SHORTER ARTICLES, COMMENTS AND NOTES

The Foreign Investment Code of the Socialist Republic of Vietnam

The Socialist Republic of Vietnam (SRV) presents the unique feature of a country determined to achieve "the ultimate objective of establishing a communist society in the purest Marxist-Leninist line"[1] while intensifying its efforts to attract Western capital and technology. In this the SRV seems to differ from the common attitude of developing socialist countries which view foreign investment "as a central component of the neo-imperialistic dependency furthered by advanced capitalist nations in the developing world."[2]

The SRV's effort to attract capital and technology from nonsocialist countries was heightened by the promulgation of the Regulations on Foreign Investments,[3] generally referred to as the SRV's Foreign Investment Code. This Code was a product of the Communist Party, not the legislature. The legislature, called the National Assembly under the 1959 Constitution, is not the true center of power in the SRV; the Party is.[4]

The Code is a curious piece of legal craftsmanship. Almost every item in it is vague. Virtually every statement is accompanied by reservations or qualifications. Concerning fiscal privileges, for example, the Code speaks of "exemptions or reduction" of income tax for "a number of years," "depending on the branch of the economy," "on the area of operation" and "on the amount of capital invested."[5] The same vagueness exists concerning customs duties, export tariffs[6] and reinvestment treatment.[7] On the

[1]Declaration of Le Duan, Secretary General of the Communist Party, 4th Party Congress (December, 1976); *See* 12 HOC TAP 120 (Dec. 1976).

[2]L. SOBEL, CHILE AND ALLENDE 49.

[3]Regulations on Foreign Investments, Decree 115/CP (April 18, 1977) [hereinafter cited as SRVFIC].

[4]The preamble to the SRV Constitution of 1959 recognizes the political leadership of the Worker's Party (renamed Communist Party in 1976). *See* B. FALL, THE TWO VIETNAMS 179.

[5]SRVFIC art. 11(1).

[6]*Id.* art. 11(2)-(3).

[7]*Id.* art. 10(5).

crucial question of nationalization, the Code mentions nationalization from ten to fifteen years after the initial investment date, but hastens to add that "in particular cases this period may be longer."[8] There are no criteria for defining "particular cases."

This vagueness obviously gives the government a great deal of flexibility in dealing with investors. The Code, on the other hand, seems to give the impression that this vagueness will be interpreted in favor of the investor. An important item at the end of the Code supports this impression: "In specific cases, if need be, the Government of the Socialist Republic of Vietnam may approve more advantageous terms in favor of the foreign party."[9] In spite of this optimistic language, it is expected that few potential investors in search of legal security will find the vagueness of the Code attractive. The authors of the Code were sophisticated enough to measure the negative impact such uncertainty would have on prospective investors. Why then is the Code not more specific?

Economic issues cannot be dealt with apart from political considerations in a Marxist state. A brief review of major political events in Vietnam since the communist takeover in April 1975 will serve as background to the genesis of the Code and will provide some idea of the dilemmas which confront the SRV leadership, dilemmas that may help explain the lack of precision in the Code.

The political events taking place in Vietnam since April 1975 show the determination of the new leadership to consolidate socialism in the North and build socialism in the South.

July 1975: The 24th Party Plenum of the Executive Committee issued a resolution at the end of its meeting stating that the two objectives of the Party in the new era of peace were to reunify the country as soon as possible and to "advance rapidly, advance firmly, advance surely toward socialism"[10] in both the North and the South. These two objectives were to be carried out through a proletarian dictatorship, collective ownership, and a threefold revolution affecting production, science and technology, and thought and culture.[11]

December 1975: Le Thanh Nghi, Vice-Premier and Chairman of the State Planning Commission, presented to the Fifth National Assembly in Hanoi the Five-Year Plan of 1976–1980, which Nghi said incorporated the directives given by the 24th Party Plenum. The Five-Year Plan's objective, in Nghi's words, "was to reach large scale socialist production without going through the capitalist phase."[12]

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[8] *Id.* art. 10(1).
[9] *Id.* art. 26.
[10] 7 HOC TAP 4 (July 1976).
[11] *Id.*
[12] 1 HOC TAP 16 (Jan. 1976). This theme of reaching large-scale socialist production without going through the capitalist phase is time and again repeated by the Vietnamese leaders who pride themselves in what they see as the most original feature of Vietnamese Communism. *See* 4 HOC TAP 79-84 (Apr. 1975).

