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DOING BUSINESS WITH VIETNAM — PROSPECTS AND CONCERNS FOR THE 1990s

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I. INTRODUCTION

In East-West relations, the 1980's may be remembered as a decade of gradual thaw in the cold war brought on by the confluence of economic and strategic needs. Beginning with tentative efforts in the early 1970's, the People's Republic of China (China) and the United States moved towards normalization of relations, culminating in the 1979 Sino-United States treaty of Friendship and Commerce.[1] The next ten years of improved relations between the two countries were buoyed by successful economic relations, encouraged by receptiveness to Chinese goods within the United States[2] and an unprecedented legal reform movement in China that, among other things, encouraged the infusion of Western capital through joint ventures, wholly foreign-owned enterprises and other liberal investment forms.[3] On the domestic front, China turned to capitalist-style incentives to motivate produc-

1. Agreement on Trade Relations Between the United States of America and the People's Republic of China, 1979, *Legislation on Foreign Relations Through 1980*, Vol. III, Comm. on Foreign Affairs and Comm. of Foreign Relations, Joint Comm. Print, Feb., 1981. The economic and legal reform experience in China will be used as a comparative model in this article in assessing Vietnam's reform efforts. Contemporary reform efforts in the Soviet Union will also be considered. For an assessment of the reform experience in China and the Soviet Union, *see* Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213 (1988).

2. For a useful review of Sino-U.S. trade during the recent reform era, *see* U.S.-CHINA TRADE — PROBLEMS AND PROSPECTS (E. Lawson ed. 1988).

3. Official English translations of significant Chinese laws appear in Vols. 1 and 2, LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Beijing: 1987). *See also* China Laws for Foreign Business (CCH Austl. 1984, periodic supplements); T. CHIU, CHINA TRADE DOCUMENTS (1988).

tion, including the encouragement of private enterprise.[4] Recognizing that these dramatic reforms in many respects appear inconsistent with doctrinaire socialism, the Chinese coined the phrase "market socialism" to describe the new economic system.

While China has enjoyed many economic successes through aggressive reform during the past decade, the Soviet Union has experienced many failures because of its adherence to rigid Stalinist-style central planning, perpetrated through the corruption-tainted reign of Leonid Breshnev. These economic failures became such a manifest political embarrassment to the Soviets that they too have confronted the necessity of major reform to ease their economic burdens. The leader of the current move to restructure (*perestroika*)[5] the Soviet economy and inject a sense of openness (*glasnost*) into Soviet society and politics is Mikhail Gorbachev, General Secretary of the Communist Party in the Soviet Union since 1985 (and more recently President).[6] As was the case with China, a major step in Soviet reform was the removal of barriers to Western investment. The U.S.S.R. Council of Ministers passed a decree on January 13, 1987, establishing a Foreign Joint Venture Law[7] which allowed foreigners to engage in joint ventures in the Soviet Union for the first time since 1930.[8] Although it is too early

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4. Private enterprise is sanctioned by the Chinese Constitution. XIANFA (Constitution) art. 11 (China), *English translation in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982), at 1 (1987). On June 25, 1988, the State council promulgated the Provisional Regulations of the People's Republic of China Concerning Private Enterprise, effective July 1, 1988, *English translation in* E. Asian Exec. Rep., Oct. 15, 1988, at 24. *See also* Provisional Regulations of the People's Republic of China Concerning Income Tax on Private Enterprises, promulgated by the State Council on June 25, 1988, effective 1988, *English translation in id.* at 26; Provisions of the State Council Relating to the Imposition of Individual Income Regulatory Tax on Investors in Private Enterprise, promulgated by the State Council on June 25, 1988, effective 1988, *English translation in id.* at 27.

5. Gorbachev's vanguard effort for his aggressive world-wide public relations campaign on behalf of the "new" Soviet Union was the publication of his 1987 best-seller book entitled *Perestroika: New Thinking for Our Country and the World.*

6. For a brief account of Gorbachev's rise to power, *see The Education of Mikhail Sergeyevich Gorbachev*, TIME, Jan. 4, 1988, at 18.

7. Decree of the U.S.S.R. Council of Ministers on Procedures for the Creation and Operation in the U.S.S.R. of Joint Enterprises in which Soviet Organizations and Firms from Capitalist and Developing Countries are Partners, promulgated Jan. 13, 1987, published in Pravda, Jan. 27, 1988, at 2, col. 1 (Eng. ed., Associated Publishers, Inc.), *English translation in Soviet Council of Ministers Decision on Joint Ventures with Western Firms*, 4 Int'l Trade Rep. (BNA) 358-61 (Mar. 11, 1987). *See also* Union of Soviet Socialist Republics: Decree on Joint Enterprises with Western and Developing Countries, 26 I.L.M. 749 (1987).

8. *See* Berman, *Joint Ventures Between United States Firms and Soviet Economic Organizations*, 1 INT'L TRADE L.J. 139 (1975-76); Pederson, *Joint Ventures in the Soviet Union: A Legal and Economic Perspective*, 16 HARV. INT'L L.J. 390 (1975).

to measure the full impact of these reforms, they clearly are based on a recognition that Western capital, know-how and technology are needed to modernize the Soviet Union.

The economic reforms in both the Soviet Union and China have been accompanied by some political reforms. However, recent developments in China provide a disturbing reminder that despite the sweeping economic reforms in communist countries in recent years, totalitarianism remains the political hallmark of communism. Student demonstrations began in Beijing, China's capital city, in mid-April 1989 to protest government corruption and the anti-democratic policies of Deng Xiaoping's regime.[9] During the next seven weeks, the movement grew throughout China and received the support of a broad cross-section of the Chinese populace. Concerned that it was losing its control over the people, the Deng government ordered the Army to use force to break up the demonstrators, and hundreds, perhaps thousands, of unarmed civilians were killed on June 4, 1989, as the Army opened fire on the crowds with automatic weapons and used tanks and armored personnel carriers against people in the streets of Beijing.[10] The Beijing massacre, coupled with the subsequent purge of moderate leaders,[11] widespread arrests and executions of dissidents,[12] and anti-Western activity, drew sanctions from the United States and other Western powers,[13] and shattered the confidence foreign investors had in China's economic and legal reforms.[14] The Beijing massacre also cast ominous clouds over the efforts by other communist countries to attract Western investment. Nevertheless, it

9. *See Upheaval in China — A Tumultuous Struggle Over the Destiny of a Nation*, NEWSWEEK, May 29, 1989, at 14; Ignatius, *Beijing Protest Swells to More than a Million*, Asian Wall St. J., May 18, 1989, at 1, col. 3.

10. *Reign of Terror*, NEWSWEEK, June 19, 1989, at 14; *Beijing Bloodbath*, NEWSWEEK, June 12, 1989, at 24.

11. Zhao Ziyang, the moderate Chairman of the Communist Party who was a strong backer of economic reforms and displayed sympathy for the democracy protestors, was stripped of his official office and held under house arrest. *Small Carrot, Big Stick*, NEWSWEEK, July 3, 1989, at 29; Kristoff, *Deng Talks of Plan to Retire*, N.Y. Times, July 23, 1989 (Int'l ed.), at 8, col. 1.

12. Kristoff, *Chinese Execute 24 More People, Including 7 from Beijing Protests*, N.Y. Times, June 23, 1989, at 1, col. 4; Wu Dunn, *Chinese Arrest 400 in Beijing Amid Fears of a Wide Purge; Roundups in Other Cities*, N.Y. Times, June 11, 1989, at 1, col. 4.

13. *World Bank Forced to Defer China Loans*, FAR E. ECON. REV., July 6, 1989, at 69; Schmitt, *Bush Order May Affect Gruman*, N.Y. Times, June 7, 1989, at 32, col. 1; *Bush Suspends Sales of Weapons to China, Halts Military Links*, Asian Wall St. J., June 6, 1989, at 1, col. 5.

14. Cohen, *Law and Leadership in China*, FAR E. ECON. REV., July 13, 1989, at 23-24; Wu Dunn, *Foreigners Scramble to Leave Beijing*, N.Y. Times, June 7, 1989, at 7, col. 1.

is clear that at least until June 4, 1989, the Chinese economic reform movement provided a useful comparative model for the development of foreign economic relations by the Socialist Republic of Vietnam (Vietnam).

In sharp contrast to the economic successes of China (Vietnam's neighbor and sometimes nemesis) and Gorbachev's promises of success in the Soviet Union (Vietnam's mentor), Vietnam continues to be the "sick man" of the East; it seems to have little hope for early reversals of an almost continuous pattern of failure. The natural resources and other indicia of economic potential in this nation of fifty million people[15] belies its apparent inability to provide even the barest of essentials to its people. Vietnam has coal, petroleum, and gas; a wide variety of important minerals and building materials; extensive forests and farmland; and significant potential for hydroelectric power.[16] With a lengthy coastline, it has great potential for fishing industries and harborage sites for shipping. Human resources are abundant, with a plethora of cheap labor in a climate of high unemployment,[17] but with a relatively high literacy rate and an eagerness to learn.[18] Because Vietnam has desperate needs in every sector of the economy, it provides a potentially large buyer's market for technology, industrial equipment and supplies, and consumer goods in spite of its current state of abject poverty. Nevertheless, its industrialization strategy in effect since the close of the war with the United States in 1976 has been a fiasco.

Vietnam's failure may be attributed to a variety of factors, not the least of which is the almost constant state of war the country has endured for almost half a century.[19] However, the Vietnam political

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15. THE SOCIALIST REPUBLIC OF VIET NAM 26 (Hanoi: Foreign Languages Publishing House, 1984).

16. *Id.* at 25-26.

17. Conservative estimates of unemployment run as high as 20% in most urban areas. Hiebert, *The Toughest Battle*, FAR E. ECON. REV., Apr. 27, 1989, at 68 [hereinafter *The Toughest Battle*]. Interviews by the author in May 1989 consistently disclosed unemployment estimates in Ho Chi Minh City (Saigon) that ran over 50%.

18. Dawson, *Will Vietnam Become a Country You Can Do Business With*, Bangkok Post, Feb. 9, 1988, at 7, *reprinted in English in* FOREIGN BROADCAST INFORMATION SERVICE (FBIS), Daily Rep., Southeast Asia, Feb. 10, 1988, at 53-54. However, because of the disarray of the economy, education appears to be receiving short shrift in the allocation of scarce resources. Interviewees told the author that most college professors now receive less than the equivalent of twenty dollars per month, making it necessary for them to spend considerable time on other jobs or in private businesses.

19. *See Ravages of War*, FAR E. ECON. REV., Apr. 27, 1989, at 72. For an account of Vietnam's wartime history, before and after the American involvement, *see* S. KARNOW, VIETNAM — A HISTORY (1983).

system and its leadership must share a heavy burden of responsibility for the current state of the nation's economy. Vietnam was lionized by the Third World after its victory over the Americans in 1975. Although they got off to a shaky start, relations between Vietnam and members of the Association of Southeast Asian Nations (ASEAN)[20] improved during 1977 and 1978, during which time most of the ASEAN countries established diplomatic relations with Vietnam. There was a time during the early post-war era of President Carter's administration when the reestablishment of diplomatic relations with the United States was still possible. However, the groundwork for goodwill was destroyed by three events initiated by Vietnam. Vietnam joined the Soviet-dominated Council of Mutual Economic Assistance (COMECON), signed a Treaty of Friendship and Cooperation with the Soviet Union, and on December 25, 1978, launched a major military invasion of Cambodia. The improving relations between Vietnam and ASEAN suddenly soured, and the possibility for a Vietnam-United States rapprochement ended for the foreseeable future.[21]

Thus, intransigent isolationism, a bellicose attitude towards its neighbors, and an extreme leftist leadership that exalted ideology over practical reform efforts stifled any prospects for the nation's early recovery. Vietnam's aggression in Cambodia and its failure to satisfactorily resolve the issue of American servicemen missing in action (MIA's) guaranteed the continuation of the United States' embargo on economic relations with Vietnam.[22] The substantial Soviet presence in Vietnam, principally at the Da Nang airbase and Cam Ranh Bay Naval Station built by American forces and abandoned during the

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20. ASEAN is important to the United States both economically and strategically. ASEAN members include Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand. Both the Philippines and Thailand are strategic allies, and the United States continues to have its key Pacific bases located in the Philippines. ASEAN countries are a major source of strategic raw materials, and together constitute the fifth largest trading partner of the United States. The United States is the second largest trading partner for the ASEAN countries, after Japan. Strategically, the ASEAN countries are located in the most important sea lanes in the world, the Straits of Malacca and Singapore, the Lombok Strait, and the Sunda Strait, all of which cumulatively constitute the life lines of United States's most important ally in the East, Japan. *See* Koh, The Second Jackson H. Ralston Lecture, *The United States and Southeast Asia: Ten Years After the War in Vietnam*, 21 STAN. J. INT'L L. 19, 20 (1985).

21. For a summary of these events and their consequences, *see id.*

22. *See* 15 C.F.R. § 385.1 (1988) (banning exports to Vietnam); 31 C.F.R. § 500.204 (1988) (banning imports from Vietnam); 31 C.F.R. § 505.10 (1988) (banning off-shore transactions with Vietnam); 44 C.F.R. § 403.2 (1988) (prohibition on transportation).

