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# The Legal Aspects of Foreign Investment in Vietnam

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# The Legal Aspects of Foreign Investment in Vietnam

*Tang Thanh Trai Le*<sup>1</sup>

## Introduction

Recent years have brought burgeoning interest in foreign investment in Vietnam. Although a few observers have sounded discordant notes about Vietnam's economic potential,<sup>2</sup> they have been drowned out in the chorus of the prevailing opinion that Vietnam appears set to become the next 'tiger' of Southeast Asia.<sup>3</sup> Recognising this potential, the US lifted its trade embargo of Vietnam in early 1994.<sup>4</sup> By this time, foreign investors from other nations had already established a presence in Vietnam.<sup>5</sup>

Foreign investors have well-founded reasons underlying their interest in Vietnam. Vietnam's plentiful natural resources, including timber, oil, agricultural resources, a long coastline, tourism, and seafood production, present ample opportunity for development.<sup>6</sup> The labour force has a 90% literacy rate,<sup>7</sup> partly due to the ease of reading and writing the language thanks to the efforts of early Portuguese missionaries to phonetically transcribe the language into the Roman alphabet. The people also possess unique qualities; they demonstrated their resilience throughout nearly 40 years of warfare. Finally, the country's isolation until recent years makes Vietnam the 'new kid on the block' in terms of investment opportunities; the investment vacuum

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- 1 Professor of Law, University of Notre Dame Law School. The author wishes to thank Arthur Povelones (JD, 1995) for his invaluable assistance in the preparation of this article.
  - 2 See, e.g. Sally Golston, 'Vietnam: Cautionary Assessment' East Asian Executive Rep, 15 January 1994, at 7 (describing American 'think tank' report skeptical of prospects for economy); Peter Passell, 'Vietnam May Be Too Poor to Justify a Big Business Invasion', NY Times, 10 February 1994, at D2; Linus Chua, 'The Door's Open But Don't Expect a Stampede', LA Times, 7 February 1994, at D3.
  - 3 See, e.g., 'DTI - Vietnam - Another Asian Tiger Says Richard Needdham', Hermes - UK Government Press Releases, 3 May 1994, LEXIS, News Library, Txprim File; Mark Evans, 'Foreign Interest in Vietnam Growing', South China Morning Post, 25 March 1994, at 14 (citing government data indicating 52% growth rate in foreign investment); Karl Schoenberger, 'Champing at the Bit', LA Times, 4 February 1994, at D1.
  - 4 Memorandum on Trade with Vietnam, 30 Weekly Comp Pres Doc 212 (3 February 1994).
  - 5 The Vietnamese government reported that through the end of 1993, it had approved 820 foreign investment projects with a value of over \$7 billion. Ton Si Kinh, 'Vietnam: Renovation and Expansion of Cooperative Relations with Other Countries', 2 (1994) (unpublished manuscript, on file with author).  
Australia ranks among the top five countries in terms of number of projects and amount invested, with 40 projects and \$477.4 million through the end of 1993; Agreement on the Reciprocal Promotion and Protection of Investment, 5 March 1991, Austl.-Vietnam, 30 ILM 1064; Margaret Harris, 'Vietnam - Frenzy as the Last Great Gold Rush Begins', Sydney Morning Herald, 5 February 1994, at 26.
  - 6 See generally W Gary Vause, 'Investment in Vietnam: Prospects and Concerns for the 1990s', 4 Fla Int'l LJ 231, 235 (1989).
  - 7 But see Malcolm W Browne, 'Overcrowded Vietnam is Said to face Catastrophe', NY Times, 8 May 1994, at sec 1, 1 (mentioning declining educational system and lack of managerial skill).

inevitably attracts investors wishing to gain an edge in an untapped market. Indeed, Vietnam now seeks investment in everything from new golf courses to infrastructure overhaul.

The Vietnamese government's first attempt to attract foreign capital came with the promulgation of a foreign investment code in 1977,<sup>8</sup> not long after the communist leadership made clear its intent to establish communism throughout Vietnam. In 1976, the country's name, formerly the 'Republic of Vietnam', became the 'Socialist Republic of Vietnam', and the Workers' Party became the Communist Party at the Fourth Party Congress later that year.<sup>9</sup> The 1977 foreign investment code accordingly placed strong emphasis on the role of the state, and subordinated foreign investment to the communist structure of the economy. Thus, only the state could enter into a joint venture with a foreign party, and the foreign party could not invest more than 49% of the joint venture's capital.<sup>10</sup> Furthermore, the code refused to rule out the prospect of nationalisation.<sup>11</sup> So while Vietnam courted capital from western nations, it did so only halfheartedly. As a result,

'... [a]lmost every item in [the code] 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". The same vagueness exists concerning customs duties, export tariffs and reinvestment treatment. On the crucial question of nationalisation, the Code mentions nationalisation from ten to fifteen years after the initial investment date, but hastens to add that "in particular cases this period may be longer". There are no criteria for defining "particular cases".<sup>12</sup>

Not surprisingly, then, the 1977 foreign investment code could only attract a handful of investments from socialist countries. In fact, Vietnam licensed only one western foreign enterprise, a French pharmaceutical firm, under the old code.<sup>13</sup> This left development needs to the state enterprises, which lacked the ability to fill the gap.<sup>14</sup> As a result, Vietnam could not shake its status as one of the poorest nations in the world.<sup>15</sup>

8 Regulation on Foreign Investments, Decree 115/CP, 18 April 1977 (hereinafter '1977 Code').

9 Tang Thi Thanh Trai Le, 'The Foreign Investment Code of Socialist Republic of Vietnam', 13 Int'l Law 329, 331 (1979).

10 1977 Code, note 8, at Article 7(3).

11 The government guaranteed no nationalisation only for a period of 10 to 15 years, or for an extended period in particular cases. at Article 10(1).

12 Le, *supra* note 9, at 329-30.

13 Douglas Pike, 'Vietnam: The Winds of Liberalisation', 12 Fletcher Forum 245, 247 (1988).

14 Prime Minister Vo Van Kiet recently commented on 'the negativity and attitude of dependence under the former subsidised system ...', 'Vo Van Kiet Gives Speech at Assembly Opening', Hanoi Voice of Vietnam, FBIS, 9 December 1993, at 65, 66 (hereinafter 'Vo Van Kiet speech').

15 Even today, Vietnam's per capita income remains around \$200, among the lowest in the world, according to a World Bank report 'Vietnam's Transition to a Market Economy' (pt 1), East Asian Executive Rep, 15 December 1993, at 9 (hereinafter 'Transition, pt 1').

## Winds of change

A well-known communist theoretician in Vietnam has noted:

'The winds of change which swept our country happened at the peak of the "perestroika" movement in the Soviet Union. Vietnam's Sixth Party Congress and the Soviet 27th Congress were progressing together, supporting each other.'<sup>16</sup>

The Sixth Party Congress adopted its own 'perestroika' in 1986 and named it 'doi moi', or renovation. The Soviet Union reportedly warned Vietnam that it would cut off the \$1.4 billion of aid and subsidised trade it gave to Vietnam if Vietnam did not enact economic reform.<sup>17</sup> Still, the communist leaders remained reluctant to launch an all-out effort to attract investors from capitalist countries. The same theoretician summed up the reason for this reluctance:

'Do not believe that the investment from capitalist countries will save us ... To pursue the route of socialism and at the same time to ask capitalism for help is but a daydream.'<sup>18</sup>

The cutoff of assistance from the Soviet Union in 1991,<sup>19</sup> though, further hastened the need for subsequent foreign investment reforms, as foreign capital became a substitute for direct economic assistance.

Meanwhile, China, a country simultaneously emulated and feared by Vietnam, had embarked on a program of economic development. Its dual emphasis on economic openness and rigid political control presented an attractive model for the Vietnamese government. Furthermore, the rapid economic development in China in the wake of the new policy undoubtedly impressed the Vietnamese leaders. Vietnam consciously incorporated much of China's foreign investment law into its new law.<sup>20</sup> The other countries of the Pacific Rim also developed rapidly, which certainly played a role in the desire of Vietnam for economic reform.

Vietnam's invasion of Cambodia adversely affected its economic development. In addition to the human and economic costs of the invasion itself, the US explicitly conditioned lifting of the trade embargo upon withdrawal of troops and assistance in reaching a settlement.<sup>21</sup> By

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16 Nguyen Khac Vien, 'Doi Moi' 18-19 (1988).

17 Gerald Segal, 'The USSR and Asia in 1987', 28 *Asian Surv* 1, 3-4 (1988).

18 Vien, *supra* note 16, at 19.

19 Harris, *supra* note 5, at 26.

20 Jerome Alan Cohen, 'Investment Law and Practice in Vietnam', xii (1990). The Vietnamese law did not, though, simply copy the Chinese law. The drafters evaluated foreign investment law in many nations and solicited the advice of a United Nations body, and made many substantial changes as a result. At xii, 2.

21 See generally Douglas Pike, 'Change and Continuity in Vietnam' 89 *Current Hist* 117, 132 (1990); Douglas Pike, 'Vietnam in 1991', 32 *Asian Surv* 74, 81 (1992) (hereinafter 'Vietnam').

disentangling itself from Cambodia through the signing of the agreement on the Cambodian peace process in Paris in October 1991, Vietnam sought to establish normal relations with China and the US and to end its isolation from its ASEAN neighbours.

The most crucial impetus for change, however, came from within Vietnam itself. Even before the formal division of Vietnam with the 1954 Geneva Accords following the French army's defeat at Dien Bien Phu, the northern and southern regions had separate economic and political cultures. The French policy of 'rule and divide' translated into the division of Vietnam into three distinct political entities: Cochinchina, Annam, and Tonkin. Cochinchina in the south, compared to the northern regions of Annam and Tonkin, enjoyed a measure of prosperity as a result of its superior natural resources, especially rice and rubber. It also had greater familiarity with western political ways, an inevitable outgrowth of French colonialism and the lack of an indigenous government. The Geneva Accords entrenched the differences with a western economic system taking hold in South Vietnam and a communist system in North Vietnam.

By the time of reunification in 1975, private enterprise, except for some small vendors, had become virtually non-existent in North Vietnam. State and collectivised enterprises accounted for 88.4% of national output and 84.4% of national income.<sup>22</sup> In contrast, a fully capitalist system operated in South Vietnam. Thus, the attempt of the government to impose communism on the south resulted in a debilitating economic crisis.<sup>23</sup>

In spite of the austerity brought about by communist rule, the standard of living of southerners remained substantially higher than that of northerners. This occurred, in no small part, due to the remittances of overseas Vietnamese, especially those who fled in 1975, to their families and relatives remaining in Vietnam. Overseas Vietnamese remitted an estimated \$300 million annually in kind and in cash.<sup>24</sup> As early as 1979, private enterprise resurfaced, this time with the implicit blessing of the authorities, especially in Ho Chi Minh City. Visitors from the north, led to believe during the war years that the south required 'liberation' because the people there lived in misery, instead came away amazed by the relative affluence of their new compatriots. Residence in the south soon became a privilege that only select northerners could enjoy. Socialisation, then, plunged the country into a deep economic crisis while failing to eliminate the differences between north and south.