July 1976: Le Duan, the Party Secretary, in a report to the first National Assembly to include representatives of both parts of the country following the general elections of April 1976, emphasized that the objective of the Five-Year Plan was to build a "centralized, unified and collectivised economy."[13] It was during this session that the National Assembly, by unanimous vote, changed the name of the country from the Democratic Republic of Vietnam to the Socialist Republic of Vietnam.

December 1976: The Communist Party convened the Fourth Party Congress, a great event in the history of the Vietnamese Communist Party, "to mark the beginning of a new era."[14] The purpose of the Congress was also to discuss the key functions of the Five-Year Plan. Again, Le Duan emphasized that the ultimate objective of the Party was to establish a communist society. The Workers' Party was renamed "Communist Party" in order "to increase the awareness of the Party members as to the true essence of the Party."[15]

March 1978: The government launched a massive campaign designed to abolish capitalist trade in Ho Chi Minh City (Saigon) and other urban areas in southern Vietnam.[16]

These events demonstrated that the SRV leadership is committed to a rapid communization of Vietnam. For pragmatic reasons, however, they need Western technology and capital. The lack of precision in the Code's provisions can, to a large extent, be explained in light of this dilemma.

Scope of the Code

The Code is composed of twenty-seven articles divided into seven sections:

Section 1 (Articles 1-4) is called "General Provisions" and deals with generalities such as the sovereignty of Vietnam, mutual benefits, qualifications and forms of investment, and areas open to foreign investment.

Section 2 (Articles 5-8) deals with the forms of business arrangements under which foreign investment may be made.

Section 3 (Articles 9-16) entitled "Rights and Obligations of the Foreign Party" deals with questions of nationalization, compensation, taxation, labor and liability.

Section 4 (Articles 17-20) concerns itself with the procedure for approval of foreign investment.

Section 5 (Articles 21-23) relates to the termination of foreign ventures.

Section 6 (Article 25) provides methods of settlement of disputes.

Section 7 (Articles 26 and 27) deals with special privileges and gives directives to various agencies to issue regulations implementing the provisions of the Code.

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[13] 3 Hoc Tap 39 (July 1976).
[14] 12 Hoc Tap (Editorial) (Dec. 1976)
[15] *Id.* at 120.
[16] Indochina Spotlight 2 (April 1978).

As its title indicates, the Foreign Investment Code applies only to foreign investments. On this point, Vietnam differs from other developing countries in Southeast Asia where investment incentives and privileges are also offered to domestic investments if they are deemed to be beneficial to the national economy.[17] The limitation of the SRV's Code to foreign investment conforms to the national policy of developing a socialist society in which there can be no room for private ownership.

Areas Open to Foreign Investment

Except for certain activities reserved to the government which are not specified in the Code, every activity related to the exploitation of natural resources, agriculture, industry, construction, transportation and so on is open to foreign investment.[18] The wide scope of activities that the Code offers to the foreign investor seems to indicate that foreign investment is accepted even in those areas often considered to be of vital national interest and therefore ineligible for foreign investment, such as public utilities or communications facilities. By not spelling out—as other investment codes do[19]—what is open to the foreign investor and what is not, the government remains free to deal with the problem on an ad hoc basis.

Procedure for Approval of Foreign Investment

In the draft stage, the official procedure went through a number of revisions to make it simpler and more attractive to the investor. The revisions followed critical comments from foreign business circles in Hanoi and Hong Kong to whom the government had communicated a draft version of

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[17] *E.g.*, Section 2 of the Philippines Incentive Act provides: "Declaration of Policy—To accelerate the sound development of the national economy . . . , it is hereby declared to be the policy of the state to encourage Filipino and foreign investments," *cited in* C. Fulda & W. Schwartz, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 630 n.18.

Taiwan: "The salient points of [the] Statute [for Encouragement of Investment] are: (1) liberal tax concessions to encourage investors, both domestic and overseas, to invest in the Republic of China." *Questions and Answers of the Investment Laws of the Republic of China* in 4 INVESTMENT LAWS OF THE WORLD 94.

Malaysia: The Investment Incentives Act does not restrict the benefits of the Act to foreign enterprise alone but encourages "the establishment and development in Malaysia of industrial and other commercial enterprises, for the promotion of exports, and for incidental and related purposes." Investment Incentives Act arts. 21, 30E.

[18] SRVFIC art. 4.

