apparent dismay of older ideologues, has also brought a lot of foreigners to Vietnam". "Safety First", *supra* note 97 at 15.

⁸²⁷ "The Problems of Progress", *supra* note 574 at 49-50.

⁸²⁸ Le Minh Huong, Deputy Minister of Interior and recently appointed to the Politburo, made the following statement in a speech on June 30, 1996: "Hostile forces are trying to carry out peaceful evolution, and make ill use of loopholes in our management and conditions...to plant their people deeper into our internal organs". "Safety First", *supra* note 97 at 15.

⁸²⁹ "Safety First", *ibid.* at 15.

⁸³⁰ "Trading Places", *supra* note 643 at 61.

⁸³¹ *Country Report 3rd quarter 1996*, *supra* note 422 at 17. On a scale of zero (not stressful) to ten (extremely stressful), Vietnam scored 7.56. It was followed by India (6.36), China (6.35) and Indonesia (5.62); Singapore (2.43), Australia (1.17) and Switzerland (1.00) were the less stressful countries in the study. *Ibid.*

⁸³² *Ibid.* at 17-18. On a scale of zero (safe) to ten (risky), Vietnam rated 6.43, followed by India (5.9), the Philippines (5.63) and Indonesia (5.59). The report ranked Singapore as the safest country in Asia. *Ibid.*

c) The Strife between Party Conservatives and Reformists...

Vietnam's leadership is based on consensus.⁸³³ This particular style of governance obviously has a direct effect on the pace of reforms in the country.⁸³⁴ On a long-term basis, the risk to foreign investment in Vietnam is that hard-liners within the party will eventually prevail over their more reform-minded colleagues. However, especially in view of Vietnam's pre-*doi moi* economic performance,⁸³⁵ it seems safe to assume that the reform process in Vietnam will not be reversed.⁸³⁶ Furthermore, one should not forget that Vietnam's approach to reform focuses on stability, incrementalism and pragmatism,⁸³⁷ which essentially means that radical changes, one way or another, are unlikely to happen. Nevertheless, although a consensus was reached in favor of a more careful approach to reform during the Eighth Communist Party Congress, held in Hanoi from June 28 to July 1, 1996, there were also signs that the struggle between party reformists and conservatives is far from over.⁸³⁸ In the same vein, it might be slightly worrisome for foreign investors to hear that, following the party congress, the Politburo now includes only four reformists out of its total eighteen members.⁸³⁹

d) ...One of Its Symptoms: the Campaign against Social Evils

The recent campaign against social evils launched on February 1, 1996 has been described as what "appears to be a symptom of the tussle between reformists and conservatives in the Communist Party".⁸⁴⁰ Decrying the negative changes occurring in

⁸³³ "Vietnam's consensus style of management is praised for helping avoid the disruptive personality cults common in other communist-ruled nations. But consensus also means long delays and many compromises. Unlike many Asian nations which Vietnam hopes to emulate, there is in Vietnam no centralized power base directing modernization." "The Problems of Progress", *supra* note 574 at 50.

⁸³⁴ Party General Secretary Do Muoi as been quoted as saying: "I myself would like to accelerate reform, but at the same time I want to see efficiency and stability". *Country Report 3rd quarter 1996*, *supra* note 422 at 11. Meanwhile, foreign donors and foreign investors alike are calling on Vietnam to expedite its reform program. "Hanoi's reforms called too slow for comfort", *supra* note 234 at 70-71.

⁸³⁵ See Section 1.- Sources and Origins [of *doi moi*] in Part B of Chapter I on page 22, above.

⁸³⁶ On the Vietnamese government's strategy for development for the years 1996-2000, see its own report in *Investment Requirements for 1996-2000*, *supra* note 227 at 5-13.

⁸³⁷ Ryan & Wandel, *supra* note 146 at 9-10.

⁸³⁸ "The underlying tensions and divisions over an appropriate development strategy for the country remain, and are likely to continue causing political uncertainty." "Safety First", *supra* note 97 at 14.

⁸³⁹ *Country Report 3rd quarter 1996*, *supra* note 422 at 8. See also *supra* note 97 and accompanying text.

⁸⁴⁰ "Bonfire of the Vanities", *supra* note 311 at 14-15.

society under the pressures of modernization, the Vietnamese government issued a decree on December 12, 1995 aimed at eradicating "noxious contents and a number of serious social evils" from Vietnamese culture.⁸⁴¹ The regulations⁸⁴² and prescriptions⁸⁴³ enacted with *Decree 87-CP* contain provisions on a wide array of issues, such as pornographic material, prostitution, gambling, illegal drugs, etc. The campaign against social evils also lead to the painting over and the tearing down of foreign-language signs.⁸⁴⁴ pursuant to *Regulations 87-CP*, foreign-language characters in advertising signs cannot be larger in size than the Vietnamese letters.⁸⁴⁵ What added to foreign investors' outcry was that the implementation of *Decree 87-CP* was by no means uniform, as some clearly illegal signs were left standing.⁸⁴⁶

The fallout of the campaign on foreign enterprises lies within the scope of the mixed signals continuously sent by Vietnamese officials to foreign investors.⁸⁴⁷ Thus, the anti-foreigner mood eventually subsided three months after the enactment of *Decree 87-CP* when General Secretary Do Muoi, in a March 12 speech, extended a warm welcome

⁸⁴¹ *Decree No. 87-CP of December 12, 1995 of the Government on Strengthening the Management of Cultural Activities and Cultural Services and Promoting the Fight Against a Number of Serious Social Evils*, reprinted in *Official Gazette* No. 4 (29-2-1996) at 17 [hereinafter *Decree 87-CP*]. See also *Directive No. 814-TTg of December 12, 1995 of the Prime Minister on Intensifying the Management and Re-establishment of Order and Discipline in Cultural Activities and Cultural Services, and Promoting the Elimination of a Number of Grave Social Evils*, reprinted in *Official Gazette* No. 7 (15-4-1996) at 24 [hereinafter *Directive 814-TTg*].

⁸⁴² *Regulations on the Circulation of and Business Activities in Films, Video Tapes and Discs, Sale and Renting of Printed Matters; Cultural Activities and Cultural Services at Public Places; Advertisements, Writing and Setting Up of Signboards* issued together with *Decree No. 87-CP* of December 12, 1995, reprinted in *Official Gazette* No. 4 (29-2-1996) at 18 [hereinafter *Regulations 87-CP*].

⁸⁴³ *Prescriptions of Urgent Measures to Fight Against a Number of Serious Social Evils* issued together with *Decree 87-CP* of December 12, 1995, reprinted in *Official Gazette* No. 4 (29-2-1996) at 23 [hereinafter *Prescriptions 87-CP*].