The Vietnamese leadership realised the futility of continued efforts to impose socialism, and decided to dramatically change its economic approach. Thus, the Sixth Party Congress officially embraced 'doi moi', or 'renovation'.

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22 Tap Chi Cong San, March 1994, at 46-48.

23 See eg, Pike, 'Vietnam', *supra* note 21, at 78 ('virtually no true economic development' during the 1980s).

24 Joseph Kahn, 'Seeking an End to Trade Hostilities: Vietnam Gears up for Lifting of U.S. Embargo', Dallas Morning News, 8 February, 1993, at 1D.

Article 15 of Vietnam's constitution, amended in 1992 in order to reflect the new party line, sets out the official meaning of 'doi moi'. Under the 'doi moi' system

'[t]he state develops the multisectoral commodity economy in accordance with the market mechanism based on state management and socialist orientations. The multisectoral economic structure with its various diverse forms of production organisation depends on the system of ownership of the entire people, of collectives, and of private parties with the system of ownership of the entire people and collectives being at the core.'<sup>25</sup>

Put simply, 'doi moi' means that the government has abandoned its attempts to impose a planned economy and collectivisation in favour of a free market structure and private enterprise.

## Foreign investment law

### Generally

As part of the 'doi moi' policy, the Communist Party decided to 'mobilise every means and use every form to attract foreign capital ...'<sup>26</sup> Prime Minister Vo Van Kiet reiterated that foreign investment represented a cornerstone of the economic openness policy, as only an attractive investment environment would enable Vietnam to obtain 'the most important foreign capital resources'.<sup>27</sup> Liberalisation of the foreign investment laws, then, served as the most essential part of the 'doi moi' policy.

Vietnam's law on foreign investment,<sup>28</sup> passed in 1987 in the wake of the watershed Sixth Party Congress, repealed, rather than amended, the 1977 law because the party had radically changed the underlying policy and purpose of foreign investment. While under the 1977 law the state had to maintain 51% ownership of all enterprises, the 1987 law permitted complete foreign ownership if desired.<sup>29</sup> Also, the new law explicitly ruled out nationalisation,<sup>30</sup> a position that Vietnamese leaders have consistently emphasised.<sup>31</sup>

25 Constitution of the Socialist Republic of Vietnam, Article 15 (1992), reprinted in 'Constitutions of the Countries of the World', (Albert P Blaustein & Gisbert H Flanz eds, 1992 Supp) (hereinafter 'Constitution'). 'Doi moi' applies only to economics, not politics. The Vietnamese Constitution, broadly amended in order to reflect the 'doi moi' policy, retains the monopolistic role of the Communist party. *Id* at Article 4.

26 'Strategy for Socio-Economic Stabilisation and Development Up to the Year 200', 30, quoted in Tap Chi Cong San, April 1994, at 9.

27 Vo Van Kiet speech, *supra* note 14, at 68.

28 'Law on Foreign Investment in Vietnam' (1987), reprinted in 30 ILM 932 (1991) (hereinafter 'law').

29 *Id* at Article 8.

30 *Id* at Article 21.

31 See 'Vietnam: Xuan Rules out Nationalisation', Vietnam Investment Rev, 30 August 1993 (chairman of SCCI saying that Vietnam would not nationalise property of foreign enterprises).

The party has pursued foreign capital with the same singlemindedness that characterised its conduct of the war.<sup>32</sup> The Seventh Party Congress in 1991 and the subsequent mid-term party congress in 1994 have reinforced the renovation policy

‘... with respect to foreign capital. Vietnam’s revised constitution reflects this policy:

The state shall encourage foreign organisations and individuals to invest capital and technology in Vietnam in accordance with Vietnamese law and international law and practice. The state shall guarantee the right of ownership of the legitimate capital, property, and other interests of foreign organisations and individuals. Business enterprises with foreign invested capital shall not be subject to nationalisation.’<sup>33</sup>

The amendments to the Law on Foreign Investment in 1990<sup>34</sup> and 1992<sup>35</sup> and the implementing regulations in 1993<sup>36</sup> have made a law already considered quite liberal even more so. The flurry of legislation passed in order to create a legal system underscores Vietnam’s focus on pleasing foreign investors.

### Areas open to foreign investment

The 1987 foreign investment law permits foreigners to invest ‘in any sectors of its national economy’.<sup>37</sup> The law specifically encourages foreign investment in five areas:

1. ‘[i]mplementation of major economic programs, export oriented production, and import substitution’;
2. ‘[t]he use of high technology, skilled labour, and concentrated investment in the exploitation and exhaustive utilisation of potential resources and in the increasing of the production capacity of existing factories’;
3. ‘[p]roduction which is labour intensive and uses the existing materials and natural resources available in Vietnam’;
- 4) ‘[b]uilding of infrastructure projects’;and

32 Tap Chi Cong San, March 1994, at 48. The government has calculated the amount of foreign investment it needs by 2000 in order to raise the country’s per capita to \$500, and has made that amount its goal. Kahn, *supra* note 24, at 1D.

33 Constitution, *supra* note 25, at Article 25. The constitutional amendments avoided the potential dilemma that the permissive rules of the foreign investment laws and regulations violated the constitution, which only permitted state and collective enterprises. See Harish Mehta, ‘Vietnam: Govt Drops Central economic Planning’, Business Times, 2 January 1992 (quoting Ngo Ba Thanh, chairwoman of the Vietnamese Law Commission).

34 ‘Law on Amendment and Addition to a Number of Articles of the Law on Foreign Investment in Vietnam’ (1990), 30 ILM 939 (1991) (hereinafter ‘1990 Amendments’).

35 ‘Law on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment in Vietnam’ (1992) (hereinafter ‘1992 Amendments’). The full text of the law as amended through 1992 appears in ‘Foreign Investments of Vietnam’ (SCCI & Phillips Fox, 1993).

36 (1993), reprinted in ‘Foreign Investment Laws of Vietnam’ note 35 (hereinafter ‘Regulations’).

37 Law, *supra* note 28, at Article 3.

5. '[f]oreign currency earning services such as tourism, ship repairing, airports, and sea ports and other services.'<sup>38</sup>

The ability of foreign investors to invest in any part of the economy contrasts with restrictions imposed upon domestic entrepreneurs. For instance, the law on private enterprises and the law on companies prohibit formation of businesses in areas 'prohibited by law' and requires approval of the Chairman of the Council of Ministers in the following areas:

'(1) Manufacturing and distribution of explosives, poison, and toxic chemicals. (2) Mining of certain precious minerals. (3) Production and supply of electricity and water on a large scale. (4) Manufacture of information transmitting facilities, postal and telecommunication services, broadcasting, television, and publication. (5) Ocean shipping and air transportation. (6) Specialist export and import business. (7) International tourism.'<sup>39</sup>

Although the foreign investor has access to all areas in principle, in practice the discretion of the State Committee for Cooperation and Investment (SCCI), the department that oversees foreign investment, to grant or refuse licences will carry out the government's intent to open or close certain areas to foreign investment.<sup>40</sup> In fact, the American embassy in Bangkok has reported that Le Xuan Trinh, Minister of the government, has announced that the government will draw up a list of areas forbidden to foreign investors, in order to 'spare foreign investors wasted effort'.<sup>41</sup>

### Forms of investment

Under the 1987 Law on Foreign Investment, foreign investment may take one of three forms:

1. '[c]ontractual business co-operation';
2. '[j]oint venture enterprise or corporation, generally called joint venture enterprise'; and
3. '[a]n enterprise with one hundred (100) per cent foreign owned capital'.<sup>42</sup>

The 1992 amendments added two new subsets of investment: investment in 'Export Processing Zones'<sup>43</sup> and 'Build-Operate-Transfer' contracts.<sup>44</sup> Separate laws control the operation of representative offices.<sup>45</sup>

38 *Id.*

39 Law on Private Enterprises, Article 5 (1990), reprinted in Foreign Investment Laws of Vietnam, *supra* note 35; Law on Companies, Article 11 (1990), reprinted in Foreign Investment Laws of Vietnam, *supra* note 35.

40 See *infra* Part III D for a discussion of the heightened procedural review given to projects in certain areas.

41 'Vietnam – Economic News', Market Reports, 17 March 1994, LEXIS, News Library, Curnws File.

42 Law, *supra* note 28, at Article 4.

43 1992 Amendments, *supra* note 35, at Article 1(7).

44 *Id.* at Article 1(7).

45 See *infra* Part III C 6.



For foreign enterprises other than those with 100% foreign-owned capital, a 'foreign party' and a 'Vietnamese party' must participate in the venture. Since 1987, the foreign investment law has consistently permitted 'one or more foreign individuals or legal economic entities' to invest as a 'foreign party' in Vietnam.<sup>46</sup> The definition of who may represent the 'Vietnamese party' has evolved with time. Article 2 of the 1987 Law defined the 'Vietnamese party' as 'one or more Vietnamese legal economic entities'.<sup>47</sup> That meant that only state entities could serve as the Vietnamese party, although private Vietnamese could 'contribute capital to Vietnamese legal economic entities to form the Vietnamese party for the purposes of business co-operation with a foreign party.'<sup>48</sup> The 1990 amendments clarified that the Vietnamese party could operate in any economic sector,<sup>49</sup> and amended Article 3 of the 1987 Law to authorise private Vietnamese economic organisations to enter into business co-operation contracts subject to conditions stipulated by the Council of Ministers.<sup>50</sup> The 1992 amendments redefined 'Vietnamese party' for purposes of all forms of foreign investment as 'one or more business enterprises from any economic sector,' thus permitting direct private participation in joint ventures.<sup>51</sup> The 1993 regulations define Vietnamese enterprises as state-run businesses, cooperatives, businesses established under the Law on Companies, and private enterprises established under the law on private enterprises.<sup>52</sup> The regulations further explain:

'Enterprises established in accordance with the *Law on Companies* or the *Law on Private Enterprises* may independently enter business co-operation contracts with foreign organisations and individuals in every sector of the national economy, except those in which investment is prohibited by the law and regulations of Vietnam.'<sup>53</sup>

46 Law, *supra* note 28, at Article 2(1).

47 *Id* at Article 2(2).

48 *Id*.

49 1990 Amendments, *supra* note 34, at Article 1(1).

50 *Id* at Article 1(2). The Council of Ministers did not put forward these conditions before it amended the law again.

51 1992 Amendments, note 35, at Article 1(1). A discussion of the Club of Women Economic Managers of Ho Chi Minh City shows the intensity of the desire to please foreign investors. One member, worried about this amendment, stated, 'After all, our country is a socialist country; if we allow private citizens to do everything, we are no longer a socialist country.' Another member responded, 'A foreign party prefers to cooperate with private parties.' Tuoi Tre Chu Nhat, 6 December 1992, at 4.

In practice, however, the need for governmental connections to navigate the procedural hurdles has discouraged most foreign investors from choosing a private partner for substantial projects. Sesto E. Vecchi, , East Asian Executive Rep., 15 December 1992, at 9.

52 Regulations, *supra* note 36, at Article 3. See Part III.I for a discussion of the law on private enterprises and the law on companies.