[19] *Compare*, Taiwan: Art. 5 of the Statute for Investment by Foreign National reads: "Investment as referred to in this Statute shall be confined to those which fall within any one of the following categories: . . ."

Indonesia: Arts. 6 and 7 of The Foreign Investment Law enumerate a number of spheres of activity to be closed to foreign capital investment and adds that "the Government may further determine other specified spheres of activity to be closed to further foreign capital investment."

For the general attitude of the developing nations in this respect, *see* LEGAL ASPECTS OF FOREIGN INVESTMENT 746 (W. Friedmann & R. Pugh ed. 1959).

the Code. But the revisions are more cosmetic than substantial. A close examination will show that the procedure remains essentially unchanged.

In the original version, all applications for investment were to be submitted to the Ministry of Foreign Trade. A fee to be fixed by the same Ministry was to be required to accompany the application. If the Ministry was to approve a project, it would forward it to the Government Council for final decision. This decision would be communicated to the foreign investor by the Prime Minister, with the license itself granted by the Ministry of Foreign Trade. The employment of foreign technicians for the project was to require additional approval of the Ministry of Labor.[20]

In the final version of the Code, the Ministry of Foreign Trade makes the final decision and grants the investment license.[21] After receiving this investment license, the foreign investor must "proceed with investment registration" with the Ministry of Foreign Trade and the Ministry of Finance.[22] One cannot explain why the investor has to "register" his investment again with the same Ministry which just granted him his license. Furthermore, what does "investment registration" mean? Does it mean registration of the investment license? Or the investment project? Or the contract with the government? One hopes these points will be clarified by the promulgation of implementing decrees. The new procedure vests the entire decision-making process in the Ministry of Foreign Trade.

Regardless of the changes, it is unlikely, in practice, that the Ministry of Foreign Trade alone can make the final decision. In view of the centralized and collegial form of decision-making in the SRV,[23] and in view of the strategic importance of foreign investment in the political and economic structure of the country, one has to assume that the decision will be made at the highest level—as indicated in the earlier draft version. Moreover, an investment project normally involves several government agencies—the Ministry of Labor, the Ministry of Light and Heavy Industries, the Ministry of Oil and Gas, the State Bank and so on. It seems unlikely that one Ministry would be given the sole authority in a matter affecting so many major government agencies. The Code provides a period of three months for consideration of the application.[24]

As will be discussed later under the section entitled "Privileges Under the Code," the Code is far from specific with regard to the extent of the investment privileges, tax exemptions or reductions, import-export duties, repatriation of profits and dividends and so on. Each project will be ex-

[20] 9 Bus. Asia 197 (1977).
[21] SRVFIC art. 19.
[22] *Id.* art. 20.
[23] Butterfield, *Vietnam's Leadership, Despite Economic and Border Wars, Shows Unusual Cohesion,* N.Y. Times, June 19, 1978, § A, at 12, col. 1.
[24] SRVFIC art. 18.

amined on an *ad hoc* basis according to its own merits, and the privileges to be accorded will be specified in a contract between the government and the foreign investor.[25]

A contract presupposes negotiation between the parties. When and where does this negotiation take place? Before the formal application to the Ministry of Foreign Trade? During the three month period for the consideration of the application? After the investment license is granted, the license being considered as an approval "in principle" subject to further negotiations? Or, is the license the contract itself? The language of the Code does not provide clear answers to these questions, but the implementing regulations to be announced may shed some light on these points.

Further, the Code is silent about the criteria the government will follow to approve or disapprove an investment project. Here as in other areas it seems that the SRV government wishes to have a free hand in selecting foreign investment without being hampered by specific Code provisions.

What Constitutes a Foreign Investment?

Practically any asset, except land, may qualify for foreign investment. Foreign investment may be in the form of tangible or intangible property. Tangible property includes, but is not limited to, equipment, machinery, tools, means of transport, and technical material necessary for establishing new installations, or modernizing or expanding existing ones.[26] The language of the Code does not seem to exclude used equipment. However, government screening prior to the approval of a project will make it unlikely that the importation of inferior equipment, either used or unused, will be acceptable.

Intangible property, such as trademarks, patents, licenses, technological processes and know-how, also qualifies for foreign investment.[27] Since the contribution of know-how normally involves the furnishing of services, the latter may also be considered a contribution of capital.