⁸⁴⁴ "Pepsi signs were ripped down or painted over across the country as Hanoi embarked on a vigorous campaign to root out what it termed social evils, a category obviously including trademarks and signs written in foreign languages." "Bonfire of the Vanities", *supra* note 311 at 14. It has been noted that the campaign might also have had the ulterior motive of enforcing tax and licensing regulations on advertising billboards. *Country Report 2nd quarter 1996*, *supra* note 73 at 12-13.

⁸⁴⁵ Arts. 29 and 31.

⁸⁴⁶ Among these, Vietnam Airlines signs reportedly escaped the paintbrushes. "Bonfire of the Vanities", *supra* note 311 at 15. The Minister of Culture and Information, Tran Hoan, admitted that the police might have been a little zealous in implementing the decree. *Ibid.*

⁸⁴⁷ "Knocking down Coke signs isn't going to make your ordinary American think that Vietnam is open to foreign commerce or is a reliable place to invest (...)." "Vietnam Syndrome", *supra* note 568 at 51.

to foreign investors and later profusely thanked them.⁸⁴⁸ For his account, Prime Minister Vo Van Kiet issued a decree on June 19, 1996 allowing foreign enterprises to advertise their trade names in a foreign language as long as the lettering used is no more than twice the size of the Vietnamese text.⁸⁴⁹ All in all, while the foreign-language sign issue is a reminder that Vietnamese leaders have yet to come to terms with the effects ten years of economic liberalization have had on their country, it also serves to demonstrate that, fortunately, they are not totally oblivious either to the broader consequences of their ideological infighting.

e) Foreign Lawyers Restrictions Raise Yet the Investment Risk

On July 8, 1995, the Vietnamese government severely curtailed the scope of activities foreign lawyers could carry out in Vietnam by issuing *Decree 42-CP* which effectively prevents them from advising their clients on Vietnamese law⁸⁵⁰ and bars foreign law firms from hiring Vietnamese lawyers.⁸⁵¹ In a country that only boasts about one tenth of the lawyers it needs,⁸⁵² the enactment of *Decree 42-CP* has raised many eyebrows and prompted foreign investors to actually question the authorities' commitment to reform.⁸⁵³ Most foreign lawyers agree that the practice of Vietnamese law should be restricted to Vietnamese lawyers alone, but they believe that the restrictions imposed by *Decree 42-CP* are premature, since most local lawyers cannot yet produce legal documents meeting the

⁸⁴⁸ *Country Report 2nd quarter 1996*, *supra* note 73 at 12.

⁸⁴⁹ *Country Report 3rd quarter 1996*, *supra* note 422 at 19. As stated (*supra* note 845 and accompanying text), article 31 of *Regulations 87-CP* previously stipulated that the foreign language characters could not be larger in size than the Vietnamese letters.

⁸⁵⁰ See *supra* note 473. Pursuant to article 20 of the *Regulations on Legal Consultancy by Foreign Lawyers' Organizations in Vietnam* issued together with *Decree No. 42-CP on the 8th of July 1995*, reprinted in *Official Gazette* no. 19 (15-10-1995) at 30 [hereinafter *Regulations 42-CP*] and article 6.1 of *Circular 791*, *supra* note 473, foreign lawyers may advise their clients on matters of foreign and international law only, and exclusively in the fields of business, investment and commerce.

⁸⁵¹ *Regulations 42-CP*, art. 24. They may however hire Vietnamese legal trainees under certain conditions. *Ibid.*, art. 29. Foreign law firms are not permitted to enter into joint ventures with Vietnamese law firms: they may only enter into cooperation agreements with them on a case-by-case basis. *Ibid.*, art. 21.

⁸⁵² "Miles to Go", *supra* note 186 at 26.

⁸⁵³ "Vietnam Syndrome", *supra* note 568 at 51. "The presence of foreign lawyers is not a prerequisite for foreign investment but it sure will be of immense help in attracting it." "Vietnam Should Encourage, Not Restrict, Foreign Lawyers", *supra* note 473.

standards expected by foreign investors.⁸⁵⁴ While the restrictions might be appropriate in ten or fifteen years, forbidding foreign lawyers from counselling their clients on Vietnamese law at this point in time is "downright unrealistic and unfair to foreign investors".⁸⁵⁵

Indeed, it is feared that the current restrictions will have a damaging effect on foreign investment in the long term.⁸⁵⁶ Additionally, one should not forget the important contribution foreign lawyers have made and can still make to Vietnam's legal development. Indeed, foreign lawyers have participated very actively in the country's legal reform, cooperating with various ministries either directly or through formal arrangements with the United Nations Development Programme or the World Bank.⁸⁵⁷ While the restrictions imposed by *Decree 42-CP* obviously do not preclude further cooperation between foreign lawyers and Vietnamese authorities, they may inadvertently affect such collaboration as foreign law firms ponder whether they will keep a strong presence in Vietnam under the present circumstances.⁸⁵⁸ Finally, it should be noted that the prohibition for foreign law firms to hire local attorneys⁸⁵⁹ also means, in effect, that Vietnamese lawyers are deprived from the benefits of the valuable training they would get from working with foreign lawyers.

⁸⁵⁴ "Laying Down the Law", *supra* note 473 at 34. Thus, according to an Australian investor, "[t]hese rules will raise risks for investors even higher". *Ibid.*

⁸⁵⁵ "Vietnam Should Encourage, Not Restrict, Foreign Lawyers", *supra* note 473.

⁸⁵⁶ "Vietnam Restricts Foreign Lawyers" (September 15, 1995) E. Asian Exec. Rep. 4.

⁸⁵⁷ Golin, *supra* note 210 at 64. "Much of the advice from foreign lawyers is solicited and is provided by firms on a gratis basis. 'Everyone's asked to contribute to Vietnam's legal development', says one foreign attorney." *Ibid.*

⁸⁵⁸ "But some [foreign lawyers] say they expect to refer more legal work to their branches overseas because the costs and logistical headaches of working in Vietnam will become prohibitive. Others say they will reduce the number of lawyers they keep in Vietnam because of the rule requiring a minimum of five years' experience." "Laying Down the Law", *supra* note 473 at 34. The *Financial Times* reported still more dire predictions: "the rules are likely to provoke some firms to pull out". "Vietnam Restricts Foreign Lawyers", *supra* note 856. Such negative prognoses were fueled even further by a Ministry of Finance circular made public in March 1996 and proposing a steep 24% tax on lawyers' turnover. The proposal has prompted twelve law firms to send a joint letter to the Ministry of Justice warning that the new tax would result in foreign law firms providing legal services from offices outside of Vietnam. According to a British lawyer in Hanoi: "If they go through with this, some law firms will have to close down and others will scale down to a minimum level of activity". A. Schwarz, "Raising The Bar - Foreign lawyers aghast at new billings tax" (March 21, 1996) *Far E. Econ. Rev.* 20 [hereinafter "Raising The Bar"].

⁸⁵⁹ *Supra* note 851 and accompanying text.