53 Regulations, *supra* note 36, at Article 4. As of the end of 1993, Vietnam had 4,212 private enterprises. 'Big Boom of Private Enterprises', Saigon Times, 13-19 January 1994, at 19.

Given that the laws and regulations permit foreign investors to invest in any sector, however, the question arises whether the authorisation for foreign investors would take precedence over the restrictions on domestic enterprises, or vice versa. Of course, the discretionary power granted to the SCCI might make this question academic.

In the case of the more than 2 million overseas Vietnamese (Viet kieu),<sup>54</sup> the law remains ambiguous. The first regulations implementing the 1987 Law on Foreign Investment had explicitly given overseas Vietnamese 'the same rights and obligations as foreign investors'.<sup>55</sup> The amended constitution does not assimilate the overseas Vietnamese who invest in Vietnam as a 'foreign party', but it does not make them a 'Vietnamese party' either.<sup>56</sup> Article 3 of the 1993 regulations established a special status for '[o]verseas Vietnamese who make direct investment in Vietnam or jointly contribute capital with one or more Vietnamese economic organisations', and hinted at 'favorable conditions' for these investors.<sup>57</sup> This ambiguity reflects Vietnam's dual objectives of maintaining jurisdiction over overseas Vietnamese and of attracting their capital.<sup>58</sup>

The government has yet to codify any of these 'favorable conditions' in the law on foreign investment or the regulations. In 1993, however, it did act outside of the foreign investment laws by lowering the tax on the repatriation of profits earned in Vietnam for overseas Vietnamese from 10% to 5%.<sup>59</sup> A circular issued in 1994 confirmed this reduction and added a 20% reduction in profit taxes for any economic unit with at least 50% ownership by overseas Vietnamese.<sup>60</sup>

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54 The government estimates that one million Vietnamese have settled in the US, for just under one half of the total, 'Overseas Vietnamese Return for Tet, Investment', Hanoi VNA, FBIS, 8 February 1994, at 44.

55 Decree Regulating in Detail the Implementation of the Law on Foreign Investment, Article 4 (1988), 30 ILM 942 (1991).

56 Article 23 of the revised constitution, prohibiting nationalisation of domestic property, does not include overseas Vietnamese as a Vietnamese party. Article 25, however, distinguishes overseas Vietnamese from other foreign organisations and individuals by saying, 'The state creates favourable conditions for overseas Vietnamese to invest in Vietnam'. Constitution, note 25, at Article 25.

57 Regulations, *supra* note 36, at Article 3.

58 The pending law on domestic investment may completely remove overseas Vietnamese from coverage as a 'foreign party'. See Tran Kim Giang, 'Vietnam Domestic Investment Law Expected to Unleash Flood of New Investment', Vietnam Investment Rev, 4 April 1994. The role of overseas Vietnamese, though, probably will remain uncertain, as legislators could not decide on how to classify them. 'National Assembly Proceedings on 6 June - Home Investment Discussed', BBC Summary of World Broadcasts, 8 June 1994, available in LEXIS, News Library, Cumwv File.

Recent political developments also suggests that Vietnam may not treat overseas Vietnamese as Vietnamese nationals. See John Rogers, 'Vietnam, US Settle Overseas Vietnamese Issue', Reuters World Service, 30 May 1994, LEXIS, News Library, Cumwv File, describing an agreement granting the United States consular access to Americans of Vietnamese origin accused of violating Vietnamese law.

59 'Overseas Vietnamese Receive Tax Incentive' Voice of Vietnam, BBC Summary of World Broadcasts, 11 May 1994, available in LEXIS, News Library, Cumwv File.

60 *Id.*, note 59.

The uncertainty surrounding the status of overseas Vietnamese has helped discourage investment by overseas Vietnamese. Through March 1994, only 39 of the 895 investment licences went to overseas Vietnamese, with registered capital of \$72 million.<sup>61</sup> These investments have come mostly from overseas Vietnamese of Chinese descent, who either invested directly or entered into joint ventures with parties from Taiwan, Hong Kong, and Singapore.<sup>62</sup>

### *Business co-operation contracts*

A 'business co-operation contract' is defined as 'a document signed by two or more parties ... with the object of conducting jointly one or more business operations in Vietnam on the basis of mutual allocation of responsibilities and sharing of profits or losses, without creating a legal entity.'<sup>63</sup> The 1993 regulations distinguish business co-operation contracts from '[c]ommercial contracts and economic contracts for the mere exchange of goods, such as delivery of raw materials in return for finished products, or purchase of equipment in return for products in the future ...'.<sup>64</sup> The business co-operation contract under Vietnamese law would appear similar to a partnership in American law. The regulations provide, however, that each partner sustains responsibility 'for its own activities'.<sup>65</sup> This raises questions about the liability of each partner beyond its own activities.

The parties may freely negotiate the terms of the contract, which takes effect when the SCCI issues a licence.<sup>66</sup> Each partner can assign its interest in the contract after granting the other contracting parties an opportunity to acquire the interest. The other contracting parties and the SCCI must approve any assignment to a third party.<sup>67</sup> The assignment must contain conditions no more favourable than those offered to the other contracting parties.<sup>68</sup> Profits and losses are split among the parties to the contract in accordance with the agreement.<sup>69</sup> The parties must apply for extension of the contract at least six months prior to its expiration; the SCCI has discretion to approve or disapprove the extension, and it decides within 15 days of the application for extension.<sup>70</sup> The contract may terminate prior to its expiration if specified termination provisions occur or if the SCCI finds that 'the business activities of the parties breach the law or do not conform with the objectives and

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61 'Overview of Foreign Investment from 1987 to 1993', VNA Hanoi, 4 May 1994, LEXIS, News Library, BBCSWB File (hereinafter 'overview').

62 See generally Iain Simpson, 'Chinese Bring Business to New Vietnam: Would-Be Refugees are Now Exporters', *Financial Times*, 15 March 1994, at 9.

63 Regulations, *supra* note 36, at Article 8.

64 *Id* at Article 8.

65 *Id* at Article 17. Each partner sustains full liability for payment of taxes to the government. *Id*

66 *Id* at Article 12.

67 *Id* at Article 13.

68 *Id* at Article 13.

69 *Id* at Article 10.

70 *Id* at Article 14.

provisions stated in the business licence'; in these circumstances, however, the agreed dispute settlement mechanism remains in force.<sup>71</sup> The parties must submit a report on the results of the performance of the contract to the SCCI.<sup>72</sup> Liquidation follows the procedure specified in the contract and must occur within six months of the expiration of the contract (or one year if necessary).<sup>73</sup> Liquidation expenses receive top priority, followed in order by labor expenses, taxes, loans, and other liabilities.<sup>74</sup>

### *Joint ventures*

Joint ventures represent the most popular form of foreign investment in Vietnam currently, constituting almost 90% of approved foreign investments.<sup>75</sup> Foreign investors gravitate toward this form of investment because of the need for access to the political, cultural, and business insights of a Vietnamese party.<sup>76</sup> A joint venture arises from a contract between a Vietnamese party or parties and a foreign party or parties (or, in special cases, from a treaty between governments) 'for the purpose of carrying out business activities in Vietnam'.<sup>77</sup> The regulations stipulate that the 'joint venture shall be established as a limited liability company and shall have the status of a Vietnamese legal person'.<sup>78</sup> The joint venture's status as a legal entity distinguishes it from the business co-operation contract, where no separate legal entity comes into being.

The law on companies, enacted after the law on foreign investment, sets out general characteristics for limited liability companies. Under Article 25 of the Law on Companies:

'A limited liability company is a company in which: (1) Capital is contributed in full by all members when the company is established. All such contributed capital is expressly stated in the company's charter. The company may not issue securities of any kind. (2) Transfers of part of contributed capital among the members may take place without restriction. Transfers of part of contributed capital to persons who are not members shall require unanimous approval from members who represent at least three quarters of the charter capital of the company.'<sup>79</sup>

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71 *Id* at Article 15.

72 *Id* at Article 16.

73 *Id* at Article 18.

74 *Id.*

75 'Joint Venture Merits in Doubt as SCCI Reviews Policies', Saigon News Reader, 10 November 1993, at 2. The article expressed concern, though, about the extensive use of the joint venture for projects such as hotels and golf courses as opposed to infrastructural projects.

76 See generally Vecchi, *supra* note 51, at 9.

77 Regulations, *supra* note 36, at Article 19.

78 *Id.*

79 Law on Companies, note 39, at Article 25. The transfer provision apparently attempts to follow the 'double majority' requirement for assignment typical of limited liability company statutes in civil law countries.

The law on foreign investment, on the other hand, allows for capital contributions either in full or 'by installments over a reasonable period agreed by the parties'.<sup>80</sup> It presumably also bars any transfer of capital between the parties to the extent that the foreign party would end up with less than 30% of the contributed capital.<sup>81</sup> In addition, transfers to third parties require unanimous approval of the other parties and the approval of the SCCI.<sup>82</sup> Limited liability companies under the law on foreign investment, then, take on distinct characteristics from domestic limited liability companies under the law on companies.

The joint venture becomes a legal entity when the SCCI grants a licence and the local authorities register the charter of the joint venture.<sup>83</sup> Foreign partners must contribute at least 30% of the prescribed capital in a joint venture,<sup>84</sup> but the regulations permit a lower amount in 'special cases' if the SCCI approves.<sup>85</sup> If the joint venture involves more than one foreign party, the 30% minimum applies to all foreign parties and the SCCI determines how much each party must contribute.<sup>86</sup> The law places no maximum limit on the contribution of a foreign party,<sup>87</sup> so the foreign party conceivably could contribute virtually all of the capital, thus making the Vietnamese partner purely nominal.

The foreign party may make its capital contribution in foreign currency, buildings, equipment, and patents and other technological processes.<sup>88</sup> The Vietnamese partner may make its capital contribution in Vietnamese currency, foreign currency, natural resources, buildings, building materials, land or water rights, equipment, and various intangible assets.<sup>89</sup> In practice, the Vietnamese usually contributes land to the joint venture as its capital contribution. If the Vietnamese party contributes assets other than land, except for residential houses the joint venture will have to rent land or any buildings affixed to the land.<sup>90</sup> The SCCI applies a fixed rate for land rental, although it

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80 Regulations, *supra* note 36, at Article 28. The government, though, has reported that it revoked 129 of the 888 licences it had granted because of untimely capital contributions. Harish Mehta, 'Hanoi Cracks Down on Investment Licence Speculation', *Business Times*, 19 March 1994, at 3.

81 The foreign party to a joint venture must contribute 30% of the joint venture's capital. Law, *supra* note 28, at Article 8.

82 Regulations, *supra* note 36, at Article 30.

83 *Id* at Article 19. The details that the charter must contain vary little from the details that the contract must contain. See *id* at Articles 21-22.

84 Law, note 28, at Article 8. 'Prescribed capital' includes the initial capital as stated in the charter, excluding capital from loans. Regulations, note 36, at Article 2.

85 Regulations, *supra* note 36, at Article 27.

86 1990 Amendments, *supra* note 34, at Article 1(5).

87 Law, *supra* note 28, at Article 8.

88 *Id* at Article 7.

89 1992 Amendments, *supra* note 35, at Article 1(2).