United States withdrawal from Vietnam,[23] is another factor that contributes to the continued chill in United States-Vietnam relations.[24]

Vietnam's post-war regime recognized early that the country desperately needed Western capital, technology and know-how to enjoy an economic recovery. However, the original 1977 Decree on Foreign Investment[25] attracted only one enterprise, a French pharmaceutical firm.[26] In 1985, a plan was announced to liberalize the industrial sector and to draw upon the Vietnamese emigré sources of investment capital and technical assistance. However, little progress was made.[27]

More recently, however, significant changes have occurred in Vietnam's domestic politics and in its foreign relations which may enhance its prospects for economic growth. The precedents for socialist country economic reforms set first by China, and next by the Soviet Union, have encouraged Vietnam's new leadership to reach out to its Asian neighbors and the West for improved trade relations and investment capital. The new Law on Foreign Investment in Vietnam (Foreign Investment Law),[28] placed in effect in 1988, offers opportunities for foreign investors to gain a foothold in the development of Vietnam.[29]

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23. Vietnam and the Soviet Union have had a defense pact since 1978, and Soviet reconnaissance aircraft began operating out of Da Nang and Cam Ranh Bay airfields in 1979. Soviet warships visit Cam Ranh Bay regularly, which gives the U.S.S.R. its only base for naval operations in the South China sea. *The Russians are Landing*, ECONOMIST, Apr. 28, 1984, at 47.

24. Other issues which continue to stall progress in the normalization of United States-Vietnamese relations are the status of Amerasian children in Vietnam, and the status of former officials of the Saigon administration. Koh, *supra* note 20, at 27.

25. The Regulations on Foreign Investment in the Socialist Republic of Vietnam, issued in conjunction with Government Decree No. 115/CP dated April 18, 1977 [hereinafter 1977 Decree on Foreign Investment]. The 1977 Decree on Foreign Investment was promulgated by the Vietnam Communist Party, not the nation's legislature. *See generally* Quigley, *Vietnam's Legal Regulation of Foreign Trade and Investment*, 6 INT'L TRADE L.J. 24 (1980-81); Comment, *The Foreign Investment Code of the Socialist Republic of Vietnam*, 1979 INT'L LAW. 329. Very little scholarly comment has been written on the Vietnamese economy or legal system since the war with the United States ended in 1975, due in part to the scarcity of reliable data, the lack of academic interest, and the inaccessibility of the Vietnam market to the United States businesses.

26. Pike, *Vietnam: The Winds of Liberalization*, 12 Fletcher F. 245 (1988).

27. *Id.* at 247.

28. Law on Foreign Investment in Vietnam, Jan. 1., 1988, *English translation in* FBIS, Southeast Asia, Jan. 12, 1988, at 47. The 1988 Investment Law, art. 41, specifically repealed the 1977 Decree on Foreign Investment, *supra* note 25.

29. The 1988 Vietnam Foreign Investment Law also provided a model for similar foreign investment laws enacted in Laos and Kampuchea (Cambodia). On April 20, 1988, Laos announced the promulgation of its law on foreign investments. Law on Foreign Investments, promulgated by the Laos Supreme People's Council, announced April 20, 1988, approved through decrees of the President and the Prime Minister, text released by the Vientiane Domestic Service on July

Although the law is vague in many important respects, it was supplemented on September 5, 1988, by the Decree of the Council of Ministers Regulating in Detail the Implementation of the Law of Foreign Investment in Vietnam (Foreign Investment Regulations).[30]

From the perspective of the United States, the threshold question is whether a warming of United States-Vietnam relations, based on a new economic interchange, is in the best interests of the United States. The premise of this article is that, for a variety of reasons, United States interests support a policy of limited economic engagement with Vietnam, provided certain conditions are met. Vietnam is not a significant military power in global terms, but it is in a position to unsettle the balance of powers in the East and to create local crises which can contribute to regional instability. Vietnam has a history of regional aggression which to this day threatens its neighbors, some of whom have significant economic ties with the United States and share common strategic interests as well. Thailand, for example, generally has been a strong supporter of the United States and is vulnerable to direct military as well as economic threats from aggressive or irresponsible Vietnamese policies.[31] China, while not a military ally of the United States, has close economic ties with the United States and thereby provides an effective counterweight to Soviet influence in the East. The continuing border clashes between China and Vietnam, and the dispute over the Vietnamese occupation of Cambodia, have maintained a state of military tension in the area. Any attempts at rapprochement between the United States and Vietnam must be made with due regard for the interests of Thailand, China, and other nations

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29, 1988, *English translation in* E. Asian Exec. Rep., Dec. 15, 1988, at 26. *See also* Brennan, *Laos Announces Law on Foreign Investment*, E. Asian Exec. Rep., Dec. 15, 1988 at 8. (English translation of Cambodian Joint Venture Law not currently available.) Following the Vietnamese example, Laos and Cambodia allow three kinds of foreign investment: by contractual arrangement, through equity joint ventures, and wholly foreign-owned companies. *See generally*, White, *Indochina Investment Bid Faces Hurtles*, Asian Wall St. J., May 1, 1989, at 1, col. 3. According to the Laotian commerce minister, more than seventy foreign companies from a variety of industrial sectors had applied to invest in Laos by early 1989. *Id.* at 5, col. 1.

30. Decree of the Council of Ministers Regulating in Detail the Implementation of the Law of Foreign Investment in Vietnam (No. 139/HDBT), *English translation in* E. Asian Exec. Rep., July 1989, at 25 [hereinafter Foreign Investment Regulations]. *See also*, Vecchi, *Highlights of Vietnam's New Foreign Investment Regulations*, E. Asian Exec. Rep., May 15, 1989, at 8.

31. Under the leadership of Premier Chatichai Choonhavan, Thailand has launched a key initiative promoting peace and economic recovery in the region by moves to open trade with Indochina. Among the Premier's cherished goals are boosting trade with the bordering states of Vietnam, Laos and Cambodia. *Uncle Chat's Whirlwind*, ASIAWEEK, Apr. 26, 1989, at 28.

in the area, to the extent these nations continue to share mutual interests with the United States.

One of the greatest strategic losses suffered by the United States when it withdrew from Vietnam was that it left behind significant military installations and equipment in the South for the Hanoi regime, which in turn were made accessible to the Soviet Union.[32] Cam Ranh Bay provided the Soviet Navy with its only direct warm water access to the Pacific. The predictable result was a significant expansion of the Soviet Pacific fleet. This enhanced Soviet military presence in an area traditionally dominated by the United States is particularly unsettling because it comes at a time when the United States forward-basing system is rapidly eroding and the United States is threatened with the possible loss of its principal Pacific installations at Subic Bay and Clark Air Force Base in the Philippines.[33] To the extent that a United States-Vietnam economic rapprochement would eliminate or diminish the substantial Soviet presence in Vietnam, American strategic interests would be well served.

From a strictly economic perspective, Vietnam offers advantages to American business. However, these advantages are overshadowed by the strategic considerations which may be effected by an improved relationship. Vietnam possesses valuable natural resources and can offer a significant new base for expansion of American business in Asian markets. Vietnam itself has a potentially large market, although it likely will be many years before that market can be developed to any significant extent. If the political obstacles to normalization of relations between the United States and Vietnam can be removed, there still will remain a host of challenges and unanswered questions for businesses contemplating trade with or investment in Vietnam. This article will examine some of the major issues raised by the prospects of doing business with Vietnam, with particular emphasis on recent legal, political and economic reform efforts in that country.

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32. There is now ample evidence to vindicate the original "domino theory" of Vietnamese expansionism, which was advanced as grounds for the United States' intervention in Vietnam, *i.e.*, that if one nation in Southeast Asia would become communist-controlled, then neighboring nations would also become communist-controlled. Not only did Vietnam invade Cambodia after the United States troop withdrawal, but it also supported the communist take-over in neighboring Laos. Soon after the fall of South Vietnam, the neutral government of Laos was defeated by the Laotian communist party with the support and encouragement of Vietnam. *See* Koh, *supra* note 20, at 21.

33. *See U.S. Overseas Military Network Unravels*, Asian Wall St. J., Jan. 7, 1988, at 1, col. 3.

II. Political Stability in Vietnam — A Prerequisite for Successful International Business Relations

A major consideration in the contemplation of normalization of relations with Vietnam, including establishment of private trade and investment relations with that country, is the stability of Vietnam's national leadership. Not only must the leadership be stable in the sense that abrupt shifts become unlikely, but it also should evince a long-term commitment to favorable relations with the West. It would be premature to conclude that such stability or commitment exists in Vietnam today, but indications are that the nation is moving positively in that direction.

Political stability will require stable and well-defined conditions of government.[34] Characteristic of governments with political stability are well-established institutions that contribute to continuity and smooth transitions, rather than generate abrupt or violent change.[35] China offers a poignant contemporary example of the vicissitudes of totalitarian leadership in communist countries. Without an established institutional method for smooth leadership transitions, raw power tends to triumph in succession debates. Deng Xiaoping, who assumed power as the *de facto* leader of China in 1978, holds only one official position in government: the Chairmanship of the powerful Military Commission.[36] The brutal suppression of the Spring 1989 democracy movement and the abrupt deposing of his former hand-picked successor, Zhao Ziyang, and his supporters, was accomplished only with the support of the Chinese Army. At 84 years of age, Deng has shown the same obsession with power that drove Mao Zedong to cling to personal control no matter what the costs might be to the nation.

The first step in Vietnam's modernization must be replacement of the octogenarian conservatives who have led the country into its current state of economic disaster.[37] An unprecedented shake-up of Vietnamese government leaders began in 1986. The Communist Party by then had determined that the government's attempts to reform prices, wages and currency, which had begun in the fall of 1985, was a failure.[38] In derogation of the traditional Stalinist approach, the 1985 reform

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34. *See* Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 INT'L L.J. 671, 679 (1987).

35. *Id.*

36. J. TOWNSEND & B. WOMACK, POLITICS IN CHINA 91 (3rd ed., 1986).

37. In addition to China, the Soviet Union, North Korea and other communist countries face similar challenges with aged, conservative leadership.

38. *Vietnam: Cabinet Shuffled*, FACTS ON FILE, July 18, 1986, at 532.

plan had included replacing heavy industry with light industry and agriculture, decentralizing control, emphasizing free market forces, eliminating state worker subsidies, and devaluing the currency.[39] The results of these reforms included an increase in prices, currency speculation, lower production and shortages.[40]

Eight cabinet members responsible for economic management were replaced at a Central Committee meeting which ended June 6, 1986.[41] Replacements were named for Deputy Premier To Huu, Finance Minister Chu Tam Thuc, Communications and Transportation Minister Dong Si Nguyen, Culture Minister Nguyen Van Hieu, Foreign Trade Minister Le Khac, Mining and Coal Minister Nguyen Chan, Home Trade Minister Le Duc Thinh, and Nguyen Duy Gia, the Director General of the State Bank.[42] Huu claimed responsibility for the problems with the reforms.[43] Another Deputy Chairman of the Council of Ministers, Tran Phuong, was dismissed in February, 1986, with no explanation.[44]

An election at the Sixth Communist Party Congress, held December 15-18, 1986, produced new leaders in the most drastic political change the party had experienced in its fifty-six years of existence.[45] On December 17, 1986, three top senior ideological hardliners from the North[46] resigned from the Politburo due to age or ill health.[47] They were Premier Pham Van Dong, eighty, who was prime minister for over thirty years; Le Duc Tho, seventy-five, senior member of the Politburo in fourth position, who negotiated with Henry Kissinger for the United States withdrawal from Vietnam; and Truong Chinh, seventy-nine, President and Secretary General of the Communist Party, who took over in July, 1986, after the death of Le Duan.[48] These men all had been strongly associated in the past with Ho Chi Minh,[49] who founded the Communist Party in Vietnam in 1930.[50]

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39. *Id.*
40. *Id.* at 532-533.
41. *Id.* at 532.
42. *Id.*
43. *Id.* at 533.
44. *Id.*
45. *Vietnam: Party Congress Elects New Leaders,* FACTS ON FILE, Dec. 26, 1986, at 964.
46. *Bottom of Marx's League: Mr. Gorbachev Can't Go on Ignoring Vietnam's Self-ruination,* ECONOMIST, Nov. 1, 1986, at 15.
47. *Vietnam: Party Congress Elect New Leaders, supra* note 45, at 964.
48. *Uncle Ho's Men Bow Out,* ECONOMIST, Dec. 20, 1986, at 46; *Vietnam: Party Congress Elect New Leaders, supra* note 45, at 964.
49. *Uncle Ho's Men Bow Out, supra* note 48, at 46.
50. *Vietnam: Without an Umbrella,* ECONOMIST, Mar. 29, 1986, at 34.