3.- Foreign Investment and the Rule of Law in Vietnam

It has been often observed that in order to complete a successful shift toward a market economy and not only attract, but also keep foreign investment, Vietnam must abide by the rule of law.⁸⁶⁰ Tracing its roots as far back as the Aristotelian philosophy of Ancient Greece, the principle of the rule of law has been restated many times over the years.⁸⁶¹ At the end of the nineteenth century, English jurist Albert Venn Dicey introduced the well-known classical version of this principle.⁸⁶² While parliamentary sovereignty was meant to put an end to the absolute power of the monarch, the rule of law served to prevent any abuse of powers on the part of the government. Essentially, Dicey viewed the rule of law as a shield against arbitrary power: all authority derived from the law and no one (including the administration) was above the law. The major flaw in Dicey's theory is that it failed to discriminate between arbitrariness and discretion, holding them both to be proscribed.⁸⁶³ For its part, far from excluding the use of discretionary powers by governmental authorities, the modern conception of the rule of law makes it clear, however, that the administration remains subject to the law.⁸⁶⁴ The principle also dictates that the law should be such as to allow the citizen to organize his affairs and predict the consequences of his actions.⁸⁶⁵ Accordingly, the law itself must meet certain criteria:⁸⁶⁶

⁸⁶⁰ E.g. Vause, *supra* note 205 at 287.

⁸⁶¹ J.N. Shklar, "Political Theory and the Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law - Ideal or Ideology* (Toronto: Carswell, 1987) 1. Shklar submits that there are two archetypes of the rule of law, Aristotle's rule of reason and Montesquieu's bid to protect the ruled against the ruler, adding that the two have become blurred over the years. Stating that Dicey's version of the rule of law was the most influential restatement of the principle since the eighteenth century, she nonetheless refers to it as an "unfortunate outburst of Anglo-Saxon parochialism". In her article, Shklar also reviews the works of contemporary legal theorists Friedrich Hayek, Roberto Unger, Lon Fuller and Ronald Dworkin.

⁸⁶² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1960).

⁸⁶³ Indeed, according to Dicey, the rule of law actually precluded "wide discretionary authority on the part of the government". *Ibid.* at 202.

⁸⁶⁴ See e.g. A.C. Hutchinson & P. Monahan, "Democracy and the Rule of Law" in Hutchinson & Monahan, eds., *supra* note 861, 97 at 101.

⁸⁶⁵ "This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behavior of its subject." J. Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q. Rev. 195 at 198.

⁸⁶⁶ *Ibid.* at 198-199. Raz lists some other important aspects of the principle of the rule of law at 198-202 and divides them into two groups. Aspects in the first group are meant to ensure that the law can adequately guide behavior; those in the second group relate to the enforcement of the law *per se* (independence of the judiciary, accessible courts with review powers, etc.).

for instance, it should not be retroactively applicable and its wording should not be too vague or too broad.⁸⁶⁷ In this last section, we will examine the Vietnamese foreign investment framework with regards to the principle of the rule of law and ponder whether this Western liberal ideal (or some aspects of it) can be implanted in Vietnam through increased business dealings with foreigners.

a) Rule of Law versus "State Rule by Law"

A word of caution should first be said about the expression *nha muoc phap quyen*, as used by Vietnamese authorities when they discuss the need to improve "state rule by law" in their country, and which is often mistranslated as "rule of law" by Western analysts.⁸⁶⁸ "State rule by law" basically refers to greater transparency in the legal system, *i.e.* reviewing all pieces of legislation adopted over the years, consolidating them by subject and then submitting the results to the National Assembly; making sure that new laws and regulations are reported and widely accessible; and training specialists to support the country's legal reform.⁸⁶⁹ Such measures are undeniably in line with the principle of the rule of law. In addition, the *1992 Constitution* itself makes references to the supremacy of law: its article 12 stipulates that the state manages society through law and its article 4 provides that all party organizations must operate within the framework of the Constitution and the law. Whether these constitutional provisions together with official declarations on "state rule by law" are sufficient to conclude that Vietnam's legal system is genuinely based on the rule of law or that it will eventually be so is, however, open to debate.

⁸⁶⁷ While legal rules in the civil law tradition are couched in much more general terms than in the common law tradition, they should nevertheless not be so broad as to lose their ability to guide behavior. R. David & C. Jauffret-Spinozi, *Les Grands Systèmes de droit contemporains*, 9th ed. (Paris: Dalloz, 1988) at 100-101 and 406-408.

⁸⁶⁸ Marr, *supra* note 618 at 13. Incidentally, this mistranslation epitomizes "the mistake of ascribing Western precepts to Vietnamese practices." Gillespie in Thayer & Marr, eds., *supra* note 559 at 130, quoting Taylor on cross-cultural analysis.

⁸⁶⁹ Marr, *ibid.* "Of particular significance here is the attempt to create greater transparency in the legal process, since former systems were often deliberately opaque on the principle that subjects should not know enough to take advantage of the law for their own selfish interests." *Ibid.*

b) Administrative Review in Vietnam

"The Party's declaration that it is subject to the rule of law will remain little more than a symbolic gesture until effective review is created".⁸⁷⁰ Genuine review of administrative action is without question a very important aspect of the principle of the rule of law. Yet, Vietnamese legal theory actually posits that "government discretion is preferable to the rule of abstract law".⁸⁷¹ While the absence of separation of powers in the Vietnamese political structure⁸⁷² evidently prevents the implementation of the common law notion of judicial review of administrative action,⁸⁷³ one should bear in mind that effective review of the administration need not necessarily be conducted through the judiciary. For instance, the French model of administrative review shuns judicial review of administrative action on the very basis of the principle of separation of powers.⁸⁷⁴ Indeed, the French interpreted the principle of separation of powers as also preventing judicial review of administrative action.⁸⁷⁵ This strict conception of the separation of powers later led the French to divide the active function of the administration from its judiciary function in order to avoid that the executive be both judge and judged (the earlier *administrateur-juge* system).⁸⁷⁶ With their primary objective being to insure that the action of the administration is conducted according to the law, administrative courts in France have successfully established themselves as guardians of the principle of legality.⁸⁷⁷

⁸⁷⁰ "Private Commercial Rights", *supra* note 192 at 372.

⁸⁷¹ *Ibid.*

⁸⁷² Pursuant to article 6 of the 1992 Constitution, the Vietnamese polity is based on the principle of democratic centralism. See also text accompanying note 167.

⁸⁷³ "So far, the failure of reforms to separate powers between the legislature, the executive administration and the judiciary constitutes a major barrier to the implementation of Western-style judicial review of administrative action." "Private Commercial Rights", *supra* note 192 at 363.

⁸⁷⁴ J. Rivero, *Droit administratif*, 13th ed. (Paris: Dalloz, 1990) at 173-174.