Salaries and wages paid to workers in foreign currency are also considered in the valuation of foreign investment. It should be noted that salaries and wages of certain local workers must be paid in foreign currency.[28]

One possible reading of the Code is that in the SRV a greater importance is given to technological than to capital investment. Indeed, capital in foreign currency or "materials" in foreign currency value will be accepted as foreign investment only when they are deemed necessary by the Vietnamese partner, i.e., the State, in a joint enterprise.[29] On the other hand, technolog-

[25] *Id.* arts. 6(3), 7(2)-(4), 11(1).
[26] *Id.* art. 2.
[27] *Id.*
[28] *Id.* art. 8(4).
[29] *Id.* art 2.

ical investment in any form is generously given an investment value in computing investment privileges.[30]

The Code is vague on the crucial problem of valuation of the assets involved. Article 7(4) merely states that "the capital . . . shall be assessed in terms of a mutually agreed foreign currency . . ." What happens if there is no agreement on the valuation? Article 25 of the Code reads: "Disputes between the foreign and Vietnamese parties arising in the course of implementing the investment contract shall be referred to the Foreign Trade Arbitration Council of the Chamber of Commerce of Vietnam for hearing except in specific cases when the parties have agreed on another arbitration procedure explicitly described in the investment contract." The procedure for settlement provided for in this Article cannot apply to the valuation dispute because valuation of assets, being a preliminary step, would normally precede the formation and implementation of the investment contract. It seems therefore that this problem will be left entirely to the respective bargaining power of the foreign party and the Vietnamese government.

Forms of Business Arrangements

Foreign investment can be made in the SRV only in one of the three following forms:

(1) cooperation in production and sharing in products;
(2) joint enterprise or company, or
(3) private enterprise specializing in production for export.[31]

The first two forms require the participation of the State as a local partner whose equity varies from 51% to 70% of the capital, depending on the type of investment.[32] As to the third form of business arrangement, the private enterprise specializing in production for export, the Code does not specifically require State participation. In this context, however, it refers to "the Vietnamese party," thus making the status of such an enterprise rather ambiguous.[33]

1. *Cooperation in Production and Sharing in Products*

Normally, this form of business cooperation between the state-run entity and the foreign investor does not result in the establishment of a new legal entity. The foreign investor will have contributed capital, equipment and know-how in return for a share in the products.[34] This form is usually adopted for the exploitation of mineral resources, especially petroleum products. It may be noted that this type of cooperation is not a pure type of

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[30] *Id.*
[31] *Id.* art. 5.
[32] *Id.* art. 7(3).
[33] *Id.* art. 8(1).
[34] *Id.* art. 6(1)(3).

service contract, a simple hiring of technology with the government having control over all basic decisions.[35]

According to the Code, the relationship between the State and the foreign investor, however, is rather like a loose joint venture. The Code provides for the assessment of the foreign party's shares, thus implying the existence of Vietnamese shares.[36] While referring to this arrangement as a "program of economic cooperation,"[37] the Code is not clear as to whether the Vietnamese party will shoulder part of the operating costs and risks.

The sharing of products will vary according to the amount of contributions by each party. The export of the foreign party's share of products will be exempted from export duties.[38] The Code does not allow the foreign party to sell the products within Vietnam unless requested to do so by the Vietnamese government.[39] The Code is silent on such issues as determination of the sale price of products, taxation, and repatriation of proceeds. Apparently, the government wishes to deal with these issues on an *ad hoc* basis, rather than tie its hands with a clear-cut prior commitment.

2. *Joint Enterprise or Company*

This form of business arrangement is the most integrated form of cooperation between the foreign party and the Vietnamese party, the latter being "a State-run economic organization."[40] In December 1976, Le Duan expounded the Party's position concerning the country's economic enterprises in these terms:

> The private capitalist enterprise will be subject to socialist transformation through joint state-private enterprises or will be guided and managed in production in keeping with the State plan. . . . As for those private enterprises that are still allowed to carry on production under the management of the socialist state and the state-run economy and have cut off their relations with the private economy their business in essence is no longer entirely private capitalism. They have become a form of state capitalism operating within the framework of a planned socialist economy and serving the interests of socialism.[41]

Either in the form of a State company or a State-run private organization, the Vietnamese party and the foreign party will "pool their capital" together; but in no case can the foreign party contribute more than 49 percent or less than 30 percent of the aggregate capital.[42] The capital contributed by the foreign party is to consist mainly of equipment, machinery, industrial property, means of transport and cash in foreign currency.[43] The