Nguyen Van Linh, seventy-one, was elected Secretary General on December 18, 1986.[51] Linh, an economic reformer, became the party's first leader with no past association with Ho Chi Minh. Linh's ideas have been strongly resisted by the northern leaders in the past, which resulted in Linh's resignation from the Politburo and its Secretariat in 1982. However, his 1983 confirmation as a southern party leader subsequently led to his appointment as Permanent Secretary to the Central Committee of the Politburo in 1985.[52]

On the same day that Linh became Permanent Secretary, three other Politburo members were ousted: Defense Minister Van Tien Dung; General Chu Huy Man, the political commissar of the army; and To Huu, who was replaced in June 1986 as a Deputy Premier.[53] Further, two economic reformers, Vo Van Kiet, sixty-four, Chairman of the State Planning Commission, and Deputy Premier Vo Chi Cong, seventy-three, were promoted within the Politburo.[54]

The sweeping political changes effected in 1986 were the direct result of a decision by the Sixth Communist Party Congress that Soviet-style central planning should be replaced with a market economy that encourages private business and foreign investment. The Party leadership also decided to shift the focus of economic development away from heavy industry toward agriculture and the production of consumer goods for export.[55]

Another reshuffle of top government officials occurred in February, 1987, following the December, 1986, shake-up of the Communist Party leadership.[56] Once again economic reformers replaced ideological hardliners.[57] Only the President and Premier escaped this reshuffle. Thirteen cabinet members were ousted and twenty-one new officials became responsible to nineteen ministries and commissions.[58] Forced retirement was imposed upon approximately 60% of the National Assembly delegates, the majority of whom were aged and inactive.[59] The new leadership clearly was moving to eliminate the deadwood in the National Assembly before the April 19, 1987, Assembly election.[60]

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51. *Vietnam: Party Leaders Elect New Congress*, *supra* note 45, at 964.
52. *Id.*
53. *Vietnam: Politburo Shuffled*, FACTS ON FILE, Dec. 26, 1986, at 965.
54. *Id.*
55. *Vietnam: Top Government Ranks Reshuffled*, FACTS ON FILE, Feb. 20, 1987, at 111.
56. *The Toughest Battle*, *supra* note 17, at 68.
57. *Vietnam: Top Government Ranks Reshuffled*, *supra* note 55.
58. *Id.*
59. Wain, *Changing Course: Admitting to Flaws in Economy, Vietnam Flirts with Capitalism*, Wall St. J., June 10, 1987, at 21, col. 1.
60. *Id.*; *Vietnam: Candidates Compete in Vote*, FACTS ON FILE, May 8, 1987, at 339.

The National Assembly election was the most open since the Communist Party of Vietnam came to power and the third election since Vietnam was reunited in 1975.[61] It was the first time that candidates were nominated at public meetings, rather than appointed by the party. There were also more candidates on the ballots than in previous elections. Eight hundred twenty-nine candidates campaigned for 496 seats in 1987, compared to only 600 candidates in 1981 who competed for the same number of seats. This election resulted in the political demise of the party's old ideological hardliners.[62]

On June 18, 1987, successors were named for President Truong Chinh and Premier Pham Van Dong,[63] both of whom had resigned in December, 1986, at the Sixth Communist Party Congress.[64] The new transitional choices were Pham Hung, seventy-five (who died on March 10, 1988), for Premier;[65] and Vo Chi Cong, seventy-four, for President.[66] Both Hung and Cong were high ranking members of the Politburo of the Communist Party of Vietnam. They were installed by the newly elected National Assembly.[67] At the June 17, 1987, opening session of this newly elected National Assembly, the new General Secretary, Nguyen Van Linh, announced that "corruption had spread to 'all layers' of the party, government and bureaucracy,"[68] but that "the country would continue to 'purify' and reorganize the party and [the] state."[69]

Although these events could prove to be harbingers of dramatic political changes in Vietnam, it is too early to conclude that stable and well-defined conditions indicating political stability have been established. Nevertheless, both the number of officials replaced, and the apparent criteria for replacement are significant. Eight cabinet members were replaced in June, 1986. In December, 1986, three of the top leaders resigned from the Politburo and three other Politburo members were ousted. In February, 1987, thirteen cabinet members were replaced with only the President and Premier surviving. However, they too were replaced the following June. In February, 1987, twenty-one new officials became responsible to nineteen ministries

61. *Id.*
62. *Id.*
63. *Vietnam: President, Premier Replaced*, FACTS ON FILE, Aug. 14, 1987, at 595.
64. *Vietnam: Party Congress Elects New Leaders*, *supra* note 45, at 964.
65. *Deaths*, FACTS ON FILE, Mar. 18, 1988, at 196.
66. *Vietnam: President, Premier Replaced*, *supra* note 63, at 595.
67. *Id.*
68. *Id.*
69. *Id.*

and commissions. Sixty percent of the National Assembly was forced to retire. The fact that such a great number of leaders and high-ranking officials were replaced indicates a strong commitment to fundamental changes in direction. All the high-ranking party and government leaders have been replaced, in recent years, including the Secretary General of the Communist Party, the President, the Premier and all the Cabinet Ministers.

Moreover, it is significant that this was the first time in fifty-six years of communist party rule in Vietnam that such drastic political change had occurred. The fact that such sweeping changes occurred through political reform rather than by military coup or other violent action suggests a strong consensus that reform is necessary. Further, the National Assembly election on April 19, 1987, was the first time that candidates were nominated rather than appointed, indicating the depth of political reforms already in progress.

In spite of these changes, future political stability is not assured. The replaced leaders and officials were ousted because they failed to improve the economy, indicating that present replacements may be ousted as well if they fail to yield early results. Tangible evidence of economic recovery therefore is likely to be the only assurance that the current leadership will maintain tenure in office.

III. New Focus on International Economic Relations

A. *The Challenge: Refocusing Foreign Relations from Conflict to Economic Cooperation*

The recent leadership changes in Vietnam have been accompanied by changes in both domestic and foreign policies. The foreign economic relations policies of Vietnam, which are the focus of the current modernization efforts, currently are the subject of dramatic change. One of the threshold challenges for the new leaders is to overcome the heritage of conflict and confrontation which has dominated Vietnam's external relations for so many years, and to shift the focus to accommodation and economic cooperation.

The early states of Vietnam had traditional trading links with China, which colonized the area now known as Vietnam for 1,000 years.[70] As late as the mid-nineteenth century, the Vietnamese imperial court continued to ignore the overtures of the West and continued to look to China as its model. Inevitably, however, European expeditions launched conquests in the Indochina Region, and Vietnam began

70. H. Sammer, Vietnam: Yesterday and Today 57, 60 (1966).

to fall to the superior French forces by 1858.[71] By 1887, Vietnam as a nation had ceased to exist for all practical purposes.[72] With the establishment of the French Indochina colonial regime, new emphasis was placed on raw material exports from Vietnam and the creation of a market for finished goods from Europe. Although some heavy industry was developed in the North, industrialization and the manufacture of finished goods were discouraged. By 1938, more than 95% of the foreign investment in Indo-China was owned by the French.[73]

After years of occupation by the Japanese during World War II, Ho Chi Minh declared the independence of the Democratic Republic of Vietnam on September 2, 1945, in Hanoi.[74] Unable to negotiate a satisfactory settlement to end French colonial claims after World War II, Vietnam began its war with France on December 19, 1946; the war did not end until 1954, leaving Vietnam divided between North and South.[75] Ten years later, the United States placed a trade embargo on North Vietnam as a result of the North's continuing aggression in the South.[76] This embargo was extended to the South in 1975 with the fall of Saigon and the integration of the South into the Socialist Republic of Vietnam.[77] Negotiations between the two countries to end the embargo began in 1977.[78] In 1978, the newly expanded Socialist Republic of Vietnam invaded Cambodia. Late in the same year, it signed a treaty of friendship and cooperation with the Soviet Union.[79] ASEAN responded to the Cambodia invasion with a trade embargo of its own.[80] The invasion, coupled with Vietnam's treaty with the Soviet Union, resulted in a total break in friendly relations with the People's Republic of China.[81]

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71. *Id.* at 105.

72. *Id.* at 111.

73. *Id.* at 118-19.

74. *Id.* at 134.

75. *Id.* at 139.

76. *See* C.F.R. at various sections cited *supra* note 22. *See also* Quigley, *supra* note 25, at 38 n.128.

77. 31 C.F.R. §500.204 (1988).

78. Quigley, *supra* note 25, at 38 n.128.

79. Union of Soviet Socialist Republics — Socialist Republic of Viet Nam: Treaty of Friendship and Co-operation, Nov. 3, 1978, 17 I.L.M. 1485.

80. *See* Manguno, *Changing Tack on Communist Vietnam, Korea Sends Businessmen, Not Soldiers*, Wall St. J., Feb. 10, 1988, at 18, col. 1.

81. After Vietnam turned for help to China's adversary (the Soviet Union), attacked China's Khmer Rouge allies in Cambodia, and expelled hundreds of thousands of Vietnamese of Chinese descent, China launched a military attack against Vietnam in February 1979 in order to "teach Vietnam a lesson." Koh, *supra* note 20, at 21. The resistance against the Vietnamese invasion

B. *Vietnam's Evolving Economic Relations*

As a result of these various embargoes and the breaking of diplomatic ties with China, Vietnam became isolated from China, its traditional trading partner, from most of the industrialized West and from its industrializing neighbors in the Pacific Basin. However, some U.S. allies recently have weakened in their support of the embargo. Vietnam now trades primarily with the Soviet Union and Japan. Some products reach other Pacific Basin countries through "middle men" arrangements in Hong Kong.[82] The United States embargo on Vietnamese trade will continue to be successful only so long as it is respected by the United States' allies and other prospective trade and investment partners with Vietnam. ASEAN has backed the U.S. embargo,[83] the purpose of which is to pressure Vietnam to pull its military troops out of Cambodia.[84] However, the prospects for profitable business in Vietnam has shifted ASEAN members, and especially Thailand, toward policies of accommodation with Vietnam.[85]

Japan and Singapore are substantially ignoring the embargo and increasing trade with Vietnam.[86] Japan is Vietnam's biggest non-communist trading partner with 1986 trade figures at $280 million.[87] Among other things, Vietnam trades seafood and coal for manufactured goods. In 1987, Vietnam's first crude oil shipment was purchased by Japan.[88] Trade with Singapore reached about $210 million in 1986, making it Vietnam's second largest non-communist trading partner.[89] Other countries that already have established trade ties with Vietnam are South Korea, Australia, France, Taiwan, India, Indonesia, and the Philippines.[90] According to Vietnamese sources, many United States trading partners and some strategic allies already have economic ties with Vietnam.[91]

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of Cambodia has been led by three disparate groups: the Khmer Rouge, having the largest military force and supported by China; Prince Sihanouk; and the Khmer People's National Liberation Front (KPNLF), led by Son Sann, Sihanouk's former prime minister. Koh, *supra* note 20, at 23. *See* Manguno, *supra*, note 80, at 18, col. 1.

82. Manguno, *supra*, note 80, at 18. col. 1.

83. *When War and Trade Don't Mix*, ECONOMIST, Dec. 19, 1987, at 33.

84. *"Glasnost" Takes a Slow Boat to Vietnam*, BUS. WK., Sept. 28, 1987, at 26.

85. *The Toughest Battle*, *supra* note 17, at 68.

86. *When War & Trade Don't Mix*, *supra* note 83, at 33.

87. *Vietnam: Ho-Ho, Ho Chi Minh*, ECONOMIST, July 25, 1987, at 26.

88. *Id.*

89. *Id.* at 27.

90. *Id.*

91. For example, the informational handbook of the Import-Export and Investment Corporation of Ho Chi Minh City (IMEXCO) lists ten socialist countries among its "partner countries,"

However, the United States embargo still wields influence, as evidenced by Honda's decision to cancel a Vietnamese motorcycle manufacturing project after being criticized by the United States Congress.[92] Therefore, the United States embargo will continue to be an obstacle for many foreign investors, and will limit the markets available to satisfy Vietnam's export needs.

The trading situation in the Pacific Basin is further complicated by Vietnam's support of North Korea, which has resulted in a South Korean trade ban.[93] Although South Korean investment in Vietnam is formally prohibited by Seoul, Koreans have noted Vietnam's investment potential, due to its cheap but literate work force and the recent revision of its foreign investment law. Of particular interest to South Korean business is the fact that, while Vietnam is interested in exporting food stuffs, it is also interested in buying vehicle tires and tubes, construction glass, fertilizer, chemicals, textiles, sugar, cement, and parts for appliances.[94] A major stumbling block is that, while Vietnam wants payment for exports in convertible currencies, it would prefer to pay in barter for imports. One report claimed that, by 1988, a Korean electronics company already was assembling television sets at a plant in southern Vietnam despite the trade prohibition.[95] Vietnamese officials disclosed to the author in May 1989 that South Koreans also are developing greater trade and investment ties in Ho Chi Minh City, where they already have in operation a joint venture enterprise manufacturing stockings and socks.[96]

The most active Asian countries in pursuing business contacts in Vietnam today are Japan, South Korea, Singapore, and Taiwan. To date, however, it appears that among United States allies, only the Japanese are pursuing extensive economic contacts in Vietnam; according to Vietnamese sources, they are very active on both the trade and investment fronts and are attempting to establish an early domi-

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plus the following non-socialist countries or city-states: Hong Kong, Philippines, Thailand, New Zealand, Germany (FRG), England, Netherlands, United Arab Emirates, Singapore, Malaysia, Korea (R.K.), Australia, Canada, Sweden, Austria, Japan, India, Indonesia, France, Switzerland, Belgium and Italy. IMEXCO, untitled informational handbook, frontispiece page (unnumbered and undated, original in author's files).