90 Frederick Burke & David Howell, 'Vietnam: A Legal Brief' 207 (1993).

determines which rate applies and may grant an enterprise a lower rental rate in special circumstances.<sup>91</sup>

The regulations subject transfer of technology to the requirements of the technology transfer ordinance.<sup>92</sup> According to that ordinance:

'The transfer of technology into Vietnam shall be subject to the following requirements: (1) It shall enhance technological standards and production efficiency and improve the quality of products or be capable of developing new products. (2) It must not be detrimental to the safety of production. (3) It shall make rational use of energy, natural resources, and manpower. (4) It shall not adversely affect the environment.'<sup>93</sup>

The amended Law also states, 'In respect of important economic establishments determined by the Government, the parties shall agree gradually to increase the proportion of the Vietnamese party's contribution to the prescribed capital of the joint venture enterprise.'<sup>94</sup> The regulations further specify that the joint venture partners may 'agree upon the timing of and the rate at which the Vietnamese party shall increase the proportion of its capital contribution to the prescribed capital of the joint venture enterprise.'<sup>95</sup>

The crucial question surrounding capital contribution regards its valuation. The regulations state:

'The value of the capital contribution of each party shall be agreed by the parties, based on international market prices at the time the contribution is made.'<sup>96</sup>

This language, however, may prove misleading. In fact, the parties most likely will value capital contributions at the time they commit to the contribution, rather than at the time of the contribution itself.<sup>97</sup> Furthermore, the contribution of the Vietnamese party frequently will defy negotiation. The Vietnamese party often contributes land to the joint venture, and before it does, both the central government and the local people's committee must approve the use of the land as the capital contribution and value the land in question.<sup>98</sup>

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91 *Id.* See also Regulations on the Lease of Land, Water, and Sea Surfaces for Foreign Investment in Vietnam, Article 3 (1990), reprinted in Foreign Investment Law of Vietnam, *supra* note 35; Circular Guiding the Implementation of Regulations on Rent of Land, Water, and Sea Surface of Foreign Investment Projects (1993).

92 Regulations, *supra* note 36, at Article 60.

93 Ordinance on the Transfer of Foreign Technology into Vietnam, Article 4 (1988), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 35. See also Decree on the Transfer of Foreign Technology into Vietnam (1991), reprinted in Foreign Investment Laws of Vietnam, *supra* note 35.

94 1992 Amendments, *supra* note 35, at Article 1(3).

95 Regulations, *supra* note 36, at Article 27. See also, *id.* Article 47 (for 100% foreign owned enterprises, if the SCCI finds the project of 'economic importance', the investors must 'consent to a Vietnamese enterprise, on the basis of agreement, purchasing a share of the capital of the enterprise so as to have the result of converting it into a joint venture enterprise').

96 *Id.* at Article 26.

97 Cohen, *supra* note 20, at 19.

98 See Circular Guiding the Implementation of Regulations on Rent of Land, Water and Sea Surface of Foreign Investment Projects (1993).

In addition, the SCCI will review the agreement between the parties and may force the parties 'to reassess the attributed values of the prescribed capital.'<sup>99</sup> This aims at the common problem of foreign investors using outdated equipment as a capital contribution.<sup>100</sup>

The parties in a joint venture must select a Board of Management to manage the joint venture, which serves for no longer than five years.<sup>101</sup> Each party appoints members in proportion to its contribution to the declared capital, provided that each party has at least two members appointed to the Board.<sup>102</sup> If the joint venture has more than two parties, each party must have at least one member.<sup>103</sup> If the venture has only one Vietnamese party and more than one foreign party, however, the Vietnamese party must have at least two Board members.<sup>104</sup> Similar rules apply if the venture has only one foreign party and more than one Vietnamese party,<sup>105</sup> or if a pre-existing joint venture adds a new foreign party or parties.<sup>106</sup> The parties must unanimously approve a Chairman of the Board.<sup>107</sup>

The Board convenes at least once a year, or whenever the Chairman or two-thirds of the Board requests a meeting.<sup>108</sup> Two-thirds of the Board members must attend each Board meeting, but members may delegate attendance and voting power to representatives.<sup>109</sup> These quorum provisions raise two issues. First, if one party has more than two-thirds of the Board members it theoretically could hold meetings without the participation of the other party. Second, the regulations do not indicate whether non-Board members can serve as proxies or whether one person can proxy for several members. Board actions generally require two-thirds approval; the Board must unanimously approve long-term production and business plans, the budget, decisions to borrow, amendments of the charter, and appointment or dismissal of the Chairman of the Board, the general director, the first deputy general director, or the chief accountant.<sup>110</sup> In the event that Board members cannot reach a decision and 'the operation of the enterprise is adversely affected', the Board may dissolve the joint venture, ask the SCCI to settle the dispute, or appoint a 'conciliatory council' with an SCCI representative as chairman; the SCCI or conciliatory council decision would bind all parties.<sup>111</sup>

99 Regulations, *supra* note 36, at Article 26.

100 Ta Thi Xuan, 'Not-so-Healthy Side-Effects Caused by Technology Imports', Saigon Times, 16-22 September 1993, at 10. The article estimates that Vietnam has lost up to \$50 million as a result of overpricing, and also comments on the ecological impact of the older equipment.

101 Regulations, *supra* note 36, at Article 31.

102 Law, *supra* note 28, at Article 12; 1990 Amendments, *supra* note 34, at Article 1(6).

103 *Id.*

104 *Id.*

105 *Id.*

106 Regulations, *supra* note 36, at Article 31.

107 Law, *supra* note 28, at Article 12.

108 Regulations, *supra* note 36, at Article 32.

109 *Id.*

110 *Id.* at Article 23.

111 *Id.*

The Board chooses a general director and deputy general director to run the daily operations of the joint venture.<sup>112</sup> Either the general director or the first deputy general director 'shall be a Vietnamese citizen residing in Vietnam and working for the Vietnamese joint venture party.'<sup>113</sup> The general director's orders take precedence over the first deputy general director, but the first deputy general director's opinion 'shall be preserved and submitted to the board of management, and decided upon at the next meeting', and the first deputy general director may propose a special board meeting.<sup>114</sup> The general director and first deputy general director remain liable to the Board for their actions, but the regulations do not say whether they also incur liability to third parties.<sup>115</sup>

Members of the company receive the right to ownership of an undivided part of the company's assets in proportion to capital contribution and the right to earn profits and bear losses in proportion to capital contribution.<sup>116</sup> As a limited liability company, each party's liability remains limited to its capital contribution.<sup>117</sup>

The joint venture must maintain accounting records that conform with 'conventional international principles and standards' and remain subject to SCCI review.<sup>118</sup> The joint venture must submit annually to the SCCI a balance sheet of the capital of the joint venture, a profit and loss account of expenditures and receipts, and a report by the Board of the activities and results of the joint venture.<sup>119</sup>

Likewise, the SCCI retains control over the transfer of interests to third parties. Parties can assign joint venture interests after providing the other parties with an opportunity to acquire the interest, but the conditions of any assignment to a third party must not contain more favourable terms than the terms offered to the other parties.<sup>120</sup> The Board and the SCCI must unanimously approve any assignment.<sup>121</sup> The SCCI also must approve any amendment to the contract or charter that the parties agree to.<sup>122</sup>

A joint venture may dissolve prior to its expiration date if a force majeure clause applies, a party fails to discharge its obligation and makes continuation of operations impossible, losses prevent continuation of operations, or other

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112 *Id* at Article 34.

113 *Id.*

114 *Id.*

115 *Id.*

116 Law, *supra* note 28, at Article 10.

117 *Id.*

118 *Id* at Article 18.

119 Burke & Howell, *supra* note 90, at 185-86.

120 Regulations, *supra* note 36, at Article 30.

121 *Id.*

122 *Id* at Article 25.



causes set out in the contract occur.<sup>123</sup> In all cases, the Board and the SCCI must approve the dissolution.<sup>124</sup> If dissolution results from default of one of the parties, that party must indemnify the losses of the other parties.<sup>125</sup> The SCCI may also dissolve the joint venture prior to its expiration if it determines that the joint venture's activities 'breach the law or deviate from the objectives and responsibilities stated in its charter and investment licence'.<sup>126</sup>

When the parties decide to dissolve or six months prior to expiration of the licence, the Board must appoint a liquidation commission.<sup>127</sup> This commission must liquidate the joint venture within six months, or one year if necessary.<sup>128</sup> Liquidation expenses receive top priority, followed by labour expenses, taxes, loans, and other liabilities.<sup>129</sup> The SCCI may form a separate liquidation commission if the parties do not do so.<sup>130</sup> It may also liquidate the venture if a dispute arises over the liquidation of the joint venture.<sup>131</sup>

### *Enterprises with 100% foreign-owned capital*

Under this form, a foreign party owns all of the enterprise's capital.<sup>132</sup> This form has proven less popular than the other forms of foreign investment, in part because the foreign party prefers to have a local partner and in part because the SCCI has not viewed this form favourably. By the end of 1991, the SCCI had licenced only 11 enterprises with 100% foreign-owned capital.<sup>133</sup> Investors in Export Processing Zones, however, have increasingly turned to this form.<sup>134</sup>

Enterprises with 100% foreign-owned capital must take the form of limited liability companies.<sup>135</sup> Most of the requirements resemble those for joint ventures. The enterprise's prescribed capital must constitute at least 30% of its invested capital.<sup>136</sup> The enterprise must also appoint a representative residing in Vietnam, who must register with the SCCI.<sup>137</sup>

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123 *Id* at Article 37.

124 *Id* at Article 38.

125 *Id* at Article 37.

126 *Id* at Article 38.

127 *Id* at Article 39.

128 *Id*.

129 *Id*.

130 *Id* at Article 40.

131 *Id* at Article 42.

132 Law, *supra* note 28, at Article 2(11).

133 Burke & Howell, *supra* note 90, at 186.

134 *Id*.

135 Regulations, *supra* note 36, at Article 44.

136 *Id* at Article 47.

137 *Id* at Article 51.

### *Export processing zones*

The law on foreign investment allows foreign organisations and individuals to invest in Export Processing Zones using any of the previous forms of organisation.<sup>138</sup> A separate set of regulations governs the operation of Export Processing Zones. They authorise '[p]roduction, processing, and assembly of export products' and '[p]roviding services in relation to the above activities and to export'.<sup>139</sup> The SCCI delegates authority over the zones, including the granting of licences, to a 'management committee',<sup>140</sup> appointed by the Chairman of the Council of Ministers and the chairman of the local people's committee.<sup>141</sup> Enterprises must give priority to Vietnamese employees, but may freely advertise for employees without first using the Labour Office.<sup>142</sup> They may pay any wages agreed to by the employer and employee.<sup>143</sup>

Export processing enterprises receive substantial financial incentives. Enterprises involved with production receive a four-year exemption from payment of profits tax and pay 10% afterward.<sup>144</sup> Enterprises involved with services receive a two-year exemption and pay 15% afterward.<sup>145</sup> All enterprises pay a 5% tax on the repatriation of profits.<sup>146</sup> They also do not have to pay export or import duties on goods imported from or exported to a foreign country or another Export Processing Zone.<sup>147</sup>

To date, only one Export Processing Zone has come into operation, although others remain under construction.<sup>148</sup> Construction difficulties and the lack of a sufficient legal framework have inhibited further development of the zones.<sup>149</sup> Use of Export Processing Zones may represent a temporary development until Vietnam liberalises its general trade policies.<sup>150</sup>

### *Build-operate-transfer contracts*

Under this form, a foreign organisation or individual, using its own capital or capital of a Vietnamese party, contracts to build an infrastructural project, and then transfers the project to the government for no compensation after

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138 1992 Amendments, *supra* note 35, at Article 1(7).