⁸⁷⁵ Historical factors have also greatly influenced the French approach to review of administrative action. Thus, various administrative courts were already established in France prior to 1789. But, most importantly, the revolutionaries remained suspicious of the judiciary as they considered that the parliaments (courts of justice in France under the *ancien régime*) had not only hampered earlier attempts to reform, but had been altogether opposed to the revolution. The principle of the separation of judiciary authority from administrative action was proclaimed in article 13 of the *Loi des 16-24 août 1790*. A. de Laubadère, J.-C. Venezia & Y. Gaudemet, *Traité de droit administratif*, vol. 1, 14th ed. (Paris: Librairie générale de droit et de jurisprudence, 1996) at 306 [hereinafter *Traité de droit administratif*].

⁸⁷⁶ Rivero, *supra* note 874 at 175. The highest tribunal conducting administrative review in France is the *Conseil d'État*, itself an administrative court. *Ibid.* at 241ff.

⁸⁷⁷ A. de Laubadère, J.-C. Venezia & Y. Gaudemet, *Manuel de droit administratif*, 13th ed. (Paris: Librairie générale de droit et de jurisprudence, 1988) at 17. For a detailed discussion of the principle of

For its part, however, the new system of administrative courts in Vietnam fails to provide effective review of administrative action. The courts, which began operating on July 1st, 1996, were set up to handle complaints from both individuals and organizations following administrative decisions from ministries, government offices, the president's office, the National Assembly office as well as from local administrative authorities.⁸⁷⁸ Unfortunately, their review powers are seriously curtailed by procedural requirements. Thus, a complaint must first be filed with the person or agency that made the decision and this person or agency then has thirty days to reply in writing to the complaint: the court will not hear the matter until the plaintiff has received a reply.⁸⁷⁹ But, what is worse, there is no way to force a defendant to respond to a complaint, thereby allowing him to prevent the court hearing from ever taking place.⁸⁸⁰ Moreover, the Prime Minister has the power to reverse the courts' decisions and the procedure to enforce them has yet to be established.⁸⁸¹

c) Discretionary Decisions Affecting Foreign Investors

The problem of unchecked administrative discretion is particularly relevant to foreign investors in Vietnam considering the very broad discretionary powers granted to the Ministry of Planning and Investment on a wide number of issues. To begin with, the decision to approve a project is essentially a discretionary one. Indeed, after they have received the opinions of the local authorities and the relevant ministries, the Prime Minister and the MPI ultimately enjoy complete discretion in their decisions to give the final approval respectively to Group A and Group B project applications.⁸⁸² Similarly, the MPI also has the final say as to whether parties to business cooperation contracts or foreign-owned enterprises are entitled to such advantages⁸⁸³ as exemption or reduction

administrative legality (*principe de la légalité administrative*), see *Traité de droit administratif*, *supra* note 875 at 593ff.

⁸⁷⁸ *Country Report 4th quarter 1996*, *supra* note 6 at 22.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*

⁸⁸¹ *Ibid.*

⁸⁸² *Decree 191-CP*, art. 7.

⁸⁸³ *FIL*, art. 36(3).

from export and import duties,⁸⁸⁴ preferential tax rates,⁸⁸⁵ and relaxation of foreign exchange controls.⁸⁸⁶ In addition, any amendment to a joint venture contract or to the charter of a joint venture must be approved by the MPI⁸⁸⁷ and, likewise, any amendment to the charter of a wholly foreign-owned enterprise does not take effect until the MPI has given its approval to the change,⁸⁸⁸ even contracts for the hiring of management companies by foreign-owned enterprises must first be approved by the Ministry of Planning and Investment.⁸⁸⁹

The discretionary powers of the MPI extend to the decision as to whether a particular joint venture enterprise or wholly foreign-owned enterprise will be designated as an important economic establishment.⁸⁹⁰ As stated, such a determination translates into a gradual increase in the share of the local partner in a joint venture or in the conversion of a wholly foreign-owned enterprise into a joint venture. Besides, in the latter case, the MPI even determines who will be the local partner in the WFOE turned into a joint venture.⁸⁹¹ Furthermore, not only has the Ministry of Planning and Investment the power to withdraw business or investment licenses when parties to business cooperation contracts or foreign-owned enterprises break the law or do not operate in accordance with the terms of their licenses,⁸⁹² but, most importantly, since *Decree 18-CP* does not specify how serious the breach of law must be or what exactly constitutes a deviation from a business or investment license, it also has complete discretion in determining when there is sufficient ground to revoke a license. Moreover, such broad discretionary powers are not subjected

⁸⁸⁴ *Ibid.*, art. 35.

⁸⁸⁵ "The State Committee for Cooperation and Investment [Ministry of Planning and Investment] shall, after receiving the views in writing of the Ministry of Finance, decide on a case-by-case basis the specific tax rates to be applied (...)." *Decree 18-CP*, art. 71. Our emphasis.

⁸⁸⁶ *Ibid.*, art. 82.

⁸⁸⁷ *Ibid.*, art. 25.

⁸⁸⁸ *Ibid.*, art. 50.

⁸⁸⁹ *Circular 215/UB-LXT*, art. 3. See also "Management Companies" in the section on joint venture enterprises of Chapter II, on page 58, above.

⁸⁹⁰ FIL, arts. 8 and 14 and *Decree 18-CP*, arts. 27 and 47. See "Gradual Increase of the Vietnamese Party's Share in a Joint Venture" on page 119, above, and "Conversion of WFOEs into Joint Ventures" on page 121, above.

⁸⁹¹ *Circular 215/UB-LXT*, art. 5.2. See also *supra* note 710 and accompanying text.

⁸⁹² *Decree 18-CP*, arts. 15(3), 38 and 52.

to truly effective review. Indeed, although article 64 of the *1996 Foreign Investment Law* now provides for a recourse against illegal decisions or actions taken by Vietnamese officials, it also stipulates that foreign investors' complaints or legal proceedings "shall be conducted in accordance with the laws".⁸⁹³ In all likelihood, this means that such cases will be handled by Vietnam's newly established administrative courts. Regrettably, as demonstrated above, the efficiency of their review leaves much to be desired. Therefore, we submit that the 1996 FIL will also fall short of ensuring effective review to foreign investors.

d) The Exercise of Discretion Must be Narrowly Circumscribed

A lot of important issues directly affecting the operations and management of foreign enterprises are indeed left to the sole discretion of the Ministry of Planning and Investment whose decisions are not subjected to effective supervisory control.⁸⁹⁴ Obviously, such wide discretionary powers on so many aspects of the foreign investment process are in line with the authorities' continuous efforts to control the activities of foreign enterprises established in the country. What is more, the legislative drafting technique itself in Vietnam is such that laws tend to be ambiguous and vague, precisely because this subsequently allows for greater administrative discretion in their implementation.⁸⁹⁵ A favorable investment environment must be supported by a legal

⁸⁹³ Article 64 reads as follows: "[t]he foreign investors, foreign-invested enterprises, parties [to a] business cooperation contract, organizations, and individuals may complain or take legal action against state officials or organs for illegal decisions or actions that cause embarrassment or difficulties for the business. The complaint or legal proceedings and the settlement of the complaint or legal proceedings shall be conducted in accordance with the laws."