92. *When War & Trade Don't Mix*, *supra* note 83, at 33.

93. Manguno, *supra* note 80, at 18, col. 1.

94. *Id.*

95. *Id.*

96. Interview by author with Tran Dung Tien, Vice President and Vice General Director, Import-Export and Investment Corporation of Ho Chi Minh City (IMEXCO), May 12, 1989 [hereinafter *IMEXCO interview*].

nation of the Vietnam market.[97] Such contacts have been vigorously pursued in recent years by Vietnam, including steps taken to reform the legal system in order to attract investment.

C. *Post-War Legal and Economic Reforms as Prelude to the 1988 Foreign Investment Law*

Earlier attempts to attract foreign investment had little success. Following the reunification of the country in 1975, Vietnam moved quickly to promulgate a liberal Decree on Foreign Investment in 1977.[98] The 1977 Decree placed a priority on heavy industrialization, in accordance with the Soviet model, and was based on an attempt to secure technology which would be financed by exports.[99] Any positive impact this Decree might have had on Vietnam's recovery was immediately overshadowed by its invasion of Cambodia.

In 1980, Vietnam announced the creation of a new constitution[100] and at the same time provided for further incentives for exports.[101] The 1980 reforms raised the prices for goods destined for export, provided special subsidies and bonuses for exporters, exempted exports from commodity taxes, and provided foreign currency loans for producers and foreign trade organizations.[102] Subsequently, the 1977 Decree provided the framework for the 1988 Foreign Investment Law, which introduced substantial liberalizing changes.

Changes in the general economic climate have occurred as a result of the major party leadership reshuffle that began in 1986, in which younger officials, the "technocrats and economic reformers," became more influential over national policy.[103] Agriculture was one of the

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97. The author bases these conclusions on many interviews in Vietnam in May 1989, including, among others, the *IMEXCO interview id.* and an interview with Pham Van Khoi, former attorney at the Saigon Bar and now Expert in Charge of Legal Affairs, Investment Management Consulting Company (IMC), Ho Chi Minh City, May 12, 1989 [hereinafter IMC interview].

98. 1977 Decree on Foreign Investment, *supra* note 25.

99. Comment, *supra* note 25, at 331. Tang Thi notes that a series of government initiatives, culminating in a "massive campaign designed to abolish capitalist trade in Ho Chi Minh City (Saigon) and other urban areas in southern Vietnam," illustrated the odd dichotomy of Vietnam attempting to totally communize while desperately seeking foreign investment. *Id.*

100. HIEN PHAT (Constitution) (Vietnam), in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz, eds. 1981 supp.).

101. Quigley, *supra* note 25, at 25 n.5. Based upon his interview with Vietnam's Minister of Foreign Trade, Quigley observed that Vietnam recognized that the nation must first stimulate small scale production before achieving large scale socialist production. *Id.*

102. *Id.*

103. *See Vietnam: Top Government Ranks Reshuffled*, *supra* note 55, at 111. This article notes that thirteen ministers were ousted, leaving only those offices of the President and Premier untouched. Twenty-one new officials were appointed to head nineteen different ministries and commissions. *Id.*

areas targeted for immediate reform, although only limited successes have been realized. In 1986, new incentives were adopted in the agricultural sector to improve the contract system that had been introduced in 1979.[104] Higher profits were permitted on above-quota agricultural production and certain tax benefits were granted. Although progress has been retarded by natural causes such as drought, typhoon flooding, and insect infestation,[105] it appears that some modest gains were realized in grain production by 1989.[106]

In 1986, a Commission for Economic Relations with Foreign Countries was created. Its special accomplishments to date have included the general economic reforms of 1987, based on the "Ho Chi Minh City Experiment," which allowed a more liberal investment policy and internal economic incentive program for that city.[107] Implicit in all of these reforms, including the subsequently enacted Foreign Investment Law[108] and its implementing regulations,[109] is an acknowledgement that the Soviet model of strong centralized control and heavy industrialization is not appropriate for Vietnam's modernization needs. An integral part of Vietnam's current economic planning is to attract light industry and its accompanying technology.[110]

The domestic reforms of April 1987 were sweeping, and included changes affecting both internal economic and international policies.

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104. The contract system in agriculture has resulted in higher output, but does place new pressures upon farmers to which they are unaccustomed, such as the prospect of bankruptcy of farm enterprises and unemployment of large numbers of idle farmworkers. *See* Wain, *A Farm Shows Effect of Hanoi's Reforms*, Asian Wall St. J., May 16, 1989, at 6, col. 1.

105. In spite of the attempts at agricultural reforms in the mid-1980's, a series of natural disasters resulted in shortfalls in food production to such an extent that Vietnam was not able to adequately feed its people (particularly in the North) during 1988. Wain, *Vietnam Seeks Aid as Its Harvests Falter*, Wall St. J., May 11, 1988, at 16, col. 1.

106. Pike, *supra* note 26, at 247.

107. *Id.*

108. Law on Foreign Investment of Vietnam, *supra* note 28, at 47. *See also Vietnam: New Investment Law Passed*, FACTS ON FILE, Dec. 28, 1987, at 1004; Greenberger, *Isolated Hanoi, Its Economy in Shambles, Trying to Win U.S. Hearts, Minds, Bucks*, Wall St. J., Feb. 8, 1988, at 22, col. 6.

109. Foreign Investment Regulations, *supra* note 30.

110. Greenberger, *supra* note 108, at 22, col. 6. The 1988 Foreign Investment Law is based on the theory that Vietnam's economic recovery can be led by an export-driven, high technology strategy. It remains to be seen whether such a strategy is appropriate for a country like Vietnam, which is in such a state of disrepair and poverty. To succeed with such a strategy, Vietnam must offer opportunities for high-technology driven industries and an economic climate promoting meaningful quality control domestically and aggressive competition abroad. It is questionable whether Vietnam is capable of meeting these basic requirements of its current strategy.

The reforms provide for the reduction of central control in the domestic market, bonuses and piecework allowances, profits for farmers up to 40% over costs, review of farm taxes and quotas, access to credit for entrepreneurs without discrimination, the abolition of road checkpoints, a move to base the economy on actual prices, and legalization of "moonlighting."[111] By 1988, thousands of new small enterprises and shops selling both imported[112] and domestically produced goods had sprung up in Hanoi and Ho Chi Minh City.[113] Private gold trading was specifically legalized in early 1989, and private enterprise generally was legalized soon thereafter.[114]

Recent reforms allow Vietnamese enterprises to form joint ventures with and accept investment from overseas Vietnamese, to import equipment and materials with profits from exports, and to allow factories to hire foreigners and expatriate Vietnamese as managers and advisors.[115] Among the most significant of all these changes was the promulgation of the 1988 Foreign Investment Law.

IV. THE 1988 FOREIGN INVESTMENT LAW

A. *Background*

The Vietnam National Assembly adopted a new Foreign Investment Law[116] on December 29, 1987, acting under authority of the Constitution of the Socialist Republic of Vietnam, articles 16, 21, and 83.[117] The Law was promulgated and placed into effect on January 1, 1988, by the Council of State of the Socialist Republic of Vietnam[118] in order to attract foreign investment, which is critical to the country's economic recovery.[119] Provisions of the 1988 Foreign Investment Law were sparse, as is typical in socialist countries, but detailed guidelines were established in the September 1988 Foreign Investment Regulations on contractual business cooperation; joint ventures; enterprises with 100% foreign capital; business organization; labor relations; finan-

111. *Vietnam: Economic Reforms Unveiled,* FACTS ON FILE, May 8, 1987, at 339.

112. Some interviewees in Ho Chi Minh City expressed their opinions to the author in May 1989 that substantial amounts of the goods in circulation were smuggled into Vietnam illegally, further compounding the significant problems of the black market.

113. *The Toughest Battle, supra* note 17, at 68.

114. *Id.*

115. *Vietnam: Economic Reforms Unveiled, supra* note 111, at 339.

116. Law on Foreign Investment in Vietnam, *supra* note 28, at 47.

117. *Id.* preamble.

118. *Id.*

119. Hiebert, *Investment: Letter of the Law — Vietnam Woos Reluctant Foreign Capital,* FAR E. ECON. REV., Feb. 4, 1988, at 78.

cial matters; foreign exchange control; accounts and audit; customs, immigration, residence and communications; and related matters.[120] However, the existence of the new law and supplemental Foreign Investment Regulations will be only one consideration for the foreign investor when deciding whether to invest in Vietnam.

The new body of law on foreign investment should not be considered in a legal vacuum.[121] This is particularly true of Vietnam, where severed diplomatic relations and embargoes continue to pose barriers to foreign trade and investment. As a consequence of Vietnam's relative state of isolation, Vietnamese exposure to the basic institutions, structures and customs of international business has been limited. Although a member of the United Nations,[122] Vietnam has not been admitted to the General Agreement on Tariffs and Trade (GATT). United States and ASEAN embargoes substantially have blocked the development of important bilateral or multilateral trade agreements and treaties with Asian and Western nations. Vietnam is ineligible for most-favored-nation (MFN) treatment by most potential trading partners in the international community. Further, sources of development aid virtually dried up for Vietnam during its military presence in Cambodia.[123]

Finally, Vietnam's participation and membership in the Council for Mutual Economic Assistance (COMECON),[124] and its close economic

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120. Foreign Investment Regulations, *supra* note 30, at 101.

121. Salacuse, *Host Country Regulation of Joint Ventures and Foreign Investment*, in JOINT VENTURING ABROAD: A CASE STUDY 103 (D. Goldsweig ed. 1985).

122. *Vietnam: Cabinet Shuffled*, *supra* note 38, at 331.

123. Both the Asian Development Bank and the International Monetary Fund (IMF) scheduled missions to Vietnam in Spring 1989. Additional economic aid also may be available in the future from United Nations organizations, which already provide an estimated U.S. $100 million per year. *The Toughest Battle*, *supra* note 17, at 68-69. The World Bank, which gave Vietnam a U.S. $60 million loan for an irrigation project in 1978, suspended its assistance the following year under pressure from the United States. Similarly, many prospective individual donor countries, particularly Japan, likely will make aid available only when the United States lifts its sanctions. The major obstacles to aid from Asian and Western nations, and world economic organizations, remain the United States embargo, the lack of a Cambodian settlement and Vietnam's default on overdue loans to the IMF. *Aid Waits for Peace*, FAR E. ECON. REV., Apr. 27, 1989, at 71. Although Eastern bloc countries probably will continue aid to Vietnam, it likely will be at a lower level with greater controls over its use. *Id.* Recent developments suggest that aid may be forthcoming soon if the withdrawal of Vietnamese troops from Cambodia are successful. *See infra* notes 319-20.

124. COMECON was formed in 1949 in response to the organization of the West European countries in their efforts to implement the Marshall Plan. Vietnam joined COMECON in 1978, but plays a relatively minor role. The core of the organization is the Soviet Union and Eastern Europe. HOYA, EAST-WEST TRADE 4-5 (1984).

and military ties with the Soviet Union will continue to limit the inflow of advanced technology from the West long after other sources of current political tensions with the United States have eased. Therefore, Vietnam's potential for participation in trade and investment activities with the West will be limited for some time until Vietnam becomes more assimilated into the main streams of international commerce. It was the general consensus of those officials and others interviewed in Vietnam by the author in May 1989 that the key to major expansion of Vietnam's economy through foreign trade and investment is the normalization of relations with the United States and full economic participation in Vietnam by American business.

The foreign investment laws of developing nations, particularly those under communist regimes, often serve primarily as statements of political intent rather than pronouncements of definitive rules of law.[125] The 1988 Foreign Investment Law is no exception, and one may assume that the actual "rules," to the extent they are articulated, are subservient to the ideological messages of the Law. Although the Law is specific in some areas, such as ownership equity and taxes, it also is vague in many other important areas. In general, the Law should be considered in the light of article 1, which promises "favorable conditions" for investors. The vagueness of the Law, coupled with Vietnam's critical need for investment, suggest that any proposed foreign investment agreement would be highly negotiable.[126] Therefore, the Law should be viewed as a policy statement that Vietnam is highly motivated to obtain the benefits of foreign investment.

The original 1977 Decree on Foreign Investment was promulgated under the auspices of the Communist Party, rather than by the national legislative body.[127] Because the Communist Party is the true center

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125. Salacuse has observed that "investment law is the primary — indeed in some cases the *only* — statement of investment policy by the host country government." It is a signal to potential investors that they are welcome. According to Salacuse, a network of other laws should be considered as the specific basis for investment. Salacuse, *supra* note 121, at 105 (emphasis in original).

126. Observers disagree as to the import of the 1977 Foreign Investment Decree's vagueness. *Compare* Comment, *supra* note 25, at 331 *with* Quigley, *supra* note 25, at 25 n.5. Tang Thi described the 1977 Decree as "a curious piece of legal craftsmanship," concluding that the draftsmen of the Decree had reason to know that its ambiguities would have a negative impact on investors. He opined that the dilemmas that the Communist leadership found themselves in explain the lack of precision. Comment, *supra* note 25, at 329-30. Quigley saw the vagueness as a more positive concession to the negotiating position of the investor. Quigley, *supra* note 25, at 25.