139 Regulations on Special Export Processing Zones in Vietnam, Article 4 (1991), reprinted in 'Foreign Investment Laws of Vietnam', note 35.

140 Regulations, note 36, at Article 57.

141 *Id* at Article 58.

142 *Id* at Article 31. See Part III.E for the general rules pertaining to the labour of foreign enterprises.

143 *Id* at Article 32.

144 *Id* at Article 51.

145 *Id*.

146 *Id* at Article 54.

147 *Id* at Articles 40, 52.

148 Nguyen Van Phu, 'New Export Zone Prompts Warning', Vietnam Investment Rev, 14 March 1994, at 1.

149 *Id*.

150 'Vietnam's Transition to a Market Economy', (pt 3), East Asian Executive Rep, 15 February 1994, at 8 (World Bank report analysing Vietnam's Export Processing Zones in light of the experience of other countries).

recovering invested capital and making 'a reasonable profit' on the transaction.<sup>151</sup> Currently, 17 projects of this sort exist, with total investment capital of \$926 million.<sup>152</sup>

The government has specified many incentives it intends to apply to this form of enterprise. These include exemption from land rent, profit and repatriation taxes at the highest priority rates, turnover taxes either exempted or at the highest priority rate, and import tax exemption for goods imported for the project.<sup>153</sup>

### *Representative offices*

Foreign parties wishing to establish a presence in Vietnam but who do not have business to directly engage in may establish a representative office in Vietnam for 'formulation of co-operation with Vietnamese parties' or 'formulation on a long-term basis of commercial contracts'.<sup>154</sup> Foreign lawyers working in Vietnam use representative offices as well.<sup>155</sup> The office cannot provide foreign currency services or export or import goods.<sup>156</sup> Parties submit applications to the Ministry of Commerce.<sup>157</sup> The Ministry of Commerce will grant a licence to potential investors only if they 'intend in good faith to proceed with the negotiation or implementation of any investment project' and prescribed capital exceeds \$2 million.<sup>158</sup> For investment projects, the licence for the representative office cannot last for longer than one year.<sup>159</sup> The foreign party must also register the representative office with the local people's committee.<sup>160</sup> The foreign party must pay a \$5,000 registration fee, plus \$2,000 for any branch offices and \$3,000 if the party wishes to renew the licence.<sup>161</sup>

### **Approval procedure**

Potential foreign enterprises must submit various documents to the SCCI for consideration before the SCCI will grant the enterprise a licence. Parties to a

<sup>151</sup> 1992 Amendments, *supra* note 34, at Article 1(1) (defining the concept); Regulations, *supra* note 35, at Article 55.

<sup>152</sup> 'Government of Vietnam Facilities Implementation of BOT Projects by Investors', Vietnam Investment Rev, 7 March 1994 (hereinafter 'BOT projects').

<sup>153</sup> *Id.*

<sup>154</sup> Regulations on Representative Offices of Foreign Economic Organisations, Article 2 (1990), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 35 (hereinafter 'Regulations on Representative Offices').

<sup>155</sup> See generally Harish Mehta, 'Foreign Lawyers Cope with Uncertainties in Vietnam', *Business Times*, 19 May 1994, at 13.

<sup>156</sup> Regulations on Representative Offices, *supra* note 154, at Article 2.

<sup>157</sup> *Id.* at Article 4.

<sup>158</sup> Circular on Representative Offices, § 2 (1991), reprinted in 'Foreign Investment Laws of Vietnam', note 35.

<sup>159</sup> *Id.*

<sup>160</sup> Regulations on Representative Offices, note 154, at Article 8.

<sup>161</sup> Burke & Howell, note 90, at 189.

business co-operation contract must submit the proposed contract, information relating to legal status and financial capacity, and the 'economic-technical statement of the contract'.<sup>162</sup> An application for a joint venture must include the proposed contract, the charter, information relating to legal status and financial capacity, and a feasibility study.<sup>163</sup> An application for an enterprise with 100% foreign invested capital must include the charter, information relating to legal status and financial capacity, and a feasibility study.<sup>164</sup> Parties must also submit an application fee of 0.01% of the invested capital of the enterprise (but no less than \$50 and no more than \$10,000).<sup>165</sup> If the parties do not know the amount of invested or contributed capital, they must pay \$10,000 until the SCCI determines the proper amount.<sup>166</sup>

The application will receive review by the local people's committee if the people's committee serves as the Vietnamese partner or the supervisory agency. If an agency of the central government serves as the supervisory authority, the central government evaluates the application.<sup>167</sup>

The extent of review of an application depends on the scope and type of the project. The most important projects, 'Group A projects', require approval by the Chairman of the Council of Ministers after review by the National Council for Project Evaluation, chaired by the chairman of the State Planning Committee and made up of various government ministers.<sup>168</sup> Group A projects include: projects over \$20 million in 'exploitation or processing of precious or rare mineral resources; telecommunications, broadcasting, television, and publishing; marine, aviation, and railway transport and, construction of sea ports, airports, railways, and national highways; production of pharmaceutical products, poisons, and explosives; real estate business, finance, and banking; projects related to defence and security; and export and import business and international tourism'; projects over \$40 million in 'heavy industry'; projects over \$30 million in other areas; and projects 'which require a large area of land and will significantly affect environment'.<sup>169</sup> 'Group B projects' require approval by the Chairman of the

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162 Regulations, note 36, at Article 9.

163 *Id* at Article 20.

164 *Id* at Article 46.

165 Circular on the Collection of Application Fees Paid in Respect of Foreign Owned Capital, § II (1989), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 34 (hereinafter 'Circular on Application Fees'). Invested capital includes all of the capital employed in the enterprise, including prescribed capital and loan capital. Regulations, *supra* note 36, at Article 2.

166 Circular on Application Fees, *supra* note 165, § II.

167 Sesto E Vecchi, 'Foreign Investment in Vietnam: Application Procedures', East Asian Executive Rep, 15 September 1992, at 18.

168 Regulations on Evaluation of Projects With Foreign Owned Capital, Article 6 (1991), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 35.

169 *Id* at Article 4.

Council of Ministers after review by the SCCI and the Chairman of the National Council for Project Evaluation, and include projects in the specified industries of any value, projects over \$30 million in heavy industry, and other projects over \$20 million.<sup>170</sup> All other projects become 'Group C projects' and receive review by the SCCI;<sup>171</sup> the SCCI obtains recommendations from various government agencies regarding the application.<sup>172</sup>

The Chairman of the Council of Ministers must reach a decision within 115 days of submission of the application for Group A projects and within 105 days for Group B projects.<sup>173</sup> No time limit exists for Group C projects, but decisions usually occur more quickly.<sup>174</sup>

The government approves build-operate-transfer projects through open bidding, selective bidding, or direct negotiation with foreign investors.<sup>175</sup>

## Labour

Foreign investors must conform their operations to Vietnamese labour law and regulations.<sup>176</sup> The labour law only allows a foreign venture to directly recruit employees after the venture attempts to obtain employees through the Labour Office or the service company appointed by the Labour Office.<sup>177</sup> This dismays foreign investors, because the service companies routinely charge several times the monthly wage the Vietnamese worker actually will receive.<sup>178</sup> The law also requires foreign enterprises to employ Vietnamese citizens unless only foreign workers possess the requisite skills, in which case the foreign enterprise must train Vietnamese workers to replace the foreign employees as soon as possible.<sup>179</sup>

The law establishes a minimum wage of \$35 per month for workers in Hanoi and Ho Chi Minh City and \$30 per month for workers elsewhere, a rate higher than that for Indonesia and Bangladesh, two of Vietnam's competitors

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<sup>170</sup> *Id* at Article 4.

<sup>171</sup> *Id*.

<sup>172</sup> Vecchi, *supra* note 167, at 18.

<sup>173</sup> *Id*.

<sup>174</sup> *Id*.

<sup>175</sup> 'BOT Projects', *supra* note 152.

<sup>176</sup> Regulations, *supra* note 36, at Article 65.

<sup>177</sup> Regulations on Labour for Enterprises with Foreign Owned Capital, Article 3 (1990), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 35 (hereinafter 'Labour Regulations'). But see *supra* text accompanying note 142 (enterprises in Export Processing Zones may recruit freely).

<sup>178</sup> Burke & Howell, *supra* note 90, at 209-10.

<sup>179</sup> Labour Regulations, *supra* note 177, at Article 5.

for foreign investment.<sup>180</sup> This wage does not apply in Export Processing Zones.<sup>181</sup> The worker must pay 10% of this wage to the general social welfare fund for unemployment and retirement. The company must pay an additional amount equivalent to 2% of the wage to the general social welfare fund. It must also pay 8% of the wage to a company-specific social welfare fund to cover employees' sick leave, maternity leave, and medical expenses.<sup>182</sup>

The foreign enterprise must negotiate a collective labour agreement with the workers' representative or trade union every one to three years.<sup>183</sup> A labour code under consideration would require any joint venture or enterprise with 100% foreign-owned capital with 11 or more workers to set up a trade union.<sup>184</sup> The proposed code also would authorise strikes by workers in foreign enterprises;<sup>185</sup> strikes have occurred with increasing frequency recently,<sup>186</sup> as workers have become disgruntled with companies allegedly paying wages below the official minimum and requiring longer hours.<sup>187</sup> The growing unrest of the labour market, however, has begun to concern potential investors,<sup>188</sup> so, to reassure investors, the proposed code would keep the minimum wage at \$35 per month rather than raise it to \$50 as trade unions had hoped.<sup>189</sup>

### Taxation of foreign investors

The tax structure for foreign investors in Vietnam comes from the foreign investment law and various other statutes. The taxes apply both to foreign investors and overseas Vietnamese investing in Vietnam, although overseas Vietnamese apparently have eligibility for a profit tax reduction, a lower remittance tax, and more extensive tax exemptions.<sup>190</sup>

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180 Burke & Howell, *supra* note 90, at 211.

181 *Id.*

182 Labour Regulations, *supra* note 177, at Article 46.

183 *Id.* at Article 26.

184 Dana Sachs, 'Vietnam: Labour Laws', *Vietnam Investment Rev*, 22 November 1993.

185 Robert Templer, "'Right-to-Strike' Law to Dominate Vietnam Parliament Session' Agence France Presse, 25 May 1994, available in LEXIS, News Library, Cumws File. If the strike involves a Vietnamese state enterprise, however, workers could only strike if doing so would not affect the general interest of society, 'Right to Strike in New Vietnam Labour code', Reuters, 24 May 1994, LEXIS, News Library, Cumws File.