[35]*See, Symposium, Mining the Resources of the Third World: From Concession Agreements to Service Contracts,* 67 PROC. AM. SOC'Y INT'L L. 227, 240 (1973).
[36]SRVFIC art. 6(3).
[37]*Id.* art. 6(1).
[38]*Id.* art. 11(3).
[39]*Id.* art. 6(3).
[40]*Id.* art. 7(1).
[41]12 HOC TAP 79 (Dec. 1976).
[42]SRVFIC art. 7(3).
[43]*Id.*

Vietnamese party is to contribute land, buildings, building materials, tools, equipment and, in general, all expenses to be paid in local currency.[44]

The joint enterprise between the foreign party and the Vietnamese party must take one of the two following forms: a "Limited Liability Company" (*Cong Ty Trach Nhiem Huu Han*) or an "Anonymous Company" (*Cong Ty Nac Danh*).[45] This distinction comes from the French company law, which has left its mark in Vietnam. An Anonymous Company (in French, *Société anonyme* or S.A.) is the counterpart of an American corporation. The Limited Liability Company (in French, *Société à Responsabilité Limitée* or S.A.R.L.) has no counterpart in American law. Different from an American partnership, a Limited Liability Company is a legal entity separate from that of the shareholders. In this respect the Limited Liability Company is similar to an American corporation. But a S.A.R.L. cannot make use of public financing. An S.A. is more strictly regulated by law than an S.A.R.L. Except when specified otherwise in the charter, the shares of an S.A. are freely transferable whereas those of an S.A.R.L. are not. There are also differences concerning the number of shareholders (an S.A. is required to have at least seven shareholders while in an S.A.R.L. the required minimum is two).[46]

In the socialist context of Vietnam, where the Vietnamese party can only be "a State-run economic organization," the differences between the two types of business organizations seem irrelevant. The drafters of the Code may have had in mind the S.A.R.L. form for small investments, and the S.A. form for larger investments. In countries where these two forms exist, this is generally the case; the S.A.R.L. because of its relative simplicity of operation and management is used by closely-held businesses and the S.A. is used by businesses soliciting public financing. It is curious that the drafters of the Code maintain a distinction with no real significance in the socialist context.

The joint enterprise will operate under the clauses of the joint enterprise contract and the bylaws (*Dieu Le*) of the company.[47] This provision indicates a departure from the civil law concept of a company. Under the civil law system, the company derives its existence from the contract among the shareholders.[48] The terms of the contract are embodied in the bylaws of the company which set forth both the organizational structure and the rules for internal administration of the corporation.

The SRV Code refers to two documents for the formation of a company: the contract of the joint enterprise between the foreign party and the Viet-

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[44]*Id.*

[45]*Id.* art. 7(1).

[46]Elder, *Limited Liability Firms Abroad*, 13 U. PITT. L. REV. 193 (1952); Kessler, *With Limited Liability for All: Why Not a Partnership Corporation*?, 36 FORDHAM L. REV. 235 (1967).

[47]SRVFIC art. 7(2).

[48]*See* R. B. SCHLESINGER, COMPARATIVE LAW 561-70 (3d ed.).

namese party and the *Dieu Le* of the Company.[49] This dual requirement may be explained by the fact that, under the normal operations of the civil law, the "registration" of the *Dieu Le* of the company is a mere formality not constitutive of the company's existence and therefore not subject to approval or disapproval of the State. But in the matter of foreign investment, approval of the State is required. The contract which spells out the conditions of cooperation between the foreign party and the State must be incorporated in the *Dieu Le* of the company. Such *Dieu Le* must contain, besides the provisions pertaining to the identity and purpose of the corporate entity, its future plans and expansion prospects. Keeping in mind that under the civil law a company is essentially a contract between the shareholders, one may conclude that the SRV government wishes to have a well-defined long-term commitment of the foreign investor when a joint enterprise is formed.

A departure from the civil law principle of corporate liability is contained in Article 7(6), which states that both the Vietnamese party and the foreign party, but not the company itself, will be responsible for the export of products on the most advantageous terms.