127. *See* Comment, *supra* note 25, at 329.

of power in Vietnam, the open support of the 1988 Foreign Investment Law by the Party is indicative of the seriousness of the intent to attract investment. When the original Decree on Foreign Investment was promulgated by the Party in 1977, Vietnam was described as "a country determined to achieve 'the ultimate objective of establishing a communist society in the purest Marxist-Leninist line' while intensifying its efforts to attract Western capital and technology."[128] The Soviet Union was the economic model. The liberalizations in the 1988 Foreign Investment Law now reflect Vietnam's disillusionment with the traditional Soviet model,[129] and a changed focus favoring light industry and the production of exportable consumer goods.

B. *Scope and Coverage of the 1988 Foreign Investment Law*

The 1988 Foreign Investment Law is composed of forty-two articles divided into six chapters. Chapter 1 (articles 1-3) is entitled "General Provisions" and contains policy statements concerning Vietnam's receptiveness to foreign investment;[130] reservations of Vietnam's "sovereignty" interests;[131] definitions of key terms;[132] and designation of those areas open to foreign investment.[133] Chapter 2 (articles 4-19) deals with the forms of business arrangements under which foreign investments may be made, and includes details on capital contribution, insurance, sharing of profits and risks, enterprise management, duration, labor provisions, banking and accounting requirements, and application of Vietnamese laws. Chapter 3 (articles 20-25) describes certain "investment guarantees," including repatriation rights and freedom from nationalization. Chapter 4 (articles 26-35) describes rights and obligations of foreign organizations and persons living in Vietnam, including details on taxes. Chapter 5 (articles 36-38) describes the rights and responsibilities of the State Organ for Management of Foreign Investment, which has general supervisory authority over foreign investments.[134] Chapter 6 (articles 39-42) contains miscellane-

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128. *Id.* (quoting the declaration of Le Duan at the 4th Party Congress in December 1976).
129. Greenberger, *supra* note 108, at 22, col. 6.
130. Law on Foreign Investment in Vietnam, *supra* note 28, art. 2.
131. *Id.* art. 1.
132. *Id.* art. 3.
133. *Id.* art. 3.
134. The 1988 Foreign Investment Regulations, *supra* note 30, at art. 6 provide that the State Organ for Administration of Foreign Investment is the State Committee for Co-operation and Investment, and that the Ministry of External Economic Relations shall act as the Government body responsible for receiving and processing investment projects submitted by foreign investors, recommending optional handling approaches, and reporting to the State Committee for Co-operation and Investment for examination and decision.

ous provisions on implementation of the law. In many respects, the 1988 Foreign Investment Law is very liberal in its concessions to investors. However, in other respects, it may be fatally vague, leaving too many important questions unanswered.

The general purposes stated in the 1988 Law are to expand economic cooperation with foreign countries, achieve domestic economic development, and step up exports based on effective exploitation of natural resources, manpower and other potentialities.[135] Much of the precatory language in the 1988 Law clearly evinces an intent to expedite the investment process. For example, article 1 guarantees that the State will extend to investors "favorable conditions and easy formalities for their investment in Vietnam."[136] Article 20 contains a guarantee by the State that any foreign organization or person investing in Vietnam will receive "fair and equitable treatment."[137]

The scope of permissible investments appears quite broad, allowing investment in "different sectors of the national economy."[138] The State encourages investment which will implement major economic programs and produce exports or import-substitution products, high-technology industries using skilled labor, intensive investment for exploitation and full employment of potential resources and for raising the output capacities of existing economic enterprises, labor-intensive enterprises using materials and natural resources available in Vietnam, enterprises engaged in building the infrastructure, and foreign currency-earning services.[139]

Foreign investment should be permitted across a broad range of both industrial and agricultural endeavors, as was the case under the original 1977 Decree on Foreign Investment.[140] The investment must

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135. *Id.* preamble.

136. *Id.* art. 1.

137. *Id.* art. 20.

138. *Id.* art. 3.

139. *Id.*

140. Article 4 of the 1977 Decree on Foreign Investment stated that "the foreign party may invest in the exploitation of natural resources, in agriculture, industry, building, transportation, etc., with the exception of those fields and branches which the Government of the Socialist Republic of Vietnam reserves for itself." 1977 Decree on Foreign Investment, *supra* note 25, art. 4. The latter reservation, while not explicitly stated in the 1988 Foreign Investment Law, is implicit in the unfettered discretion it gives to the government to approve investments. Quigley commented that the wide scope of the 1977 Decree on Foreign Investment suggested that even areas considered vital to national interests might be open to foreign investment. *See* Quigley, *supra* note 25, at 30-31. Tang Thi noted, "[b]y not spelling out — as other investment codes do — what is open to the foreign investor and what is not, the government remains free to deal with the problem on an ad hoc basis." Comment, *supra* note 25, at 332. Based on his

be authorized by the State Organ for Management of Foreign Investment, and its approval likely will be highly dependent upon the current state economic plan.[141] Therefore, the prospective investor should be aware of both the flexibility allowed by the 1988 Law as well as the current internal priorities of Vietnam, to the extent such information is available to foreigners.

C. *Forms of Investment*

The 1988 Foreign Investment Law authorizes direct investments in the form of business cooperation contracts (contractual ventures),[142] joint ventures,[143] and wholly foreign-owned enterprises.[144] Each investment form is treated in more detail in the 1988 Foreign Investment

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interview with the Vice-Minister of Foreign Trade in 1978, Quigley observed that examples of market reservations might be mining, petroleum industries, processing of agricultural products, timbering, fisheries, and construction of tourist hotels. Quigley, *supra* note 25, at 30. More recent statements from Vietnamese leaders point to an emphasis on the development of light industries, such as electrical appliances, radios, and related spare parts. *See* Manguno, *supra* note 81, at 18.

141. However, article 63 of the Foreign Investment Regulations, states that the Vietnamese state authorities shall not assign plan targets to the investment partners. Foreign Investment Regulations, *supra* note 30, art. 63. Moreover, due to the rapid changes in the domestic economy since 1986, and with the new emphasis upon decentralization, the future status of central economic planning is uncertain. At the time of this writing, officials at the State Planning Commission's Institute for Strategic Planning reportedly have begun work on a long term development strategy which they hope to present to the Council of Ministers in 1990. *The Toughest Battle*, *supra* note 17, at 68.

142. A "business co-operation contract" is defined as a "contract between the foreign and Vietnamese partners for business co-operation." Law on Foreign Investment in Vietnam, *supra* note 28, art. 2(5). The only example given of such contracts is "production sharing and other forms of business cooperation." *Id.* art. 5.

143. A joint venture is an enterprise in Vietnam established by a contract between the Vietnamese and foreign partners, which may include joint ventures established by the Government of Vietnam and other foreign governments. *Id.* art. 2(10). Although the precise meaning of the business cooperation contract is unclear from the Law, it appears that the major practical distinctions between such a contractual arrangement and the joint venture is that the latter contemplates equity interests for each partner in the venture, and requires meaningful participation of the foreign partner in the operational aspects of the business.

144. A wholly foreign-owned investment is described in the 1988 Foreign Investment Law as an "enterprise with 100 percent foreign invested capital," which is further defined as "an enterprise which a foreign organization or person is authorized by the Government of the Socialist Republic of Vietnam to establish on the territory of Vietnam, the capital of which is wholly (100 percent) owned by the same foreign organization or person." Law on Foreign Investment, *supra* note 28, art. 2(1).

Regulations.[145] Indirect investment operations (e.g., capital lending) are specifically excluded from coverage by the Regulations.[146]

Under the contractual venture arrangement, which the 1988 Law describes as "contractual business co-operation,"[147] a foreign partner and a Vietnamese partner may establish key terms of their business relationship as a matter of contract, rather than by law.[148] The contract specifies such matters as scope and line of business; the rights, obligations and liabilities of the parties; and other aspects of the relationship between the parties.[149] The contractual venture is not a separate legal entity as is the case with equity joint ventures. The Foreign Investment Regulations specify the legal elements of a binding contract to establish a contractual business co-operation venture;[150] the application[151] and approval procedures;[152] the conditions of assignment,[153] extension,[154] termination and expiration[155] of the contract; the requirements of an annual report;[156] and the legal obligations of the contracting parties.[157]

In contrast, the joint venture is a "juridical person" subject to Vietnamese law,[158] which governs many aspects of the parties' relation-

145. *See* Foreign Investment Regulations, *supra* note 30, ch. II (contractual business cooperation), ch. III (joint venture), and ch. IV (enterprise with 100% foreign capital).

146. *Id.* art. 3.

147. *Id.* art. 2(11).

148. An example of a contractual venture would be a production agreement whereby the foreign investor provides the equipment and technology, and the Vietnamese partner pays back the foreign investor with products thereby produced. The original 1977 Decree on Foreign Investment also allowed three types of foreign investment. Article 6 authorized the establishment of "co-operation in production with sharing of products between the Vietnamese and foreign parties." 1977 Decree on Foreign Investment, *supra* note 25, art. 6. The foreign investor could contribute a combination of capital and technology in conjunction with a Vietnamese state company. The finished products would be shared in an agreed proportion. The foreign investor's portion of the finished products would be for export only, unless the Vietnamese company requested a quantity of those products to be sold in-country. In addition, the export of the foreign investor's share would be exempt from export duties. This type of relationship has been described as a "loose joint venture." Although no legal entity was specifically created, the assessment of shares would seem to have implied the existence of such a business relationship. *See* Comment, *supra* note 25, at 335; Quigley, *supra* note 25, at 31.

149. Law on Foreign Investment in Vietnam, *supra* note 28, art. 5.

150. Foreign Investment Regulations, *supra* note 30, arts. 9-10, 14.

151. *Id.* art. 11.

152. *Id.* arts. 12-13.

153. *Id.* art. 15.

154. *Id.* art. 16.

155. *Id.* art. 17.

156. *Id.* art. 18.

157. *Id.* art. 19.

158. Law on Foreign Investment in Vietnam, *supra* note 28, art. 6.

ship.[159] For example, the 1988 Law specifies that the capital contribution by a foreign partner may include foreign currencies; plant, buildings, equipment, machinery, tools, components and spare parts; and patents, technical know-how, technological processes and technical services.[160] The capital contribution of the Vietnamese partner may include Vietnamese currency; natural resources; building materials, fittings and furnishings; rights to use of land, water surface, or sea

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159. Article 5 of the original 1977 Decree on Foreign Investment authorized formation of a "joint enterprise" between a foreign party and "a state run economic organization." 1977 Decree on Foreign Investment, *supra* note 25, art. 5. The intent of the joint enterprise arrangement was to subrogate the private capitalist to the state controlled companies. *See also Comment*, *supra* note 25, at 331, 336. This was true of both domestic and international joint enterprises. The foreign corporation would be allowed to export its share of products exempt from export duties. 1977 Decree on Foreign Investment, *supra* note 25, art. 11(3). The foreign firm was allowed to contribute no less than 30% nor more than 49% of the aggregate capital. *Id.* art. 7(3). Article 7 of the 1977 Decree further provided that the capital contribution of the foreign party was to consist mainly of equipment, machinery, industrial property, means of transport, and cash in foreign currency. Capital or "materials" were allowed as investment only insofar as they were deemed necessary by the Vietnamese partner (state enterprise), while technological investment was given a special value in computing the investment privileges. The Vietnamese state company would contribute land, buildings, building materials, tools, equipment and, in general, any expenses would be paid in local currency. Article 8(4) required that all wages and salaries of Vietnamese nationals were to be paid in foreign currency. The joint enterprise's articles of incorporation were to be registered with the Ministries of Foreign Trade and Finance and assets were to be deposited in the Foreign Trade Bank of Vietnam. *Id.*

The joint enterprise was required to take the form of one of two possible business relationships recognized by Vietnam law. 1977 Decree on Foreign Investment, *supra* note 25, art. 7(1). The two forms seem to be derived from French corporate law, reflecting the French influence on Vietnamese legal history. The first form is a "limited liability company," which has no counterpart in common law. The limited liability company has some aspects of a partnership, but is a legal entity separate from its shareholders, which gives it some aspects of the corporate form under American law. However, it cannot use the corporate form of public financing. The limited liability company is closely related to the French *Societé a Responsibilité Limitée* (S.A.R.L.). The second form that the joint enterprise could take was that of an anonymous company, which is modelled after the French *Societé Anonyme* (S.A.). The S.A. is more strictly regulated than the S.A.R.L.; its shares are freely transferable, and an S.A. must have at least seven shareholders while an S.A.R.L. requires only two. It should be noted that these concepts suggest an early distinction from the traditional socialist concept of ownership. Article 7 of the 1977 Decree on Foreign Investment also provided that the joint enterprise operate under the by-laws of the company. While under the civil law system the company would derive its existence from the shareholders' contract, this common law departure enables the company to operate under a system of directors. *See generally* Comment, *supra* note 25, at 337. Further changes in the general law and code allowed factories to form joint ventures without state participation. *See Vietnam: Cabinet Shuffled*, *supra* note 38, at 532. Foreign participation was eventually allowed to reach 99% of total equity. *See id.* at 533.