186 Eleven strikes occurred in Ho Chi Minh City alone in the first two months of 1994, compared to 17 strikes in the entire country in 1993. John Rogers, 'Labour Investment Top Vietnam Assembly Agenda', *Reuter Asia-Pacific Business Report*, 25 May 1994, LEXIS, News Library, Cumws File.

187 Sachs, *supra* note 184.

188 Richard Wunderman, 'Vietnam: What does 1994 Hold for Vietnam's Economy?' *Vietnam Investment Rev*, 7 February 1994.

189 Rogers, *supra* note 186.

190 Michael J Scown, 'Taxation in Vietnam' *East Asian Executive Rep*, 15 June 1993, at 8 (hereinafter 'Taxation'); Michael J Scown, 'Corporate Tax Changes', *East Asian Executive Rep*, 15 October 1993, at 8. See notes 59-60 and accompanying text for a discussion of incentives for overseas Vietnamese.

The regulations establish a basic 'profits tax at the rate of 25% of the profits earned, except in cases which are within the incentive category....'<sup>191</sup> The regulations set up several incentive categories. Projects at the 25% rate may receive a one-year exemption from taxation in the first year after it makes profits and a 50% exemption in the two subsequent years.<sup>192</sup> A project may receive a 20% rate, a full exemption for two years after making profits, and a 50% exemption for the three subsequent years if it has two of the following characteristics: 500 or more workers; use of advanced technology; export of 80% of its products; or legal or contributed capital over \$10 million.<sup>193</sup> Projects of infrastructural construction, projects exploiting natural resources, heavy industry, 'cultivation of perennial industrial crops,' projects in disfavored geographical regions, and projects transferring property without compensation to Vietnam upon completion may receive a 15% rate, a full exemption for two years after it makes profits, and a 50% exemption for the four subsequent years.<sup>194</sup> Finally, projects developing infrastructure in disfavored regions, projects of 'reafforestation', or projects of 'special significance' may receive a 10% rate, a full exemption for four years after it makes profits, and a 50% exemption for the four subsequent years.<sup>195</sup> The exemption periods of longer than two years in the 1993 regulations contradict the 1987 Law, which only authorizes two years of full exemptions and two years of a 50% exemption beyond that.<sup>196</sup> The Ministry of Finance has proposed legislation to correct this inconsistency.<sup>197</sup>

For purposes of calculating profits for taxation of enterprises with foreign-owned capital, revenue includes revenue from sales of products, provision of services, and other revenue.<sup>198</sup> Expenditures subtracted to determine taxable profits include cost of raw materials, wages, depreciation, patent costs and related fees, management expenses, taxes paid, interest on loans, marketing and service expenses, social insurance fund payments, insurance costs, losses brought forward from previous years, and other expenditures not exceeding 5% of total expenditures.<sup>199</sup> The taxation office reviews all claims in this respect.<sup>200</sup> For business co-operation contracts, the SCCI determines the method for calculating profits.<sup>201</sup>

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191 Regulations, *supra* note 36, at Article 66. 'In relation to the exploitation of oil and gas and a number of other rare and precious natural resources the profits tax rate applicable shall be determined on a case by case basis ... but shall be no less than 25% of the profits earned.' In other words, taxes for these investments will exceed those for other projects.

192 *Id* at Article 69(1).

193 *Id* at Articles 67(1), 69(2).

194 *Id* at Articles 67(2), 69(3).

195 *Id* at Articles 67(3), 69(4). Hotel, banking, finance, insurance, accounting, and auditing and commercial services projects do not qualify for these incentives. *Id* at Articles 68, 69(5).

196 Law, *supra* note 28, at Article 27.

197 'Vietnam: Finance Ministry Proposes Tax Cuts', Vietnam Investment Rev, 4 April 1994.

198 Regulations, *supra* note 36, at Article 74.

199 *Id*.

200 *Id*.

201 *Id* at Article 75. The Ministry of Finance establishes this method in its Circular on Taxation of Foreign Investment in Vietnam (1993), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 34.

Foreign investors may obtain various other financial incentives. The law allows enterprises to carry over losses for up to five years.<sup>202</sup> Projects may also receive a refund of taxes paid on profits reinvested into capital.<sup>203</sup> An enterprise may depreciate assets using any acceptable accounting method.<sup>204</sup> An export processing enterprise will not have to pay export duties, which range from 0% to 35% for products receiving the 'minimum' rate (products when a treaty applies) and from 0% to 45% for products receiving the 'regular' rate,<sup>205</sup> on goods exported from the Export Processing Zone.<sup>206</sup> If an export processing enterprise imports goods into the Export Processing Zone, it will not have to pay import duties,<sup>207</sup> which range from 0% to 80% for minimum rate goods and from 0% to 100% for regular rate goods.<sup>208</sup> Other enterprises gain eligibility for exemption from import duties if the products relate to capital construction, production of export goods, or legal capital in the form of intellectual property.<sup>209</sup>

The law permits foreign investors to repatriate:

1. profit shares;
2. 'any payments due as a result of provision of technology or services';
3. principal and interest of loans;
4. invested capital; and
5. '[o]ther sums of money and assets lawfully owned by them'.<sup>210</sup>

Organisations or individuals who repatriate profits become subject to a withholding tax; if capital contributions exceed 50% of legal capital or invested capital exceeds \$10 million, the investor must pay 5% of repatriated money; if invested capital exceeds \$5 million, the rate climbs to 7%, and other investors must pay 10%.<sup>211</sup> The repatriation tax only applies to profits; individuals receiving income must pay income taxes.<sup>212</sup>

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202 Law, *supra* note 28, at Article 27.

203 Regulations, *supra* note 36, at Article 72.

204 See Scown, 'Taxation', *supra* note 190, at 8.

205 *Id.*

206 1992 Amendments, *supra* note 35, at Article 1(10).

207 *Id.*

208 See Scown, 'Taxation', *supra* note 190, at 8.

209 Regulations, *supra* note 36, at Article 76.

210 Law, *supra* note 28, at Article 22.

211 Regulations, *supra* note 36, at Article 70. Overseas Vietnamese now must pay only 5% regardless of capital contribution, See *supra* note 59.

212 Law, *supra* note 28, at Article 23; Regulations, *supra* note 36, at Article 78. Income includes 'irregular income', such as income derived from the transfer of technology and service-generated income over a specified threshold; this type of income receives a lower rate. Scown, 'Taxation', *supra* note 190, at 8.



Companies also must pay a 'turnover tax', or a sales tax on enterprises with foreign-owned capital that sell certain products or services in Vietnam. The tax is calculated by multiplying the gross revenue by a tax rate set by the item or service category (these rates vary widely).<sup>213</sup>

Foreign investors must also pay royalties for the use of natural resources, including minerals, food, and marine products.<sup>214</sup> Rates range from 1% to 40%.<sup>215</sup> Resources contributed by a Vietnamese party remain exempt from the royalty.<sup>216</sup>

## Duration

The parties to a business co-operation contract determine the duration of the contract, provided the SCCI approves.<sup>217</sup> The SCCI will likely require an appropriate durational limit before it will approve a project.<sup>218</sup>

Vietnam has expanded the potential duration of other foreign enterprises. Originally, an enterprise could not exist for longer than 20 years unless it received special approval.<sup>219</sup> The 1992 amendments extended the maximum period to 50 years, or 70 years in special cases approved by the government.<sup>220</sup> In practice, the duration of the enterprise will correspond to the duration of the lease of land used by the enterprise.

The SCCI will only grant a 50-year licence to large industrial or infrastructural projects; other projects will receive a licence of 20 to 40 years.<sup>221</sup> The regulations also empower the government to revoke licences of any foreign enterprise before expiration if the government finds a violation of the law or a deviation from the terms of the licence.<sup>222</sup> Indeed, the SCCI has revoked a large number of approved licences under these provisions.<sup>223</sup>

<sup>213</sup> Scown, 'Taxation', *supra* note 190, at 8.

<sup>214</sup> Ordinance on Royalties, Article 2 (1990), reprinted in 'Foreign Investment Laws of Vietnam', *supra* note 35.

<sup>215</sup> *Id* at Article 6.

<sup>216</sup> *Id* at Article 3.

<sup>217</sup> Regulations, *supra* note 36, at Article 8.

<sup>218</sup> Cohen, *supra* note 20, at 15.

<sup>219</sup> Law, *supra* note 28, at Article 15.

<sup>220</sup> 1992 Amendments, *supra* note 35, at Article 1(5).

<sup>221</sup> Nguyen Xuan Trinh, 'Vietnam: Factors Affecting the Duration of Foreign Enterprises', Vietnam Investment Rev, 17 January 1994.

<sup>222</sup> Regulations, *supra* note 36, at Article 15 (government can revoke licence of business cooperation contract if 'the business activities of the parties breach the law or do not conform with the objectives and provisions stated in the business licence'); *id* at Article 28 (government can revoke licence of joint venture if 'the joint venture parties fail, without reasonable cause, to comply with the timing for making contributions to the prescribed capital'); *id* at Article 38 (government can revoke licence of joint venture if its activities 'breach the law or deviate from the objectives and responsibilities stated in its charter and investment licence'); *id* at Article 52 (government can revoke licence of a 100% foreign owned enterprise if its activities 'breach the law or deviate from the objectives and responsibilities as stated in the charter of the enterprise and the investment licence').

<sup>223</sup> The government reported that it has revoked 129 of the 888 licences it had granted through March 7, 1994 because the investors had not implemented the projects within six months, as required. Mehta, *supra* note 80, at 3.

## Dispute settlement

The 1987 law encourages amicable settlement through negotiation of any dispute between the parties.<sup>224</sup> The unanimity requirement for joint venture decisions represents a potential cause of frequent conflict. A recent decree emphasises the alternatives set out elsewhere in the regulations as the means of resolving these disputes.<sup>225</sup> Some observers in the government-controlled press have suggested granting more enforcement powers to the SCCI in order to break deadlocks.<sup>226</sup>

If negotiation fails, the parties may refer their dispute to a Vietnamese economic arbitration body, an arbitration body of a third country, an international arbitration body, or a council established pursuant to agreement between the parties.<sup>227</sup> If the dispute involves a Vietnamese economic organisation, however, the law of Vietnam applies and the dispute must go before a Vietnamese body.<sup>228</sup> If the dispute involves 'State bodies' of Vietnam, the parties must refer the dispute 'to a competent State body.'<sup>229</sup>

Lacking a suitable role model, Vietnam has struggled to determine the role of law in its transition period to a market economy.<sup>230</sup> Vietnam has not yet become a party to the primary international arbitration treaties, so even if parties choose an international forum, they risk domestic non-enforcement of international arbitration decisions.<sup>231</sup> Domestically, parties filed 50 disputes in Ho Chi Minh City in 1992 for arbitration, but resolved them all before arbitration, at least partially because courts might not enforce arbitration decisions.<sup>232</sup>

## Other laws

Investors have regularly complained that the provisions of the law on foreign investment mean little absent a system of laws to guarantee the rights of foreign investors.<sup>233</sup> In a continuing attempt to satisfy these concerns, Vietnam has passed a flurry of legislation in recent years to supplement the law on foreign investment.

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<sup>224</sup> Law, *supra* note 28, at Article 25.