⁸⁹⁴ It should be noted that the MPI is not the only government body with discretionary powers affecting foreign investment in Vietnam. Thus, other ministries and local authorities are also issuing various permits and licenses foreign investors need during the implementation phase of their projects (*Decree 191-CP*, arts. 10-14). Most notably, there has been a lot of complaints on the part of foreign investors about the valuation of land-use rights by local People's Committees. See Subsection b) (Over)Valuation of Land-Use Rights: Greater Contribution, in the second section of the second part of this chapter, on page 127, above.

⁸⁹⁵ "Written laws and regulations can only be regarded as general guidelines, establishing the rough ambit of bureaucratic discretion." Gillespie in Thayer & Marr, eds., *supra* note 559 at 143. See also *supra* note 218 and accompanying text.

framework precise enough to give foreign investors an idea of what awaits them when doing business in Vietnam.⁸⁹⁶

That being said, one should not forget that Vietnam is currently reforming its legal system. Legal development, by its very nature, requires the use of discretion to address the particular issues it raises.⁸⁹⁷ Yet, unchecked discretionary powers in a developing legal framework can also lead to "goal-substitution" by government officials.⁸⁹⁸ Thus, while the implementation of the foreign investment legislation undeniably calls for discretionary decisions on the part of Vietnamese authorities, we submit that the exercise of administrative discretion in Vietnam should be more narrowly circumscribed and that authorities should be made more accountable for the decisions they make. This would not only instill greater confidence in the country's foreign investment environment, but it would also make it more difficult for corrupt officials to exact payments in exchange for favorable decisions.

c) Foreign Influence on Legal Development in Vietnam

The multifarious shortcomings affecting Vietnam's legal system, such as frequent legislative changes,⁸⁹⁹ excessive accumulation of laws and regulations,⁹⁰⁰ contradictions between different pieces of legislation,⁹⁰¹ ill-defined laws,⁹⁰² *ex post facto* changes in the rules⁹⁰³ and difficulties to find copies of newly enacted legislation,⁹⁰⁴ have oftentimes been deplored by foreign investors. Conscious of the necessity to deal with such grievances in order to attract a greater flow of foreign direct investment, Vietnamese authorities have frequently reaffirmed their intention of further strengthening state rule by law in their

⁸⁹⁶ "However, foreign investors prefer clear and unequivocal rules of law announced in advance to provide a basis upon which possibilities for success may be assessed." Vause, *supra* note 205 at 274.

⁸⁹⁷ R.B. Seidman, "Drafting for the Rule of Law: Maintaining Legality in Developing Countries" (1987) 12 Yale J. Int'l L. 84 at 89.

⁸⁹⁸ "Goal-substitution" refers to the process by which an official substitutes some other goal for that established for her position by higher authority." *Ibid.* at 87.

⁸⁹⁹ "Vietnam Syndrome", *supra* note 568 at 50-51.

⁹⁰⁰ Marr, *supra* note 618 at 18.

⁹⁰¹ "Private Commercial Rights", *supra* note 192 at 334-335.

⁹⁰² Golin, *supra* note 210 at 64.

⁹⁰³ Bencivenga, *supra* note 580.

⁹⁰⁴ Golin, *supra* note 210 at 64.

country. Thus, the continued presence of foreigners doing business in the country will contribute to greater conformity to certain aspects of the rule of law. It remains nonetheless doubtful that Vietnam ever embrace the principle of the rule of law in its entirety: ideological obstacles, such as a "Confucian/Socialist disdain for the rule of law",⁹⁰⁵ as well as more pragmatic hurdles, such as a bureaucratic antagonism toward private rights in general⁹⁰⁶ and foreigners in particular,⁹⁰⁷ will be difficult to overcome. Yet, one should not forget that, in any country, greater or lesser conformity to the principle of the rule of law is conditioned by various historical and political factors and that, as a matter of fact, the rule of law often enters in conflict with other values.⁹⁰⁸ To say the least, Vietnam's current legal reform epitomizes such conflict.

⁹⁰⁵ "Private Commercial Rights", *supra* note 192 at 331.

⁹⁰⁶ *Ibid.* at 333.

⁹⁰⁷ "Regardless of statements of official policy changes emanating from the top, one cannot expect a bureaucracy taught and seasoned to be cautious towards outsiders to suddenly open up." Vause, *supra* note 205 at 275.

⁹⁰⁸ "Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though other things being equal, the greater conformity the better - other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realisation of other goals." Raz, *supra* note 865 at 210.

Conclusion

Whether it has been conveyed privately or through public reports, foreign donors' message to Vietnam remains the same: the pace of reforms in the country needs to be increased. By contrast, Vietnamese authorities appear far from convinced that accelerated reforms are the solution to their nation's woes. If anything, they seem more inclined to question the overall effect of *doi moi* on society. The current campaign against social evils, first launched in December 1995, is a clear indication that the changes brought about by the renovation program are causing the communist leadership a lot of worry. Hence the consensus reached during the Eighth Party Congress in June and July 1996 for a more cautious approach to further reform. Ostensibly welcoming foreign investment in the wake of their country's economic opening, Vietnamese leaders remain uneasy about the looming danger of peaceful evolution. Meanwhile, as foreign investors continue to deplore the various shortcomings in the investment framework, project approvals are starting to decline in Vietnam. Although it has been propounded that initial foreign investment numbers were, in any case, unsustainable,⁹⁰⁹ the country's low project implementation rate suggests that decreasing foreign investment might be occasioned by more than just a cyclical downward trend. Yet, in spite of a reformist party member's dire warning about an impending crisis, the authorities are still confident that they can continue to attract foreign investment.⁹¹⁰

Vietnam is indisputably a difficult place of business. While a number of reasons have been given for the current drop in investment approvals, one thing is certain: control mechanisms over both the entry and operations of foreign enterprises seriously impede investment in the country and, as a result, hurt the development of the economy. Vietnam must take measures to improve its investment climate or else run the risk of seeing foreign investors turn to more receptive markets in the region. Importantly, lesser control over foreign enterprises would also alleviate two very grave problems plaguing the Vietnamese

⁹⁰⁹ *Country Report 3rd quarter 1996*, *supra* note 422 at 17.