160. Law on Foreign Investment in Vietnam, *supra* note 28, art. 7.

surface; plant, buildings, equipment, machinery, tools, components and spare parts; and services for the construction and commissioning of the plant, patents, technical know-how, technological processes and technical services.[161] Additionally, the 1988 Law provides that the two partners may mutually agree upon other forms of capital contribution.[162] Capital contribution does not include any loans or credits provided to the joint venture.[163]

Unlike the original 1977 Decree on Foreign Investment, which limited foreign equity ownership to a maximum of 49% of capital, the 1988 Foreign Investment Law places no ceiling on the foreign investor's equity ownership. However, the minimum required investment of 30% is retained from the earlier 1977 Decree.[164] The value of the partners' respective capital contributions under the 1988 Law are to be assessed "according to international market prices" and shall be expressed in the deed of establishment of the joint venture in Vietnamese currency, or in a foreign currency determined by mutual agreement.[165]

The 1988 Law states that profits and risks of the joint venture are to be shared in proportion to the partners' respective capital contributions.[166] Risks are to be minimized by mandatory insurance of the joint venture assets by a Vietnamese insurance company, or by other qualified insurance companies as mutually agreed by the parties.[167]

The 1988 Law incorporates the related principles of domestic self-sufficiency and emphasis on export earnings. The partners must agree upon the percentages of products to be allocated for export and domestic consumption, on "the principle of self-provision" in respect of foreign currency needs.[168] The 1988 Law requires that foreign currency earnings from exports and other sources shall be at least sufficient to meet all the foreign currency needs of the joint venture and ensure its normal operation and the benefits of the foreign partners.[169] This provision no doubt reflects concern that foreign joint ventures might allow themselves to develop such an imbalance between foreign exchange earnings and expenditures that crises develop requiring state

161. *Id.*
162. *Id.*
163. *Id.* art. 2(7).
164. *Id.* art. 8.
165. *Id.*
166. *Id.* art. 10.
167. *Id.* art. 9.
168. *Id.* art. 11.
169. *Id.*

intervention to allow exchanges of Vietnamese currency for foreign currency, thereby creating a drain on the nation's limited foreign exchange reserves.[170]

The joint venture is to be controlled by a "board of management," consisting of nominees appointed by the parties in proportion to their respective capital contributions, provided that each shall have at least two nominees on the board.[171] The board shall decide "[t]he most important matters," including the orientation of the venture's activity, business planning, and key personnel. Decisions are to be made unanimously.[172] The board shall have a chairman appointed by mutual agreement of the parties. Operating officers shall include a general director and deputy general directors nominated by the board, all of whom shall be Vietnamese citizens.[173]

The 1988 Foreign Investment Regulations provide more detailed treatment of various aspects of joint ventures, including provisions on application procedures;[174] elements of the joint venture contract[175] and charter;[176] approval procedures to be followed by the State Committee for Cooperation and Investment;[177] amendments to the contract or charter;[178] capital contributions;[179] assignment of capital;[180] limitations on legal liability;[181] the board of management[182] and operating officers;[183] transfer of technology[184] and protection of industrial property;[185] dura-

170. A contemporary example of this problem is provided by the case of American Motors Corporation's investment in China's Beijing Jeep Corp., Ltd., which almost shut down in 1986 because it did not have sufficient foreign exchange reserves to purchase necessary components from abroad to manufacture its products. *See* Vause, *China's Developing Automobile Industry: An Opportunity for U.S. Investment — And Challenge for China's New Foreign Investment Laws*, 10 PA. J. INT'L L. & BUS. 195, 210-21 (1988).

171. Law on Foreign Investment in Vietnam, *supra* note 28, art. 12.

172. *Id.* art. 13.

173. *Id.* art. 12.

174. Foreign Investment Regulations, *supra* note 30, art. 23.

175. *Id.* art. 24.

176. *Id.* art. 25.

177. *Id.* art. 26.

178. *Id.* art. 28.

179. *Id.* arts. 29-31.

180. *Id.* art. 32.

181. *Id.* art. 33 (liability of each partner to the other partners, to the joint venture, and to third parties is limited to the venture's legal capital).

182. *Id.* arts. 34-38.

183. *Id.* art. 39.

184. *Id.* arts. 40-41.

185. *Id.* art. 42. The provisions on protection of industrial property are extremely vague, merely asserting that the Vietnam government "shall protect the industrial property of the transferor of technology [and the rights and the obligations of the parties as stated in the

tion;[186] extensions;[187] termination[188] and dissolution[189] of the joint venture; and procedures for resolving disputes between the joint venture partners, including arbitration.[190]

The third form of enterprise authorized by the 1988 Foreign Investment Law is the wholly foreign-owned enterprise, in which the foreign investor assumes full capital investment and management responsibility.[191] The enterprise is a juridical person under Vietnamese law, and is subject to control by the State Organ for Management of Foreign Investment.[192]

The 1988 Foreign Investment Regulations address some of the questions arising from wholly foreign-owned enterprises. Various provisions of the regulations deal with such matters as duration of the enterprise,[193] application requirements,[194] charter requirements,[195] approval procedure,[196] amendments to the charter,[197] appointment of representative,[198] and provisions on temporary discontinuance or dissolution of the enterprise.[199] In many respects, the provisions resemble those applicable to joint venture operations, although considerably less detail is provided.

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contract transferring the technology] shall conform to the provisions prevailing in Vietnam in this regard and to international practice." *Id.*

186. *Id.* arts. 43-44.

187. *Id.* art. 45.

188. *Id.* art. 46.

189. *Id.* arts. 47-52.

190. *Id.* art. 53.

191. *Id.* art. 14. Article 8 of the 1977 Decree on Foreign Investment allowed a foreign investor to initiate a private enterprise specializing solely in production for export. The foreign firm was expected to supply raw materials, fuel, and equipment, and to hire Vietnamese workers, with the exception of some foreign technical personnel as authorized by the Foreign Trade Ministry. The firm would pay no duty on raw materials and production-related items imported into Vietnam, nor would it pay an export duty on finished products. Although no percentages of contribution were mentioned, which would suggest that the enterprise could be wholly foreign-owned, there was an ambiguous reference in the Decree to a "Vietnamese party." In any event, the "export-oriented enterprise" could not be simply a branch of a foreign enterprise. It necessarily had to be registered with the Ministry of Foreign Trade and the Ministry of Finance as "a juridical person under Vietnamese law." 1977 Decree on Foreign Investment, *supra* note 25, at art. 8(5).

192. Law on Foreign Investment in Vietnam, *supra* note 28, art. 14.

193. Foreign Investment Regulations, *supra* note 30, art. 56.

194. *Id.* art. 57.

195. *Id.* art. 58.

196. *Id.* art. 59.

197. *Id.* art. 60.

198. *Id.* art. 61.

199. *Id.* art. 62.

D. *Banking and Financial Requirements*

Certain banking and financial requirements apply to all enterprises with foreign investment. The enterprise shall open its accounts in Vietnamese currency and in foreign currency with the Bank for Foreign Trade of Vietnam, or with branches of foreign banks as may be established in Vietnam and approved by Vietnam's State Bank.[200] Books of account must be kept in accordance with generally accepted international principles and standards approved by the Vietnam Ministry of Finance, and are subject to control by Vietnam authorities.[201] Article 19 of the 1988 Law provides that the foreign investment enterprise "shall be established, authorized to operate, to transfer its capital and to dissolve itself according to its charter and in full accordance with Vietnamese laws."[202]

E. *Duration and Nationalization*

Enterprises with foreign-invested capital are guaranteed a duration of no more than twenty years, but this period may be extended "where necessary."[203] The 1988 Law does not state who has authority to grant such extensions, but it is reasonable to assume the authority rests with the State Organ for Management of Foreign Investment. The 1988 Law extends to foreign investors important guarantees with respect to duration and nationalization. These guarantees are improvements over the original 1977 Decree on Foreign Investment. Article 21 of the 1988 Law clearly states that foreign investment enterprises shall not be nationalized. Further, it provides that the invested capital, property and assets of a foreign organization "shall not be requisitioned or confiscated under administrative procedure."[204]

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200. Law on Foreign Investment in Vietnam, *supra* note 28, art. 17.

201. *Id.* art. 18.

202. *Id.* art. 19.

203. *Id.* art. 15. Under article 10 of the 1977 Decree on Foreign Investment, foreign investment enterprises had a life expectancy of only ten to fifteen years, although "in particular cases this period may be longer." 1977 Decree on Foreign Investment, *supra* note 25, art. 10.

204. Law on Foreign Investment in Vietnam, *supra* note 28, art. 21. Article 10 of the 1977 Decree on Foreign Investment provided that the state would guarantee the protection of the invested capital for at least ten years, but included a proviso that: "If, required by the national economy, the enterprise should be nationalized, it would be purchased by the Vietnamese Government at a reasonable price agreed upon by the two sides." 1977 Decree on Foreign Investment, *supra* note 25, art. 10(1). This provision caused a great deal of cautionary comment. Under the 1988 Foreign Investment Law, renewal of corporate or "business entity" charters still may be required within limited time periods, and the foreign investor should negotiate clear terms in the venture's charter to assure the venture's maximum life expectancy. Law on Foreign Investment in Vietnam, *supra* note 28, art. 21.

F. *Repatriation of Profits and Capital; Exchange Controls*

The 1977 Decree on Foreign Investment contained significant ambiguities on the subject of repatriation of profits and capital, a matter of critical importance to most foreign investors.[205] Although ambiguities have not been entirely eliminated, the 1988 Law is explicit in stating that foreign organizations or persons shall have the right to repatriate or remit abroad their share of the profits, any approved payments due to them for provision of technology and services, the principal and interest due on any loan made in the course of business operation, their invested capital, and other sums of money and assets in their legal ownership.[206] Expatriate personnel working in Vietnam for a foreign investment enterprise specifically are authorized to repatriate or remit their incomes abroad, after payment of Vietnamese income taxes and in accordance with provisions of Vietnam's foreign exchange control regulation.[207] The implementing Foreign Investment Regulations contain additional provisions on repatriation of capital and profits[208] and foreign exchange control.[209] Sources in Vietnam have advised the author that additional regulations on exchange controls were being drafted at the time of this writing.[210]

Presumably, should there arise any conflict between these provisions and the State Bank's regulation of foreign currency, the 1988 Law provisions would prevail. However, because repatriation of capital usually is a potential sticking point for both investors and host countries, particularly in developing economies, it would be advisable to negotiate more detailed understandings on repatriation issues in advance to supplement the sketchy provisions of the 1988 Law.

G. *Labor and Personnel Issues*

The 1988 Law provisions on labor and personnel are extremely sketchy. The foreign investment experience under the Chinese Joint

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205. 1977 Decree on Foreign Investment, *supra* note 25, art. 10(4). Article 10(4) provides that the foreign party remit home the yearly share of net profit, after payment of tax and prior deduction for the reserve funds, which amounted to 5% of the enterprise's annual profit. Remittances could not exceed 25% of the total invested capital. *Id.* The Decree further stated that the investor must "comply with the Vietnamese regulations of foreign trade and exchange control." *Id.* art. 14.

206. Law on Foreign Investment in Vietnam, *supra* note 28, art. 22.

207. *Id.* art. 23. Neither a Vietnamese income tax law for expatriates nor applicable foreign exchange control regulations were available at the time of this writing.

208. Foreign Investment Regulations, *supra* note 30, arts. 88-89.

209. *Id.* at ch. VIII.

210. IMC Interview, *supra* note 97.

Venture Law[211] provides a useful analogy in assessing potential problems in this area. The 1979 Chinese Joint Venture Law only provided a general framework for foreign investment, and it provided no details on labor-management relations. On July 26, 1980, the Chinese State Council promulgated the Regulations on Labor Management in Joint Ventures Using Chinese and Foreign Investment.[212] The Chinese Joint Venture Regulations addressed broad issues of recruitment, benefits, and dismissal within a joint venture. The Chinese Ministry of Labor further elaborated on the regulations on January 19, 1984, by promulgating the Procedures for the Implementation of Regulations on Labor Management in Joint Ventures Using Chinese and Foreign Investment.[213] In response to increasing concerns of investors over a variety of investment issues, including labor and personnel matters, the Chinese State Council promulgated the Provisions for the Encouragement of Foreign Investment on October 27, 1986.[214] Those provisions were not sufficiently clarified until the publication one month later of China's most specific set of labor-related rules for foreign investment enterprises, the Regulations Concerning Employment, Autonomy, Workers' Wages and Insurance and Welfare Fees in Foreign Enterprises.[215]

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211. Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, adopted 5th Nat'l People's Cong., 2d Sess. (July 1, 1979), promulgated by Order No. 7 of the Chairman of the Standing Committee of the Nat'l People's Cong. and effective as of July 8, 1979, *English translation in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982), at 150 (1987) [hereinafter Chinese Joint Venture Law]. Subsequently, China adopted two additional laws authorizing other forms of foreign investment. The wholly foreign-owned enterprise received formal government sanction in 1986. Law of the People's Republic of China on Enterprises Operated Exclusively with Foreign Capital, 6 Nat'l People's Cong., 4th Sess. (Apr. 12, 1986), *English translation in* BEIJING REV., May 5, 1986, at 16, *reprinted in* 4 China L. Rep. 63 (1987). Cooperative joint ventures, which generally are undertaken by Chinese and foreign partners for specific projects pursuant to government-approved contractual arrangements, specifically were sanctioned in 1988. The Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures, 7th Nat'l People's Cong., 1st Sess. (Apr. 13, 1988), *English translation in* E. Asian Exec. Rep., May 15, 1988, at 27.