<sup>225</sup> See *supra* note 111 and accompanying text.

<sup>226</sup> Phap Luat, 22 February 1994, at 5.

<sup>227</sup> Regulations, *supra* note 36, at Article 100.

<sup>228</sup> *Id* at Article 101.

<sup>229</sup> *Id* at Article 102.

<sup>230</sup> Mark Sidel, 'Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training', 11 *Pac Basin LJ* 221, 225-26 (1993).

<sup>231</sup> Transition pt 1, *supra* note 15, at 9.

<sup>232</sup> Marcus W Brauchli, 'As US Firms Seek Access to Vietnam, Investors There Encounter Obstacles', *Wall St J*, 7 April 1993, at A10.

<sup>233</sup> Indeed, the foreign investment law itself stood on shaky ground until Vietnam amended its constitution to protect the rights of investors, note 33 and accompanying text.

The law on private enterprises<sup>234</sup> and the law on companies<sup>235</sup> authorise three forms of private business organisations – the ‘private enterprise’, with capital matching or exceeding legal capital and owned by an individual personally liable for its activities, the limited liability company, and the ‘shareholding company’, where shareholders make capital contributions in the form of equal shares. The state guarantees to these businesses the right to long-term existence, the ability to exercise business discretion under the law, the right to own the means of production, the ability to inherit capital and assets, and the other legal rights of the owners.<sup>236</sup> More specifically, the businesses have the right to select the areas and size of business, choose the form and method of raising capital, select customers and enter transactions with them, recruit and hire labour, use foreign currency, make decisions regarding the use of remaining revenue, and take initiatives in the business activities.<sup>237</sup>

The Ordinance on Economic Contracts<sup>238</sup> sets out many provisions governing business agreements, and explicitly covers economic contracts between Vietnamese legal entities and foreign organisations and individuals.<sup>239</sup> The ordinance gives a legal entity and an individual with business registration the right to enter into an economic contract.<sup>240</sup> The state has the duty to protect the legal rights and interests of the parties as stated in the contract.<sup>241</sup>

The law on petroleum<sup>242</sup> establishes a specific set of rules governing production sharing contracts and joint ventures involving oil and gas operations. Petroleum contracts cannot last for longer than 25 years, or 30 years in the case of deep sea exploration, with five-year extensions at the discretion of the government.<sup>243</sup> PetroVietnam, Vietnam’s national oil company, has the right to participate in a contract and has priority status regarding any assignment of interest.<sup>244</sup> The law also sets out an extensive tax regime.<sup>245</sup>

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234 Law on private enterprises, *supra* note 39.

235 Law on companies, *supra* note 39.

236 Law on private enterprises, note 39, at Articles 3-4; Law on companies, *supra* note 39, at Articles 4-5.

237 Law on private enterprises, note 39, at Article 22; Law on companies, *supra* note 39, at Article 12.

238 Ordinance on Economic Contracts (1989), *supra* note 35.

239 *Id* at Article 43.

240 *Id* at Article 2.

241 *Id* at Article 6.

242 Law on petroleum (1993).

243 See Vietnamese Law on Petroleum, Saigon Times, 12-18 August 1993, at 25.

244 *Id*.

245 See Vietnamese Law on Petroleum, Saigon Times, 19-25 August 1993, at 24.

The law on land, in keeping with the ideological orientation of the government, does not provide for private ownership of land.<sup>246</sup> Furthermore, aside from residential houses, the law does not affirm a right of ownership of other buildings attached to the property. This has concerned foreign investors, who have unsuccessfully sought to purchase buildings.<sup>247</sup> The land law, however, does give parties 'the right to exchange, transfer, rent, inherit, or mortgage the right to use land allocated by the state'.<sup>248</sup> The government must approve any transfer or assignment of land rights.<sup>249</sup>

Vietnam recently passed a bankruptcy law, which takes effect on 1 July 1994, delineating the rights of the bankrupt and of creditors.<sup>250</sup> The law permits both 'voluntary' and 'involuntary' requests for declarations of bankruptcy. If an enterprise becomes insolvent, the enterprise may file a petition on its own behalf for bankruptcy.<sup>251</sup> Secured or partially secured creditors may also file a request if they send a debt claim to an enterprise and do not receive payment within 30 days. Trade unions or employee representatives may request a bankruptcy declaration if an enterprise does not pay employee salaries for three months (other countries typically make the time period 60 days), provided that they have not accepted partial payments.<sup>252</sup>

The bankruptcy law emphasises reorganisation over bankruptcy by liquidation. When a judge decides to process the bankruptcy request, the enterprise must immediately present reconciliation and reorganisation plans. The reconciliation process includes a creditors' meeting, which must include two-thirds of the total unsecured debt of the enterprise. Half of the creditors must approve any decision reached at this meeting, so that the largest creditors cannot dominate the meeting.<sup>253</sup> Article 36 states that judges may grant bankruptcy if one of the following six criteria exist:

1. the owner did not have a valid reconciliation or reorganisation plan;
2. the owner or legal representative did not comply with the reconciliation or reorganisation plan;
3. the creditors' meeting did not approve the reconciliation or reorganisation plan;

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246 Law on land, Article 1 (1993), reprinted in 'Foreign Investment Laws of Vietnam', See Vietnamese Law on Petroleum, note 35.

247 Burke & Howell, *supra* note 90, at 206.

248 Law on land, *supra* note 246, at Article 3.

249 *Id.* at Article 76.

250 The new bankruptcy law covers both domestic and foreign enterprises. See Le Dang Doanh, 'Bankruptcy Law Shores Up Market Economy', Vietnam Investment Rev, 21 February 1994, at 14; Le Dang Doanh, 'Bankruptcy Law Needs a Further Six Months of Ground Work', Vietnam Investment Rev, 28 February 1994, at 12.

251 *Id.*

252 *Id.*

253 *Id.*

4. the enterprise remained inefficient after reorganisation and the creditors request bankruptcy;
5. reorganisation resulted in a serious breach of the creditors' meeting agreement and the creditors request bankruptcy; or
6. the owner died or fled during the resolution period and either the inheritor refused to comply or no inheritor existed.<sup>254</sup>

Article 39 lists the priorities for debt repayment from the enterprise's remaining assets:

1. bankruptcy fees and expenses;
2. labour liabilities;
3. tax liabilities; and
4. debts to listed creditors, proportionally.<sup>255</sup>

### **Appraisal of investment climate**

Foreign investment has become the single most important element of the Communist Party's new economic strategy. As mentioned earlier, the party now seeks to 'mobilise every means and use every form to attract foreign capital ...'.<sup>256</sup> In order to implement this approach, the government has taken a U-turn from isolation to total openness, and has gone to any lengths to please foreign investors.

The government's openness to foreign investment has contributed to the economy's success in recent years. Through the end of 1993, Vietnam had granted licences to 820 foreign enterprises with estimated capital of over \$7 billion.<sup>257</sup> The number has increased sharply each succeeding year, and should grow even more quickly with the lifting of the US embargo. The government estimated that through March 1994 joint ventures had produced goods and services worth \$780 million, created almost 50,000 jobs, and paid \$211 million to the government.<sup>258</sup> The increase in foreign investment also has helped Vietnam grow at a brisk pace in the last several years, while inflation has dropped significantly.<sup>259</sup> Vietnam's ability to have companies implement their investment plans, though, has not matched pace. Although Vietnam had approved almost \$5 billion in foreign direct investment through

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Tap Chi Cong San, *supra* note 26, at 9.

<sup>257</sup> See note 5.

<sup>258</sup> See *supra* note 61.

<sup>259</sup> 'Vietnam Plans Economic Development', BNA Int'l Bus & Fin Daily, 23 May 1994, LEXIS, News Library, Cumwv File (hereinafter 'Plans') (quoting statistics provided by Vice Prime Minister Tran Duc Luong).

1992,<sup>260</sup> only \$900 million of non-oil investment had received implementation, resulting in a 20% rate of total implementation to total approved investment.<sup>261</sup> Vietnam's foreign investment law requires implementation within six months of approval of the licence, but only 25 to 30% of approved projects receive implementation within one year of approval.<sup>262</sup> Vietnam's economic needs should result in a sustained effort to secure foreign investment. The government wants to increase Vietnam's per capita GNP, currently at approximately \$200, to \$500 by 2000,<sup>263</sup> and projects that it will need \$26 billion in additional foreign investment in order to achieve that goal.<sup>264</sup>

The general investment climate of the country will prove more crucial to success in attracting foreign investment than the incentives set out in the laws themselves.<sup>265</sup> A favourable investment climate requires more than a set of liberal laws. Many serious impediments still block the creation of a genuinely favourable investment climate in Vietnam. Frequently cited impediments include the lack of infrastructural and educational development, the inadequacy of the legal system, cumbersome investment procedures, and widespread corruption. The maintenance of a one-party political system dedicated to socialism, however, may represent the most significant obstacle to a fully vibrant market economy.

Vietnam's current structural weaknesses limit the potential for successful investment. The country encounters chronic power shortages and its water supply cannot meet the needs of many investors.<sup>266</sup> The country's infrastructure desperately needs rebuilding after several years of neglect; the problems will worsen with time and the rate of growth will slow as a result unless the country invests more in infrastructure.<sup>267</sup> Vietnam has made a concerted effort to improve the nation's infrastructure, and has obtained substantial loans for purposes of infrastructural improvement.<sup>268</sup> Development of an adequate infrastructure, however, will take years.

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260 By March 1994, this figure had increased to \$8.5 billion, from 895 licensed projects, Overview, *supra* note 61.

261 Transition, pt 1, note 15, at 9. Although many developing countries experience low percentages of implementation, Vietnam's rate still leaves much room for improvement. See Harish Mehta, 'Deal with Vietnam Without the "Dragon" Label', *Bus Times*, 28 April 1994, at 15. The implementation rate should improve as companies hesitant to commence operations in the face of the US embargo start up. See 'Pledges of Foreign Investment in Vietnam Up 29%', *Agence France Presse*, June 12, 1994, LEXIS, News Library, Curwv File.

262 Transition pt 1, *supra* note 15, at 9.

263 Kahn, *supra* note 24, at 1D.

264 See 'Plans', *supra* note 259. The government also seeks \$26 billion in domestic investment, a quite ambitious goal; note 26 and accompanying text for an official acknowledgement of the limits on attracting domestic investment.

265 Transition pt 1, *supra* note 15, at 9.

266 *Id.*

267 'Vietnam's Transition to a Market Economy' (pt 2), *East Asian Executive Rep*, 15 January 1994, at 8 (hereinafter 'Transition, pt 2').

268 The World Bank pledged \$1.86 billion in aid for 1994, with total disbursements expected to reach \$700 million. Shada Islam, 'Welcome Back', *Far Eastern Econ Rev*, 25 November 1993. Vietnam also has turned to build-operate-transfer projects for infrastructural development, See *supra* part III.C.5.