⁹¹⁰ According to an official at the Ministry of Planning and Investment, the party leadership is indeed "far too optimistic" in that regard. "Safety First", *supra* note 97 at 15.

investment environment, bureaucracy and corruption. To exert such a high level of control, authorities must indeed rely on a huge bureaucratic apparatus:⁹¹¹ the number of approvals, licenses, permits, and stamps required to conduct business operations in Vietnam is simply flabbergasting, amounting to sheer "bureaucratic obstructionism",⁹¹² a situation itself compounded by the decentralization of political and regulatory authority in the country. And evidently, the more red tape, the more opportunities for corruption. As a matter of fact, bribery has been reported to often be "the only way to make business predictable".⁹¹³ Vietnamese leaders are aware of the dangers corruption poses to the economic development of their country and have taken steps to tackle the issue.⁹¹⁴ Yet, for all the official denunciations, anti-corruption campaigns and arrests, the incidence of graft in the country remains on the rise.⁹¹⁵ This was to be expected. The problem of corruption in Vietnam is indeed just the more formidable as it originates in part from and is exacerbated by the very nature of the government bureaucratic structure and by the authorities' interventionist propensity.

Clearly, Vietnam is torn between promotion and control of foreign investment. Its desire to protect its national sovereignty and avoid having its economy foreign-controlled is most legitimate. However, to successfully attract outside capital, it must be able to offer a favorable investment climate. To begin with, approval procedures in Vietnam are simply too burdensome: they need to be further streamlined and deadlines for evaluating application files must be strictly enforced. Similarly, the post-approval licensing process is far too onerous, as amply evidenced by the low rate of project implementation in the

⁹¹¹ "Coping with bureaucracy has widely been regarded as the greatest challenge facing potential investors." IMF Occasional Paper, *supra* note 579 at 16.

⁹¹² Neilson in Duffield, ed., *supra* note 559 at 52-54. Neilson gives examples of the bureaucracy involved in various dealings with governmental authorities: "[i]n Ho Chi Minh (HCM) City, 16 seals are required for a land grant permit, a six-month- to four-year long process. Some 32 papers and 52 signatures are required to establish a family enterprise. In Hanoi, 54 papers are needed for the registration of a motorbike. In the case of the People's Committee of HCM City, a foreign-invested license must pass 20 city desks for approval and 18 more offices for implementation." *Ibid.* at 53.

⁹¹³ Ngo, *supra* note 74 at 96.

⁹¹⁴ A. Schwarz, "Enemy No. 1 - Economic opening has unleashed corruption scourge" (July 11, 1996) *Far E. Econ. Rev.* 18. Tran Bach Dang, Saigon underground Communist Party chief before 1975, was quoted as saying: "[i]t is difficult to beat us from outside, but corruption on the inside could destroy us". *Ibid.*

⁹¹⁵ According to government sources, 17,000 economic crimes were uncovered in 1995 alone. *Ibid.*

country. Pre- and post-approval procedures play an essential role in imparting confidence in the foreign investment framework. By giving foreign investors a foretaste of what awaits them when doing business in Vietnam, these two stages determine whether or not they will actually pursue their investment plans. The resounding success of the country's industrial zones is evidence that less cumbersome procedures constitute in themselves very strong investment incentives. The screening of investment applications and the licensing procedures are but preliminary foreign investment control mechanisms. As demonstrated in this thesis, the Vietnamese foreign investment framework is teeming with other ways to monitor foreign enterprises. Even the country's investment protection guarantees are deeply colored by the authorities' suspicion of foreign interests: purposely vague, they can easily be circumvented by other provisions. If Vietnam is to grant truly reliable investment guarantees, it will have to accept to relinquish some control over foreign investment and thus leave itself ultimately vulnerable (to some extent) to the exercise of private rights, a step it is apparently not yet ready to take.

The Vietnamese reject the Western legal notion that private rights are at least theoretically equal to state rights.⁹¹⁶ cultural and political factors concur to establish the predominance of collective rights over individual rights. Vietnam's particular conception and handling of private rights have an obvious impact on its treatment of foreign investment. Its traditional emphasis on collective rights is reflected in the *1992 Constitution* which specifies that private individuals and enterprises are to pursue activities that are "beneficial to the nation and the people".⁹¹⁷ Furthermore, one should not forget that, for ideological reasons, the state sector in Vietnam is to "assume a leading role in the national economy".⁹¹⁸ In practice, this translates into substantial advantages for state firms over private enterprises in spite of their theoretical equality before the law.⁹¹⁹ Vietnamese authorities still have to subscribe to the notion that often, in a liberalized economy, private and state rights will effectively clash and that, in order to develop a strong market

⁹¹⁶ "Private Commercial Rights", *supra* note 192 at 371.

⁹¹⁷ *1992 Constitution*, art. 21.

⁹¹⁸ *Ibid.*, art. 19.

⁹¹⁹ *Ibid.*, art. 22.

economy, private rights must be both protected and promoted, even when they do come into conflict with state interests.

Although the presence of foreign investors might have an influence on Vietnam's legal development, it cannot be expected to completely transform the country's business environment. Besides very influential ideological and political factors, cultural traits also play a significant role in defining Vietnam's investment climate. For instance, the Vietnamese, particularly the business people, are extremely reluctant to resort to courts to settle disputes.⁹²⁰ This preference for compromise over judicial confrontation has been embedded into various pieces of legislation,⁹²¹ among which, notably, the *Foreign Investment Law*.⁹²² Also, business dealings in Vietnam and, for that matter, in Asia are based on long-term relationship and trust.⁹²³ Accordingly, legislation does not have as much importance as the agreement reached between the parties,⁹²⁴ an agreement itself subject to being renegotiated should the circumstances surrounding its conclusion change. By contrast, not only do Western investors expect that once a contract is signed, it will be binding as is, but they are also more inclined to follow the law⁹²⁵ and, therefore, are far less comfortable with Vietnam's evolving legal framework than their local counterparts.⁹²⁶

For their account, domestic investors feel that the more favorable investment conditions granted to foreigners are unfair to them.⁹²⁷ While foreign investors are indeed granted incentives, they also are at a definite disadvantage compared to local investors in certain areas. For example, they are charged more for land-use rights and, pursuant to Vietnam's two-tiered pricing system, they must pay higher prices for products and

⁹²⁰ First interview with Mr. Tri, *supra* note 781.

⁹²¹ "Private Commercial Rights", *supra* note 192 at 370.

⁹²² FIL, art. 25. See also *Decree 18-CP*, arts. 100-102.

⁹²³ Interview with Mr. Do Kim Lang, International Relations Department of the Chamber of Commerce and Industry of Vietnam, in Hanoi, on June 19, 1996.

⁹²⁴ R. Evans, "Why we are back in Vietnam" (1993) 67:4 *Law Institute Journal* 234. This is particularly true in the north where people ask: "a deal is a deal, why worry about the law?" *Ibid.*

⁹²⁵ "(...) the Vietnamese don't appreciate how important it is for a foreigner to follow the written law. That is the only protection you have as a foreigner, that you have gone by the book." *Ibid.*

⁹²⁶ Interview with Mr. Hoi, *supra* note 487.