212. *English translation in* China Investment Guide 1984/85, at 398 (1984).

213. *Id.* at 400 (1984).

214. *English translation in* BEIJING REV., Oct. 27, 1986, at 26; FBIS, Daily Report, China, Oct. 15, 1986, at K-2 [hereinafter Chinese Investment Provisions]. Article 15 provided only that enterprise management would have the power "to determine . . . production and operation plans, to raise funds, to use funds, to purchase production materials and to sell products; and to determine . . . the wage level, the forms of wages and bonuses and [allowances]." *Id.* art. 15. The Chinese Investment Provisions contained no other references to labor and personnel matters. *Id.*

215. Promulgated Nov. 26, 1986, *English translation in* FBIS, Dec. 3, 1986, at K-5.

China's lengthy and somewhat tortuous task of elucidating labor regulations for foreign investment enterprises generated considerable consternation and impatience by investors along the way. At least one message Vietnam's lawmakers should discern from the experience of its neighboring giant is that the sooner it resolves critical labor-related and other key concerns of foreign investors, the better.

One of the attractions for prospective investors in countries like China or Vietnam is the abundance of cheap labor. Although China is more advanced and has demonstrated far greater economic stability during the past decade than Vietnam, China has had serious problems with respect to labor and personnel issues in foreign investment enterprises.[216] Not only has China found it necessary to amplify its labor regulations with greater detail, it also has liberalized its personnel rules to allow employers to establish capitalist-style reward and punishment systems, with monetary incentives and discipline for cause. In contrast, Vietnam's 1988 Foreign Investment Law does not address any of the essential questions relating to motivation of employees.

Article 16 of the 1988 Foreign Investment Law provides that Vietnamese citizens shall be given priority in recruitment, although the foreign investment enterprise may recruit expatriate personnel where high technical qualifications are required for which Vietnamese personnel are not available. Recently, Vietnam relaxed its labor regulations to allow the hiring of foreign specialists and managers, which had been discouraged under the 1977 Foreign Investment Decree and Regulations.[217] The salaries, wages and fringe benefits of Vietnamese personnel are payable in "Vietnamese currency originating from foreign currencies."[218] The enterprise is required to deposit funds with the Vietnamese National Budget to cover social insurance for personnel in accordance with Vietnamese laws.[219] Other rights and obligations of Vietnamese personnel are to be guaranteed by their labor contracts.[220] In contrast to the 1977 Decree on Foreign Investment, no

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216. *See generally* Vause & Vrionis, *China's Labor Reform Challenge: Motivation of the Productive Forces*, 24 STAN. J. INT'L L. 447 (1988).

217. *See Vietnam: Economic Reforms Unveiled*, *supra* note 111, at 339.

218. Law on Foreign Investment in Vietnam, *supra* note 28, art. 16.

219. *Id.* art. 31.

220. *Id.* art. 16. The 1977 Decree on Foreign Investment specified that the foreign enterprise would be governed by "internal labor legislation." 1977 Decree on Foreign Investment, *supra* note 25, art. 12. Article 8(4) provided that wages could be paid at normal wage levels, but must be in a convertible currency. Wages generally are paid in Vietnam at a piece work rate. *Id.* art. 8. *See* Quigley, *supra* note 25, at 33. The Vietnam Constitution also provides for certain rights and duties in relation to the workplace. For example, article 58 of the Constitution

mention is made in the 1988 Law of the role of labor organizations or collective labor agreements.[221] Although the 1988 Law touches upon a few labor and personnel matters, it remains very sketchy and is seriously deficient in this vital area of concern to foreign investors.

The implementing regulations provide some additional provisions on labor issues, but still fall short of providing definitive guidance on the subject. The regulations briefly treat labor contracts,[222] wages,[223] and the right of workers to form labor unions.[224] Sources in Vietnam have advised the author that the ninth draft of more definitive regulations on labor were under review at the time of this writing.[225]

H. *Taxes*

The 1988 Foreign Investment Law specifies corporate taxes applicable to foreign investment enterprises, ranging from 15% to 25% of earned profits.[226] However, the Law does not specify how to determine the applicable tax for a particular enterprise within that range. As is the case with so many other aspects of the 1988 Law, it is so vague that it leaves a wide spectrum of issues to be determined on an *ad hoc* basis through negotiations. The 1988 Law does state that for oil and gas and some other valuable and rare resources, income taxes shall be levied at higher rates "in accordance with international practice."[227]

Not only does the tax rate itself appear open for negotiation, the 1988 Law also authorizes certain tax holidays to be extended to joint ventures by the government.[228] Factors to be considered include the branch or sector of investment involved, the scale of the investment (presumably, bigger is better, but this is unclear), the volume of the

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provides that "[w]ork is the primary right, obligation and privilege of citizens." HIEN PHAT, *supra* note 100, art. 58. Article 59 provides that workers are entitled to rest, and to social insurance benefits in retirement, old age, sickness, or disability. *Id.* art. 59. Article 63 guarantees equal pay and equal treatment to both sexes. *Id.* art. 63.

221. The foreign enterprise was required by article 12(1) of the 1977 Decree on Foreign Investment, to conclude a contract with the trade union committee, which would negotiate a "collective contract" regulating production levels and work conditions on an annual basis. 1977 Decree on Foreign Investment, *supra* note 25, art. 12.

222. Foreign Investment Regulations, *supra* note 30, arts. 68-69.

223. *Id.* arts. 70-71.

224. *Id.* art. 72.

225. IMC Interview, *supra* note 97.

226. Law on Foreign Investment in Vietnam, *supra* note 28, art. 26.

227. *Id.*

228. *Id.* art. 27.

enterprise's exports and its nature and duration. The decision as to whether and to what extent the tax holiday is to be granted is made by the State Organ for Management of Foreign Investment. It may exempt the joint venture from income tax payments for a maximum of two years from the first profit-making year. Thereafter, the joint venture may be allowed a 50% reduction of income tax for a maximum of two succeeding years.[229] Extensions and additional reductions may be granted by the State Organ for Management of Foreign Investment "in exceptional cases where encouragement of investment is needed."[230] No similar provision is made in the 1988 Law for contractual ventures or wholly foreign-owned enterprises. However, the 1988 Law provisions on taxation are sufficiently vague that all taxation issues, regardless of the form of investment, likely will be subject to negotiation, particularly if the proposed enterprise is especially needed in Vietnam's modernization efforts.

Tax refunds may be received for reinvested profits.[231] After payment of its income taxes, the joint venture is required to use 5% of its profits to set up a reserve fund, which shall be limited in total to 25% of the venture's registered capital.[232] Upon repatriation of capital abroad, all foreign organizations or persons must pay a tax of 5% to 10% of the profits repatriated. The 1988 Law only states that export and import duties "shall be levied according to the law of export-import duties."[233] Chapter 4 of the 1988 Law, which deals with taxes, concludes with the statement that "[t]he State Organ for Management of Foreign Investment may decide a tax exemption or reduction in each individual case where investment is exceptionally encouraged."[234]

The implementing 1988 Foreign Investment Regulations establish a corporate income tax on taxable profits for each of two categories of investments: (1) "Priority" investments are those under article 3 of the 1988 Law which meet certain additional criteria in the Regulations. Taxes for priority projects are assessed at the rate of 15% to 20% of actual profits. (2) "Standard" investments include all other investments with taxes ranging from 21% to 25% of actual profits.[235] Investments under the priority category may receive tax exemptions for a maximum of two years from the time the joint venture starts making a profit

229. *Id.*
230. *Id.* art. 28; *see also id.* art. 33.
231. *Id.* art. 32.
232. *Id.* art. 30.
233. *Id.* art. 34.
234. *Id.* art. 34.
235. Foreign Investment Regulations, *supra* note 30, art. 73.

and a 50% reduction of corporate income tax for another maximum period of two succeeding years.[236] The Regulations also provide certain other financial incentives,[237] provisions on withholding taxes,[238] reinvestment incentive refunds,[239] provisions for taxable year,[240] definitions of certain key terms,[241] method of assessment of profits,[242] provision for exemption of import duties in certain cases,[243] provision for business tax and sales tax,[244] personal income tax,[245] and special provisions relating to the usage of lands, forests, seas and other natural resources within the territorial boundaries of Vietnam.[246] Sources in Vietnam have advised the author that new regulations on taxes were under consideration at the time of this writing.[247]

In summary, the 1988 Law represents a liberalization of tax requirements, but remains so vague and indefinite that it is unlikely that many investors will commit significant capital to Vietnam until the government provides more specific guarantees. Until such time that more specific regulations are promulgated to address the many unanswered fiscal and taxation questions raised by the 1988 Law, such guarantees must be obtained through individual negotiations.

I. *Role of the State Organ for Management of Foreign Investment*

For the most part, the 1988 Law is administered by the State Organ for Management of Foreign Investment (State Organ), which has the general authority "to solve matters related to the investment operation of foreign organizations and persons in Vietnam."[248] Its specific rights and responsibilities with respect to foreign investment enterprises include providing assistance and guidance in negotiation and conclusion of contracts; service as a focal point for settlement of all matters at the request of the foreign investment contracts; granting

236. *Id.* art. 74.
237. *Id.* art. 75.
238. *Id.* art. 76.
239. *Id.* art. 77.
240. *Id.* art. 78.
241. *Id.* art. 79.
242. *Id.* art. 80.
243. *Id.* art. 81.
244. *Id.* art. 82.
245. *Id.* art. 83.
246. *Id.* art. 84.
247. IMC Interview, *supra* note 97.
248. Law on Foreign Investment in Vietnam, *supra* note 28, art. 36.

of preferences to foreign investment enterprises; monitoring and controlling foreign investment contracts; and analysis of the economic activities of foreign investment enterprises.[249]

The application and approval process for foreign investment contracts is set forth in article 37. The application is to be submitted to the State Organ along with the business co-operation contract or the joint venture contract, the charter of the joint venture or wholly foreign-owned enterprise, the project feasibility study, and any related documents as may be required by the State Organ.[250] The State Organ will consider applications and communicate decisions to the partners within three months of receiving an application. If approved, the State Organ issues an investment license to the partners.[251] The enterprise becomes a juridical person under Vietnamese law from the date of registration of its charter with the State Organ.[252]

More specific provisions concerning the Role of the State Organ may be found in the implementing 1988 Foreign Investment Regulations. Article 6 of the Regulations provides that the State Organ for administration of foreign investment is the State Committee for Co-operation and Investment. Additionally, the Ministry of External Economic Relations shall act as the government body responsible for receiving and processing investment projects submitted by foreign investors, recommending optional handling approaches and reporting to the State Committee for Co-operation and Investment for examination and decision.

J. *Dispute Resolution*

The Eastern emphasis on non-litigative dispute resolution is reflected in article 25 of the 1988 Law, which calls for mutual consultation and amicable settlement of any disputes between the two partners arising from a business co-operation or joint venture contract, between a joint venture or a wholly foreign-owned enterprise and Vietnamese economic institutions, or between enterprises. In the event an agreement settling the dispute is not reached, the dispute shall be referred to the Vietnamese economic arbitration body or any other arbitration or "law enforcement institution" as may be agreed upon.[253] There appears to be no geographic limitation on the forum where the dispute

249. *Id.*
250. *Id.* art. 37.
251. *Id.* art. 38.
252. *Id.* ch. 3, preamble.
253. *Id.* art. 25.

may be heard and decided, provided the decisionmaker is selected by mutual agreement.

The implementing regulations specifically provide that in the case of joint ventures, disputes remaining unsettled after negotiations between the partners may be referred to one of the following bodies: (a) the Foreign Trade Arbitration Committee at the Chamber of Commerce and Industry of the Socialist Republic of Vietnam; (b) an arbitration body in a third country; (c) an international arbitration body; or (d) an arbitration committee to be set up as may be agreed upon between the partners.[254]

Under the 1977 Decree on Foreign Investment, the contract normally provided for arbitration in either Vietnam or a third country.[255] The Foreign Trade Arbitration Committee, located in Hanoi, has been in existence since 1963, and the procedure for referring a dispute to the panel is very formal. However, the experience of foreign firms with the board reportedly has been very favorable.[256] In addition, Vietnam has a Maritime Arbitration Committee, also organized in 1963, which hears disputes related to ocean-carrying contracts.[257] Vietnam reportedly has placed a premium on honoring foreign investment contracts.[258]

Under the 1977 Decree on Foreign Investment, labor disputes were referred to the trade union organization at the plant, and could be forward to either a local labor office or to a local people's court.[259] Litigation between the foreign firm and a Vietnamese citizen would go to a people's court, which is a lower court of general jurisdiction.[260] In contrast, the 1988 Law has no special provision for the handling of labor disputes. The 1988 Foreign Investment Regulations merely state that the settlement of labor disputes "shall be regulated by labor contracts."[261]

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254. Foreign Investment Regulations, *supra* note 30, art. 93.