3. *Private Enterprise Specializing in Production for Export*

This seems the only form of business arrangement available to the foreign investor who wishes to operate alone without the participation of the State. Since the law does not specify the percentage of foreign and Vietnamese contributions, it seems to indicate that this type of enterprise can be 100 percent foreign-owned. This interpretation appears to be supported by the fact that the term "private" is used to characterize such an enterprise. However, the Code provision also refers to a Vietnamese party, leaving the Code ambiguous.[50] It could be interpreted as a requirement of Vietnamese participation, but it could also mean that the foreign investor is precluded from importing into Vietnam materials which can be purchased in Vietnam. Whatever the interpretation, a foreign investor would be well-advised to seek clarification with the government as to the extent of foreign ownership required in this type of enterprise.

Assuming that this export-oriented enterprise can be 100 percent foreign-owned, it still cannot be set up simply as a branch of a foreign enterprise. It can only operate under the form of "a juridical person under Vietnamese

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[49]SRVFIC art. 7(2).

[50]SRVFIC art. 8(1) Reads:

The organization of a private enterprise specializing in production for export shall be carried out under the following conditions: (1) The foreign party shall import into Vietnam technical equipment, raw materials, fuel and other materials, etc., needed for the construction and operation of the enterprise, with the exception of those which the *Vietnamese party* can supply through trade transactions. (emphasis added).

law."[51] Its *Dieu Le* must be registered with the Ministry of Foreign Trade and the Ministry of Finance.[52]

Privileges Under the Code

The privileges granted to the foreign investor relate to:
(1) Taxation;
(2) Import and export duties;
(3) Repatriation of profits and capital;
(4) Guarantee against nationalization.

At the outset, a general *caveat* must be given. As indicated above, the Code is vague as to the extent of the privileges to be accorded to the foreign investor. Unlike the investment codes of other developing nations in the area, the SRV Code does not spell out with any degree of specificity what the foreign investor is expected to receive in the way of incentives or privileges.[53] Almost everything is left to private negotiations between the foreign party and the government on a case-by-case basis. Again, the SRV seems reluctant to make any *a priori* commitment. The vagueness of the Code provisions would give the government great flexibility but, as previously noted, it may also deter foreign investment.

1. *Taxation*

The lowest tax rate, 30 percent of net profits, is applied to enterprises engaged in export-oriented production.[54] To discourage intercorporate pricing, by which the foreign party sells to its affiliates at a low price, the tax is collected at a fixed rate on business turnover or per unit of product.[55] A tax rate of 40 percent is applied to activities requiring a high standard of modern technology and large capital investments.[56] A tax rate of 50 percent is applied to all other types of business activities.[57] Unlike other developing countries in Southeast Asia, the SRV has not adopted progressive tax rates. Nor does it make any provisions for accelerated depreciation.[58]

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[51] *Id.* art. 8(5).

[52] *Id.*

[53] *Compare,* Indonesia: Tax holiday for a period not exceeding six years for "new bodies investing their capital in the field of production which is granted priority by the Government," and five years for all others. For the "priority" enterprises, the exemption starts from the date of production, for the others, the exemption starts from the date of their formation. Corporation Tax Law of 1925, arts. 1A, 1B, 2.

Taiwan: Five year tax exemption from date on which company begins to market its products or to render its services. Statute for Encouragement of Investment, art. 6.

Malaysia: Tax relief for a period of two years starting from commencement of production can be extended for up to eight years. Investment Incentives Act, arts. 13, 14.

[54] SRVFIC art. 15(2).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *E.g.,* Indonesia: Law Concerning Investment of Foreign Capital, art. 15; Malaysia: Investment Incentives Act, arts. 28, 30E; Taiwan: Statute for Encouragement of Investment, arts. 6, 8.

The Code provides that the foreign investor may apply for a lower tax rate to the Ministry of Finance. The decision of the Ministry is to be based on the type of economic activity and by the amount of capital invested by the foreign party.[59] Furthermore, should the enterprise incur "unforeseen and unavoidable risks," the government may consider a tax reduction.[60] These risks may be understood to include cases of *force majeure* or acts of God, although again the law is not clear on this point. If the foreign investor chooses to reinvest the profits, the reinvestment will be eligible for a tax exemption or tax cut, depending on the importance of the reinvestment and the area in which the reinvestment is made.[61]

Income tax exemption, according to the Code, is granted "for a number of years."[62] Import and export duties may be "waived" or "reduced" "once or several times" depending on the material to be imported and the products exported.[63] Exemptions or reductions of import duties are granted to imports of equipment and materials needed for the operation of enterprises that specialize in production for export and joint enterprises,[64] but no exemption or reduction of import duties is mentioned with regard to the coproduction form of business enterprises.