⁹²⁷ First interview with Mr. Tri, *supra* note 781.

services, adding up to the cost of investing in Vietnam.⁹²⁸ Moreover, the Ministry of Finance has proposed to introduce a unified 33% profits tax rate for both domestic and foreign enterprises. This will clearly benefit domestic firms whose current profits tax rate is 35-45%, compared to 10-25% for their foreign counterparts. The authorities are also contemplating other changes favoring domestic investors, such as stricter rules on import duty exemptions and income tax reductions for the Vietnamese.⁹²⁹ Thus, it seems that steps are now being taken to bring foreign and local firms to a closer level before eventually merging their two legislative frameworks. Indeed, the Ministry of Planning and Investment has already been mandated to draft a consolidated law governing both foreign and domestic investment.⁹³⁰ The merger of the two frameworks is however a long-term goal, expected to coincide with Vietnam's participation into Afta, currently set for 2003 or 2006.⁹³¹

As Vietnam becomes more involved in regional and global trade alliances, pressure to make adjustments to its investment framework will also come from its trading partners, thus creating further impetus for change. While Vietnamese leaders are very much concerned about preserving their hard-won independence,⁹³² increased trade and business dealings with foreigners will gradually abate the suspicion⁹³³ they harbor toward outsiders. Together with its recent membership of ASEAN, Vietnam's bid to join the World Trade

⁹²⁸ "Many foreign investors are finding Vietnam more expensive than they anticipated. Telecommunications, office rental and transport costs are high by regional standards." "Promises, Promises", *supra* note 562 at 49.

⁹²⁹ *Country Report 4th quarter 1996*, *supra* note 6 at 25.

⁹³⁰ First interview with Mr. Tri, *supra* note 781. Incidentally, such a consolidation would be in keeping with the World Bank's recommendation of an integrated investment policy in the country. *Transition to the Market*, *supra* note 66 at 86-87.

⁹³¹ Interview with Mr. Hiep, *supra* note 539. Mr. Hiep added that the new law would not only govern domestic and foreign direct investment, but also Vietnamese investment abroad as well as indirect foreign investment in Vietnam.

⁹³² "For the many Vietnamese who see foreign investment as a zero-sum game, the worry is that the independence they gained through war is now being squandered in peace." "Opportunity's Costs", *supra* note 294 at 56.

⁹³³ According to a Western lawyer practicing in Vietnam, the Vietnamese have two types of fear which contribute to impede investment in the country. The first is an "inherent fear of parting with information" and the second is the fear of "being 'taken down' by foreigners". Thayer in Thayer & Marr, eds., *supra* note 637 at 16-17.

Organization is at the core of its trade policy development over the next ten years.⁹³⁴ Admission into the WTO is indeed crucial for the country to become an attractive base for exporters and thus to induce an even greater flow of foreign investment within its borders. Vietnam's accession to the World Trade Organization depends naturally on the success of its economic reforms, but also largely on the progress made in its relations with the Americans and, more particularly, on whether it can secure most-favored-nation status from the United States.⁹³⁵

In the meantime, there is no question that Vietnam's investment framework can still be improved. Regrettably, the *1996 Foreign Investment Law* is rather disappointing in that regard: the new law basically restates the pre-existing framework while clarifying certain issues. If anything, government control over foreign enterprises is reaffirmed. Thus, while only excluding two less critical matters from its scope of application, article 14 of the 1996 FIL now specifies that, in any case, the parties to a joint venture may agree in the charter of their enterprise to extend to other issues the much decried unanimity vote requirement on important decisions taken by the board of management. Under the new law, the investment review process has also been altered: contrary to earlier pledges to turn the MPI into a one-stop investment approval agency, article 58 of the 1996 FIL now grants local authorities the power to consider investment applications and to issue licenses for projects that fall within their jurisdictions, as determined by the government. Certain projects (presumably the smaller ones) will henceforth be approved by the local People's Committees. This is indeed a last minute change of plan as the proposed amendments to the *Foreign Investment Law* initially rejected the idea of delegating the power to license small-size and medium-size projects to local authorities and instead provided for a local registration requirement.⁹³⁶

⁹³⁴ Ryan & Wandel, *supra* note 146 at 19. After first applying to become a member of the WTO at the end of 1994, Vietnam recently resubmitted its application. *Country Report 4th quarter 1996*, *supra* note 6 at 17.

⁹³⁵ *Country Report 4th quarter 1996*, *ibid.* See also Ryan & Wandel, *ibid.*

⁹³⁶ Baker & McKenzie, *Legislative Alert - Proposed Amendments to the Law on Foreign Investment* (Baker & McKenzie, July 1996), document obtained from Mr. Frederick Burke, on file with the author. See *supra* note 589 on the former SCCI's refusal to comply with a request from the HCMC People's Committee to approve smaller project, lest this should jeopardize the centralization of project approvals.

It is obviously too early to say whether the two-tiered approval process will translate into shorter application review delays. While it may address the issue of overlapping authority between the central and local levels, the somewhat reduced role of the Ministry of Planning and Investment as the central approval authority might render coordination between the other state agencies involved in the evaluation process more difficult.⁹³⁷ What is more, devolution of central power to local authorities can derail reforms. Such a risk is even more pronounced in Vietnam in view of the spirit of independence traditionally exhibited by local authorities. Amongst the few other changes introduced by the new FIL, article 60 now stipulates a shorter two-month time limit for application review. It remains to be seen, however, whether the new maximum period for project evaluation will be systematically enforced. Certainly the most innovative provision in the *1996 Foreign Investment Law*, article 64 allows for the review of the decisions affecting foreign investors. Although the efficiency of the new system of administrative courts in Vietnam leaves much to be desired, the fact that foreign investors can now avail themselves of a review process is nonetheless encouraging: it indicates that Vietnamese authorities are not (at least ostensibly) entirely opposed to the idea of increased accountability in the foreign investment framework.

Vietnam is a country of enormous potential: its citizens are a proud people who will not accept to lag behind their neighbors in their development. As the Vietnamese have proven in the past, their resourcefulness and their resilience in the face of adversity is not to be underestimated. But pitfalls still strew the path. Indeed, the difference this time is that their greatest obstacle might just come from within. Vietnamese leaders' efforts to liberalize their country's economy are impeded by their own ideological antagonism

See also *MPI Presentation Regarding the 1996 FIL*, *supra* note 217 at 16: State Management of Direct Foreign Investment, for the (then) reasons for not transferring approval authority to the local level. Notice that the proposed local registration requirement has been dropped from the 1996 FIL: article 60 provides that "an investment license is also deemed a certificate of business registration".