In addition to infrastructural difficulties, the educational system also faces decline, as Vietnam now charges for services provided for free before 'doi moi'. As a result, more children drop out and teachers move to better-paying jobs in the private sector.<sup>269</sup> A poor educational system threatens to exacerbate the nation's lack of management skills, already termed the country's greatest deficiency by some observers.<sup>270</sup>

Vietnam's legal system provides little support for its economic policies. This comes as no surprise given that Vietnam has created an entire legal system from scratch in a very short period of time.<sup>271</sup> The rapid additions and changes to foreign investment laws in order to attract investment, while laudable, have brought a great deal of uncertainty and confusion. Often the changes occur so quickly that local authorities and courts do not even know of them.<sup>272</sup> Instances of contracts requiring redrafting because of the changes in the law have occurred frequently. Investors could look to the guarantee against changes in the law adverse to the interest of the foreign investor,<sup>273</sup> but prudent investors cannot rely on this promise to secure their interests against the changes.<sup>274</sup>

Foreign investors face the added difficulty of receiving adequate protection of their rights in a judicial system lacking independent status.<sup>275</sup> Even when a foreign investor obtains a judgment in its favour, it has no assurance that the judgment will receive enforcement.<sup>276</sup>

Vietnam's legal community presently consists of northerners trained in the Soviet legal system and southerners trained in the French and American systems.<sup>277</sup> While a legal system born from such diversity could become an interesting hybrid over the long term, the system currently lacks the coherence necessary to support the needs of the present market economy.

The cumbersome investment procedures begin with the SCCI's role in approving and implementing investment projects. The requirement of a feasibility study even for small and medium-sized projects makes little sense,

269 'Vietnam: New Asian tiger Struggles to be Born', *Austl Fin Rev*, 2 June 1994, at 67 (hereinafter 'New Asian Tiger'). Warren Strobel, *Washington Times*, 9 May 1994, at A1 (health and education systems deemphasised); Browne, *supra* note 7, at sec 1, 1.

270 'New Asian Tiger', *supra* note 269, at 67.

271 Prior to 'doi moi', the only real law consisted of ordinances handed down by high-level government officials. Dana Sachs, 'Vietnam: Investment Series – The Centerpiece of an Open-Door Policy', *Vietnam Investment Rev*, 1 November, 1993. In its continuing effort to update its laws, Vietnam has asked the United Nations Development Program to fund a program for the reform of the legal system to further support the market economy. Robert L Brown, *Nat'l LJ*, 13 June 1994, at C1.

272 Brauchli, *supra* note 232, at A10.

273 Regulations, *supra* note 36, at Article 99.

274 'Vietnam: Be Alert to Government Policy Shifts – Businessman', *Business Times* (Malaysia), 23 March 1994, LEXIS, News Library, Cumws File.

275 Instances of foreign parties prevailing in Vietnamese courts remain the exception, although the situation has improved. See Harish Mehta, 'S'Pore Car Dealer Wins case Against Viet Partner', *Business Times*, 22 November 1993, at 3.

276 Mehta, *supra* note 155, at 13.

277 Sidel, *supra* note 230, at 227.

especially given that the SCCI lacks the resources to evaluate so many feasibility studies anyway.<sup>278</sup> The State authorises and supervises all activities of foreign enterprises except for their everyday operations.<sup>279</sup> The SCCI retains a large amount of discretion in this regard and has the ability to revoke an enterprise's licence or dissolve it.<sup>280</sup> This exercise of discretion, furthermore, occurs without any right of appeal or independent supervisory control.<sup>281</sup>

If the procedural faults concerned only the SCCI, foreign investors would at least have a discernible target for improvement. Vietnam, however, suffers from 'horizontal' and 'vertical' inefficiencies in its foreign investment procedures beyond the SCCI itself. Horizontally, many separate agencies claim a role in the process, which may result in contradictory decisions. One typical story involved a company granted a licence by the SCCI to operate a duty-free shop in the Hanoi airport, only to discover that the Commerce Ministry had issued a licence to another company. Even after the Prime Minister's office interceded on behalf of the company, the airport operator continued to block the company with the SCCI licence from entering the airport or securing an import permit.<sup>282</sup>

Vertically, local governments exercise control over projects approved by the central government. As the Vietnamese proverb puts it, sometimes 'the King's laws must yield to the village rules.' Local governments often have imposed conditions beyond those in the law in reviewing applications for foreign investment, such as clearing mines as a condition of approval.<sup>283</sup> This local involvement extends the approval process beyond the three-month time period stipulated in the foreign investment law.<sup>284</sup>

In view of the multiple agencies claiming jurisdiction over an investment project, investors end up paying 'unwritten fees' as well as 'written fees'. The minister in charge of foreign investment has cited the example of a foreign investor who had to pay a total of 120 'unwritten fees', three times the number of 'written fees'.<sup>285</sup> The minister commented that streamlining of investment procedures would not succeed because no agency would relinquish its jurisdiction due to the income generated from the system.<sup>286</sup>

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278 Transition, pt 1, *supra* note 15, at 9.

279 *Id.*

280 *Id.*

281 *Id.*

282 Murray Hiebert, 'Miles To Go', *Far Eastern Econ Rev*, July 29, 1993, at 24.

283 'Foreign Investors Face Snags in Vietnam', *Straits Times*, 22 July 1993, at 36.

284 Transition, pt 1, *supra* note 15, at 9.

285 Tuoi Tre Chu Nhat, 17 April 1994, at 6 (quoting Minister Dau Ngoc Xuan).

286 *Id.*



All observers concur about the magnitude of the corruption problem in Vietnam.<sup>287</sup> In the first four months of 1993 alone, Vietnam faced 365 cases of official corruption and 61 smuggling cases.<sup>288</sup> The government has continually emphasised the problem of corruption, and has vowed to take tough measures to combat it.<sup>289</sup>

In the last analysis, however, political factors constitute the greatest impediment to the development of a genuinely favourable investment climate in Vietnam. Although party members generally agree about the necessity for change, they disagree over how much renovation they can permit before the market economy would unleash forces undermining the party's monopoly of political power.<sup>290</sup> In spite of the dramatic market reforms brought about by 'doi moi', socialism remains the official goal of the country. Vietnam's revised constitution continues to affirm the role of the party as 'the leading force of the state and society'.<sup>291</sup>

In order to maintain party unity, economic reformers in the party often must yield to the political hard-liners.<sup>292</sup> At the mid-term party congress of January 1994, the first mid-term conference in the 63-year history of the Vietnamese Communist Party,<sup>293</sup> the party stressed that pursuit of an economic open door policy would not evolve into a political open door policy. Do Muoi, the Secretary General, simultaneously exalted the renovation policy and its economic results and emphasised the goal of socialism and the necessity of one-party rule. Accordingly, the party characterised 'peaceful evolution', its euphemism for anything other than rule by the Communist Party, as the supreme enemy of the people.<sup>294</sup> The party, then, continues to emphasise socialism both as the foundation of and the justification for Communist Party rule. As one party theoretician noted, 'If the economy is privatised and the Communist Party no longer leads, there is no longer socialism ... This is what the enemy wants and tries by all means to push us in that direction.'<sup>295</sup>

287 In complaining about alleged bribery surrounding contracts with local governments, one official for an oil company remarked that Vietnam has become the greediest country in Southeast Asia, 'Something Smelly in Vietnam's Doi Moi', *Economist*, 4 June 1994, at 33.

288 Murray Hiebert, 'Opening a Pandora's Box', *Far Eastern Econ Rev*, 29 July 1993, at 24, 25.

289 The midterm party congress called corruption a 'national disaster', and set out a series of measures to curtail its growth, 'Resolution Part II', Saigon Giai Phong, FBIS, 8 April 1994, at 57, 58; Saigon Giai Phong, FBIS, 12 April 1994, at 74, 75.

290 One party leader, Nguyen Van Linh, asked, 'Should the gains of the revolution obtained at the price of the blood of so many generations of Vietnamese now be placed in the hands of forces taking the country on to the capitalist road?' Nicholas Cumming-Bruce, 'Vietnam: Leaders Stress Caution and Conservatism at Opening of Communist Party's Seventh Congress', *The Guardian*, 25 June 1991, at 8. Some people already have left the party because they believed the party had abandoned socialism. Others have left in protest of the continuation of one-party rule.

291 Constitution, *supra* note 25, at Article 4.

292 Thai Quang Trung, 'Vietnam: The Challenge of the Reformists', *Business Times*, 13 January 1993, at 25.

293 Paul Cleary, 'Vietnam: Party to Air Concerns Over Market Moves', *Austl Fin Rev*, 20 January 1994, at 6.

294 Fearing an outbreak of 'peaceful evolution' with the lifting of the US embargo, the government has tightened down further on political dissent. Phillipe Agret, 'Vietnam Sends Clamp-Down on Dissent', *Agence France Presse*, 20 March 1994, available in LEXIS, News Library, Cumws File.

295 Tap Chi Cong San, March 1994, at 59.

The continuing allegiance to socialism, even if largely cosmetic, prevents the party from making decisions necessary to implement the market structure. One prime example involves the status of state enterprises. State enterprises in general have become largely inefficient,<sup>296</sup> 23% of them operate at no profit or at a loss, and 80% utilise obsolete equipment.<sup>297</sup> Purely economic considerations require that Vietnam shut down a great number of these enterprises, and in fact, its new bankruptcy law, as reformers have stressed, will enable it to close many state enterprises in an orderly fashion.<sup>298</sup> The prospect of closures, however, has led to proclamations by hard-liners stressing the leadership role of state enterprises in economic development<sup>299</sup> and articles declaring that state enterprises should always outnumber private enterprises.<sup>300</sup>

Another area held hostage to socialism concerns land ownership. Under the constitution, the state owns all land.<sup>301</sup> The Vietnamese party to a foreign enterprise typically makes its capital contribution in the form of land.<sup>302</sup> As a result, foreign investors have voiced concern that, under current law, foreign enterprises cannot use land as collateral for loans.<sup>303</sup> Thus, they have called for the promulgation of a mortgage law to give banks the power to directly resell foreclosed property.<sup>304</sup> A mortgage law with these provisions, of course, would create tension with the socialist principle of state ownership of all land.

Even if Vietnam successfully passes laws responding to the concerns of foreign investors, many investors may still worry that the gains will not last. As long as the ideological conflict within the party remains unresolved and Vietnam's political future remains uncertain, investors may fear that the government proposes liberal foreign investment laws as a matter of expediency rather than out of a genuine desire to implement a market structure over the long term. Predictability must exist in order for investment to flourish, and Vietnam has yet to demonstrate that it can provide this security.

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296 The state sector operates at a 0.97% profit rate, compared to a 2.16% profit rate for the private sector. Tran Dinh Thanh Lam, 'Vietnam: Private sector Grow, Problems Remain', *Vietnam Investment Rev*, 7 March 1994.

297 *Kinh te Saigon*, 24 February 1994, at 14.

298 Nguyen Tri Dung, 'Vietnam: National Assembly Passes Bankruptcy Law', *Vietnam Investment Rev*, 3 January 1994.

299 *Nhan Dan*, 17 February 1994, at 1.

300 See eg, *Tap Chi Cong San*, March 1994, at 28, 59.

301 Constitution, *supra* note 25, at Article 17.

302 See *supra* text accompanying note 90.

303 Michael Collins, 'Investors Learn to Live with Vietnam's Legal Vacuum', *Vietnam News*, 21 December 1993.

304 *Id.*