2. *Repatriation of Profit and Capital*

The foreign investor, after payment of tax and deduction for a reserve fund equal to 5% of the company's annual profit, is allowed to repatriate his share of profits not exceeding 25% of the invested capital.[65] Repatria-

[59]SRVFIC art. 11(1).
[60]*Id.* art. 11(4).
[61]*Id.* art. 10(5).
[62]*Id.* art. 11(1).
[63]*Id.*
[64]*Id.* art. 11(2), 12(3).
[65]*Id.* art. 10(4). *Compare,* Indonesia: Repatriation of net profits, depreciation of capital assets and cost related to the employment of foreign persons working in Indonesia, Law Concerning Investment of Foreign Capital, arts. 19, 20, 24: Malaysia: Authorization of repatriation, through bilateral treaties, of capital invested, interest, dividends, fees, royalties, any other revenues accruing on invested capital, and of compensation in respect of expropriation or nationalization. *See* Agreement between the Government of the French Republic and the Government of Malaysia Concerning the Guarantee of Investments, art. 4; Agreement between the Federal Republic of Germany and Malaysia Concerning the Promotion and Reciprocal Protection of Investments, art. 5; Agreement on Economic Cooperation between the Kingdom of the Netherlands and Malaysia, art. 9; Taiwan: Repatriation of yearly income or net profit or interest accruing from investment and 15% or more of the total amount of invested capital after completion of the approved investment plan. Statute for Investment by Foreign Nationals, arts. 11, 12, 16.
The meaning of this article is not clear. The 25% ceiling may apply to the amount of reserves and not to the repatriation of profits. The article reads as follows:
Article 10—The foreign party . . . shall enjoy the following rights:
4. To remit home or transfer to other countries:—the yearly share of net profit, after payment of tax and prior deduction for the reserve funds which shall amount to 5% of the enterprise or company's annual profit; and not exceed 25% of the total invested capital.

tion of disinvested capital is allowed as a result of a transfer approved by the government, dissolution of the enterprise, or nationalization.[66] The Code requires the foreign investor to "comply with the Vietnamese regulations of foreign trade and exchange control."[67] One may ask the question: in case of conflict between the investment contract and subsequent exchange regulations, which of the two will prevail?

3. *Guarantee Against Nationalization*

The guarantee against nationalization is limited to a period of ten to fifteen years from the date of issuance of the investment license. But in some particular cases, this period may be extended.[68] In case of nationalization, the Code provides for the purchase of the foreign portion of the shares by the Government at a "reasonable price agreed upon by the two parties."[69] The foreign party is to be allowed to repatriate the proceeds in the foreign currency initially invested and within "an appropriate period of time."[70]

Labor

The Vietnamese leaders never fail to point out that labor is one of the most attractive assets of Vietnam because of its low cost and stability.[71] Wages are set by the Ministry of Labor, which allocates the labor force to different sectors of the economy. The SRV government does not encourage the hiring of foreign staff. The hiring of foreign personnel in enterprises specializing in the manufacturing of products for export is allowed, but only for "those services which Vietnam is not prepared to provide."[72] Such hiring must be approved by the Ministry of Foreign Trade.[73] The hiring of Vietnamese personnel must be made through collective bargaining conducted with their representatives. Wages and salaries of local personnel employed in enterprises specializing in production for export must be paid in foreign currency.[74]

Duties

The Code contains fairly unveiled threats to companies which fail in their duties to observe the laws and regulations and submit to the control of the

[66]SRVFIC art. 10(4).
[67]*Id.* art. 14(3).
[68]*Id.* art. 10(1).
[69]*Id.* art. 10(2).
[70]*Id.*
[71]*E.g.*, speech by Le Thanh Nghi, Chairman of the State Planning Commission, *reprinted in* 1 Hoc Tap 16 (Jan. 1976).
[72]SRVFIC art. 12(2).
[73]*Id.*
[74]*Id.* art. 8(4).

competent bodies of the Vietnamese State.[75] These duties include compliance with the foreign trade and exchange regulations and, in particular, the implementation of all the clauses of the investment contract.[76] If the foreign investor commits any fraud or "breach of faith," it will forfeit all or part of its investment privileges. The penalty can be as severe as revocation of the investment license without compensation in cases of "serious violations."[77]