⁹³⁷ Article 55 of the 1996 FIL specifies that "[t]he government is the unified state management authority on foreign investment in Vietnam" and that both the MPI and the local People's Committees have the authority to issue investment licenses. Article 56 of the 1996 FIL, for its part, reads as follows: "[t]he Ministry of Planning and Investment is the state body in charge of managing foreign investment. It assists the government in managing foreign investment activity in Vietnam. (...)."

toward fundamental principles of market economy. Their insistence that the state sector continue to "assume a leading role in the national economy" adversely affects the growth of the private sector and, consequently, the investment environment in general. While it is worth mentioning that Asian governments typically intervene more often in the economic affairs of their countries than their Western counterparts,⁹³⁸ the strong ideological and political overtones of Vietnam's interventionism should also be underscored. The Vietnamese foreign investment climate is indeed highly influenced by communist leaders' fear that granting too much weight to private rights will weaken the state sector and, as a result, the party's legitimacy.⁹³⁹ Vietnam needs to come to terms with the fact that the private sector is the driving force in a successful market economy.⁹⁴⁰ It must therefore give a fair chance to the private sector to expand and grow by leveling the playing field between private enterprises and state firms.

There is a lot at stake for Vietnam. The development of its economy depends indeed primarily on its ability to attract - and keep - foreign investment. Its comparative advantages alone will not suffice to entice outside capital: it must be able to offer foreign investors favorable conditions in an environment conducive to business. Thus, a major disincentive to investment in Vietnam, the land issue, must urgently be tackled in order to facilitate project financing. To that end, foreign investors must be granted long-term and stable land-use rights, backed by effective protection against state expropriation. Also, truly reliable investment guarantees would contribute to bolster foreign investors' confidence in the country. The Vietnamese foreign investment framework is currently much too skewed toward control: state interference in business decisions must be kept to a strict minimum. As long as Vietnam fails to limit discretionary powers of government agencies over foreign enterprises and to provide for genuine review of administrative

⁹³⁸ Neher & Marley, *supra* note 822 at 21.

⁹³⁹ "To them [leading government officials and prominent Communist Party members], a strong state sector is a hallmark of a successful socialist economy and a pillar of the Party's own legitimacy." *The Way We Were*, *supra* note 91 at 56-57.

⁹⁴⁰ Indeed, as stated in the UNDP report prepared ahead of the December 1996 donors' conference, "[i]nternational experience indicates that few if any countries in the world have successfully developed with state firm-led industrial strategies". "Hanoi's reforms called too slow for comfort", *supra* note 234 at 70.

action, it will continue to be viewed as a risky place of investment. This might not exactly be the image Vietnam wants to project as it vigorously competes with its neighbors to spur foreign capital within its borders. Recent declining project approval numbers should serve to remind Vietnamese authorities that foreign investment must indeed be based on mutual benefit.

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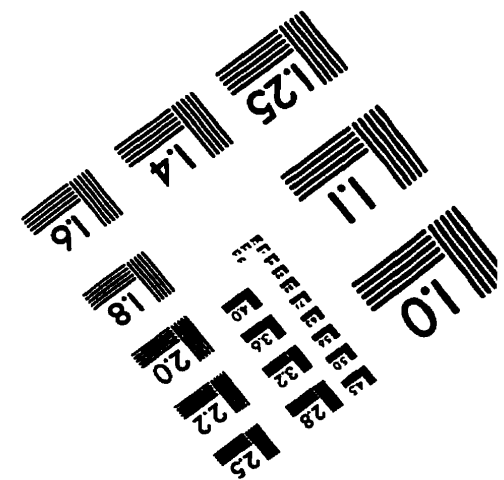
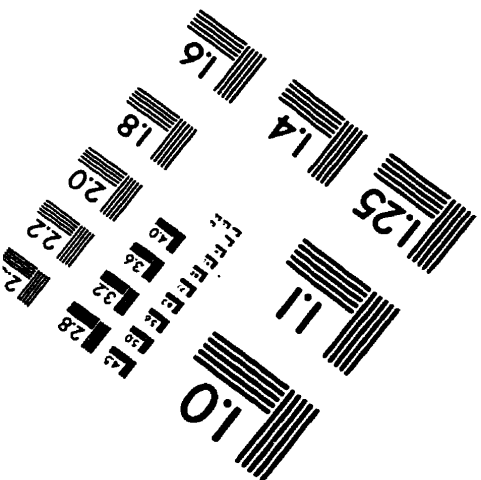
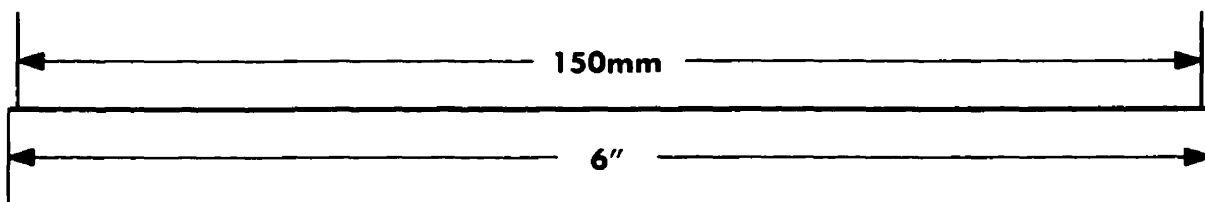
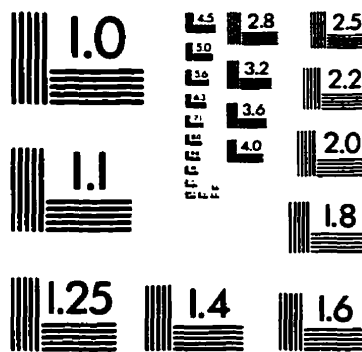
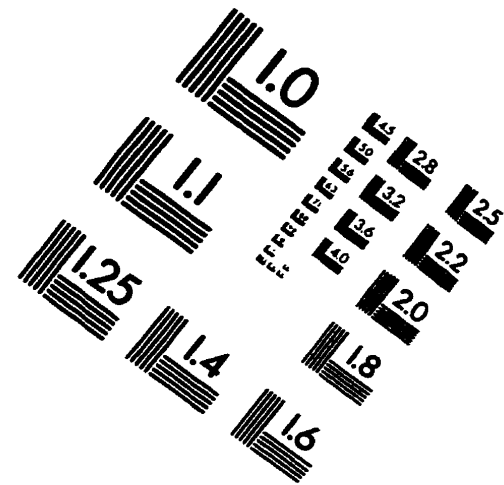
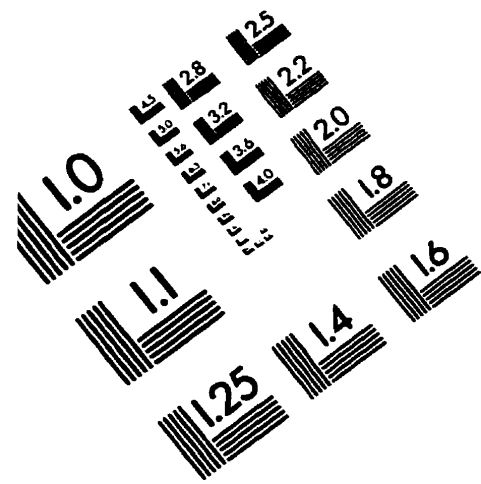
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