Conclusion

An adequate appraisal of the Code can only be made in the context of the SRV's internal legislation concerning matters closely connected with the operation of the Code, such as the SRV's company law, banking and exchange regulations and tax and labor law. At the Sixth National Assembly in July 1976, a commission composed of seventeen representatives was appointed to draft unified legislation in these areas. In the meantime, the National Assembly recommended that existing legislation in the North and South continue to apply with flexibility as circumstances require.[78] Thus, at this point, there is great uncertainty as to the legal framework within which the Code will operate. This uncertainty, added to the vagueness of the provisions of the Code themselves, may help to explain why the Code has not aroused enthusiasm among private investors.[79]

The SRV's Foreign Investment Code has been generally acknowledged as "relatively liberal for a socialist country."[80] In particular, Article 26, implying that the privileges cited in the Code represent only a minimum, shows the eagerness of the SRV government to attract foreign investment. But, on the other hand, some specific provisions of the Code may deter the foreign investor, for example, the provision on nationalization. For investments in areas requiring high technology and sizable capital, the prospect of nationalization in ten or fifteen years is clearly a deterrent. Few reasonable investors would be willing to run the risk of nationalization on the promise of "reasonable compensation within an appropriate period of time." Vietnamese leaders have made it very clear that "foreign enterprises are not permanent. The two sides would have to agree to a mutually acceptable period [for termination of the foreign investment]."[81]

The drafters of the Foreign Investment Code are certainly aware of the lack of attractiveness of certain of its provisions. But they have to reconcile

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[75]*Id.* art. 14(1).
[76]*Id.* art. 14(3)-(4).
[77]*Id.* art. 16.
[78]3 HOC TAP 120 (July 1976).
[79]*See* Chanda, *Vietnam Opens the Door to Investors*, 96 FAR EASTERN ECON. REV. 41 (1977); Harshfield, *Non-National Yes, but only for 10-15 years*, 97 FAR EASTERN ECONOMIC REVIEW 34 (1977). Mr. Harshfield is Vice-President and Area Corporate Officer, Citibank N.A., Hong Kong. He has made several visits to Hanoi.
[80]9 BUS. ASIA 197 (1977).
[81]Chanda, *supra* note 78, at 42.

the contradictory demands of Marxist ideological purists and pragmatists. The purists look upon any capitalist involvement with apprehension. The pragmatists favor foreign investment as a necessary means to foster Vietnam's economic development. The Foreign Investment Code in its final version reflects the tension between these two groups within the SRV leadership.[82] In spite of the promulgation of the Foreign Investment Code, the SRV is still without a foreign investment policy. The Code is best understood in this political context.

As it stands, the Code cannot be attractive to the foreign investor who seeks legal security. But it is also true that no code, however specific and clear it may be, could provide foolproof legal security to investors wishing to do business in a foreign country. Other considerations, cultural, social and political, can have equal, and sometimes greater, weight. The question of the stability of the present political regime, for instance, can be much more significant than the legal provisions of a code. The investor must be reasonably certain that unfavorable political and social changes will not occur. He must be assured that communication between him and the host government will be open. He must be certain that no discrimination will take place against him. He must feel that a stable working relationship can develop between himself and the host government's officials associated with the enterprise. These and other factors are part of the "investment climate"[83] the prospective investor must carefully evaluate before any final commitment. Vietnam in the present phase of its development will be hard-pressed to compete with its neighbors in the Philippines, Indonesia, Malaysia and Singapore, in offering the foreign investor a favorable investment climate.

On the other hand, the foreign investor will find in Vietnam plentiful resources which have scarcely been exploited. While the risks will be great, the prospect of quick and sizable returns commensurate with the risks could be incentives powerful enough to draw investors to Vietnam. It is true that the experience of economic cooperation between Western companies and foreign governments in the past has on the whole not been bad.[84]

However, when the time comes for foreign investment, it will not be the SRV Foreign Investment Code that will guide the investor in his operations

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[82] It was reported, for example, that when the emphasis of the Five Year Plan shifted from heavy industry to agriculture and light industry to meet the need for food and essential goods, some senior Party members had misgivings about this shift, fearing that the Party might veer away from the traditional Marxist priority given to heavy industry. Chanda, *Hanoi Comes Down to Earth*, FAR EASTERN ECON. REV. 29 (February 4, 1977).

[83] Fabouros, *Legal Security for International Investment*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 699 (W. Friedmann & R. Puch ed. 1959).

[84] LEGAL ASPECTS OF FOREIGN INVESTMENT, *supra* note 19, at 753.