255. *See* Quigley, *supra* note 25, at 27-28.

256. *Id.* at 28.

257. *Id.* at 29.

258. For example, Prime Minister Pham Van Dong stressed this point to the Fourth National Congress: "We must strictly carry out the economic agreements and contracts concluded between our country and other countries." Quotation appearing *id.* at 29 n.18.

259. 1977 Decree on Foreign Investment, *supra* note 25, art. 24.

260. *Id.* (limiting liability for torts to the assets of the entity established to operate in Vietnam).

261. Foreign Investment Regulations, *supra* note 30, art. 68. The United States does not have diplomatic relations with Vietnam, and the Treasury Department forbids American travel companies to arrange or promote tours to Vietnam. In June 1989, Lindblad Travel Inc. was penalized more than $75,000 for violating the United States trade embargoes against Vietnam and Cambodia by offering tours to those countries. Hays, *Agency Is Fined for Tours to Vietnam*

In the past, Vietnam has insisted that Vietnamese civil law is the law for construction of the investment contract, and the Vietnamese party may not stipulate to a foreign system.[262] The 1988 Law does not specifically address this issue.

K. *Immigration, Communications, Import Licensing and Customs Issues*

The implementing Foreign Investment Regulations contain provisions on visas,[263] including availability of emergency visas to be issued at the port of entry upon 24 hours advance request.[264] The Regulations further provide that foreigners traveling under visas for purposes of conducting investigations and preparing for an eventual investment or participating in the execution of an investment project "shall enjoy free circulation in the areas deemed necessary for production and business operations . . . ."[265]

Foreigners working at enterprises with foreign capital are extended priority treatment in the use of postal and telecommunications facilities, and may set up their own communication system within the enterprise.[266]

Requirements for import duties are set forth in the Regulations.[267] By decree promulgated on March 3, 1989, the State Council established a schedule of "tariff of duties on commercial import goods," with tariffs ranging from 0% to 100%.[268] However, the tariff schedule is very sketchy at best. Generally, the Regulations call for "favorable conditions to facilitate customs clearance for foreign investment enter-

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and Cambodia, N.Y. Times, June 15, 1989, at 8, col. 5. However, individual travel to Vietnam by Americans is not forbidden and Americans may enter the country on United States passports. What is prohibited by the U.S. embargo is "doing business" with Vietnam. Vietnam visas may be obtained in various locations, including Bangkok, Thailand. However, the U.S. State Department discourages visits to Vietnam because it cannot provide consular protective services, and no third country represents the interests of the United States in Vietnam. *See Arranging a Visit to Vietnam is Tricky for Americans*, St. Petersburg Times, June 26, 1988, at 5E, col. 1.

262. *See* Quigley, *supra* note 25, at 35. (Based on his interview with Luu Van Dat, Quigley observed that this insistence on application of Vietnamese law was a way of protecting Vietnamese sovereignty.)

263. Foreign Investment Regulations, *supra* note 30, arts. 105-109.

264. *Id.* art. 107(3).

265. *Id.* art. 108.

266. *Id.* art. 110.

267. *Id.* art. 101.

268. Tariff of Duties on Commercial Import Goods, Promulgated in accordance with Decree 134 of the Socialist Republic of Vietnam State Council, Mar. 3, 1989. An English translation of this tariff schedule was obtained in Vietnam by the author and is in the author's files.

prises."[269] The Ministry of External Economic Relations shall issue licenses for exports and imports of commercial goods, and the General Department of Customs shall issue licenses for imports and exports of personal effects of foreigners.[270]

Very little detail is provided with respect to import licensing and procedures. The Regulations state that only one import application shall be required for the equipment, machinery, transport vehicles or raw materials and other materials to be imported by the foreign partner as part of his capital contribution.[271] Imports to meet the needs of production under a business cooperation contract already approved by the State Committee for Co-operation and Investment will be subject to either a single overall import quota or an annual import quota as may be proposed by the parties to the contract.[272] Priority will be given to the procurement of needed products in Vietnam as substitution for imports.[273]

L. *Summary and Conclusions — The Foreign Investment Law*

When the 1988 Foreign Investment Law of Vietnam is compared to some of its counterparts in the communist world, it demonstrates a desire to make many concessions necessary to attract investment capital. As compared to the Joint Venture Law in China,[274] for example, it is more comprehensive and addresses some of the critical issues not treated in sufficient detail in the Chinese prototype. However, it remains seriously deficient in that many aspects of potential problem areas, e.g., labor and personnel matters, repatriation of profits and capital, and taxation, have not been addressed sufficiently or at all. The 1988 Law likely will require far more amplification before a substantial number of investors decide to commit funds.[275]

The fact that Vietnam is only now attempting to emulate the Chinese example, after Westerners have had ten years of experience of investments under the new Chinese laws, may work against Vietnam in subtle ways. Americans traditionally have had a fascination

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269. *Id.*
270. *Id.* art. 103.
271. *Id.* art. 65.
272. *Id.*
273. *Id.*
274. Chinese Joint Venture Law, *supra* note 211.
275. Article 112 of the Foreign Investment Regulations calls for circulars to be issued by various ministries within 45 days of the date of the signing of the Regulations, but apparently the drafting process remains incomplete at the time of this writing. Foreign Investment Regulations, *supra* note 30, art. 112.

with China, and this sinophilia no doubt was a factor in early Western interest in Chinese investment opportunities. When early investors realized that success in China would require considerable time, patience and sacrifice, and that the visions of one billion consumers rushing to buy joint-ventured products was largely an illusion, a much more cautious mood set in. Particularly during the mid-1980's period, bitterness was evidenced among some Western investors in China, and overall investment appeared to fall into a state of decline. The reforms which followed, particularly the Provisions for the Encouragement of Foreign Investment promulgated by the State Council in 1986, injected some renewed enthusiasm in China's foreign investment sector.[276] By the late 1980's, however, the Chinese economy had developed a number of serious problems and a government-imposed austerity program was underway.[277]

The Beijing Massacre, which occurred on June 4, 1989, resulted in a severe faltering of Western confidence in China's legal system,[278] and drove many Western businessmen out of the country.[279] The Chinese experience graphically illustrates the many pitfalls of doing business in a developing socialist nation, particularly where totalitarian control by the Communist Party prevails. The more sober mood that now prevails in China no doubt will carry over to Western attitudes about investment in Vietnam, even if the United States embargo and other problems are resolved in the near future.

Until additional laws and regulations more clearly define the rights and duties of foreign investors, investors must depend upon negotiations with the government to more adequately protect their investments. Even if they can obtain needed assurances from the government, broader macroeconomic and political issues will continue to affect the attractiveness of investment in Vietnam. And finally, of course,

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276. Chinese Investment Provisions, *supra* note 214.

277. During the first half of 1989, gross industrial output in China grew by only 8.8%, compared to 17.2% for the same period in 1988. The growth of state, collective and village-level industries also were in a state of decline. During the same period, China was experiencing a decline in investment and retail sales. Inflation had reached record levels, and it appeared that a long-term recession was inevitable. *Towards Recession*, FAR E. ECON. REV., July 27, 1988, at 67. The period of significant growth in the agricultural sector appeared to have ended, and grain output had stagnated since 1984, while the costs of subsidizing grain for urban consumers continued to escalate. Rosario, *Coming a Cropper*, FAR E. ECON. REV., July 13, 1989, at 71. China's balance-of-payments difficulties were growing, and were expected to become worse in 1990. Rosario, *Foreign Accounting*, FAR E. ECON. REV., July 27, 1989, at 56.

278. *See, e.g.*, Cohen, *Law and Leadership in China*, FAR E. ECON. REV., July 13, 1989, at 23.

279. Wu Dunn, *Foreigners Scramble to Leave Beijing*, N.Y. Times, June 7, 1989, at 7, col. 1; Kreisler, *Companies Rush Exodus From Beijing*, N.Y. Times, June 7, 1989, at 29, col. 1.

the possibility of an abrupt swing to the left, as recently occurred in China, will cast an ominous cloud over investment in Vietnam for years to come.

V. Economic and Political Policies Affecting Modernization

A. *The Need for a Favorable Business Environment*

For investment in Vietnam to be attractive to foreigners, the government's economic policies must encourage foreign investment and the economic conditions of the country should provide a favorable environment. The Vietnamese government must make a commitment to treat foreign investments in a fair and just manner, to articulate policies characterized by predictability and consistency, to adopt unambiguous and nondiscriminatory rules, and to promote efforts to supply investment opportunity information.

Vietnam's government presents the 1988 Foreign Investment Law as the best evidence of its new policy of encouraging foreign investment. The Law is a major step forward in that it establishes in advance certain rules applicable both to the government and investors. One of the strengths of the 1988 Law is that it establishes one central government agency with the primary responsibility of managing foreign investment, the State Organ for Management of Foreign Investment.[280] Whether that agency will be consistent, fair, and nonarbitrary can only be determined through experience. The president's office apparently will have direct control over the State Organ for Management of Foreign Investment, which may help insulate it from the pervasive influence of government bureaucrats.[281] However, local bureaucrats will be responsible for handling the daily government business problems of foreign investment, which likely will result in the involvement of many ministries and departments.[282]

Nguyen Yuan Danh, national assembly member and one of the drafters of the law, said that a regional investment board will be created in each city and province.[283] These local boards will be supervised by the National Committee for Cooperation and Investment in Hanoi.[284] But Danh did make it clear that each board will be "allowed to act independently" and "have room for regional initiative" when

280. Law on Foreign Investment in Vietnam, *supra* note 28, art. 14.
281. Dawson, *supra* note 18, at 7.
282. *Id.*
283. Hiebert, *supra* note 119, at 79.
284. *Id.*

dealing with foreign investors.[285] One risk is that this structure may not ensure predictability in policy implementation, and may permit a lack of commitment to consistent and just treatment of foreign investment at the local level. Experiences in other socialist countries have illustrated how great the potential is for local bureaucrats to frustrate the noblest ambitions of central authorities and national lawmakers. On the other hand, increased decentralization of control may prove to be advantageous in that it unleashes local initiative and allows some local experimentation.

Ambiguities abound in the 1988 Law, and delays in clarification can stifle the interest of prospective investors. Article 42 states that detailed provisions for implementation will be issued by the Council of Ministries; such provisions are needed in all major areas of investor concern. For example, article 35 refers to the current import-export law,[286] but does not state what the law is. Article 27 provides for the possibility of tax incentives,[287] but does not specify who will make the decisions. Tax incentive requests can easily be lost in the bureaucracy. Article 23 provides that expatriate personnel salaries will be subject to income tax before repatriation,[288] but fails to state how the precise rates will be determined. Labor costs are ambiguous, and article 16 requires only that Vietnamese salaries will be paid in Vietnamese currency "originating from foreign currencies."[289] Until a stable official exchange rate is set, actual labor costs cannot be predicted. One government official explained that Hanoi wanted the law to be "as simple as possible" to allow for flexibility and leeway for government authorities.[290] However, foreign investors prefer clear and unequivocal rules of law announced in advance to provide a basis upon which possibilities for success may be assessed. Additionally, the Vietnamese bureaucracy, modelled after the Chinese and trained by the French, can be frustrating at best and potentially a nightmare for Westerners.[291]

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285. *Id.*

286. Law on Foreign Investment in Vietnam, *supra* note 28, art. 35.

287. *Id.* art. 27.

288. *Id.* art. 23.

289. *Id.* art. 15.

290. *Hanoi Woos Foreign Capital with Workforce and Resource Potential: New Investment Law Must be Able to Stand Up to Competition, printed in German in* Handelsblatt, Jan. 25, 1988, at 9, *reprinted in English in* JPSS-SEA-88-018, Mar. 28, 1988, at 51 [hereinafter *Hanoi Woos Foreign Capital with Workforce*].

291. *See* Dawson, *supra* note 18, at 7.

Ambiguous phrasing and absence of definitive provisions upon which decisionmaking can be premised deeply undermine Vietnam's statements of commitment to consistent and just treatment of foreign investment. With no predictable implementation of the law and incomplete advance notice of the rules of the game, investors understandably will be wary. The first step that must be taken is an extensive lawmaking effort to remedy these problems.

In addition to the obvious need for more information on legal rights and responsibilities, there is a great need for "investment opportunity information," including statistics on economic trends, trade flows, domestic market patterns and consumption patterns.[292] Socialist nations traditionally have been closed societies, and this works to their detriment in world economic relations. For example, one Western businessman found the Vietnamese unwilling to provide basic but necessary statistical information to consummate his proposed transaction.[293] He needed to know the amount of denim imported by Vietnam in 1987 and its uses to determine the costs and demand, but was only told that he should make an offer. His repeated explanations of the reasons for his request failed and he finally gave up. Apparently, the Soviet concept of *glasnost* (openness) has not yet matured in Vietnam.[294]

This anecdote illustrates the kinds of socio-economic, political and sometimes cultural barriers that may remain when a nation attempts such a radical change in economic policies. Regardless of statements of official policy changes emanating from the top, one cannot expect a bureaucracy taught and seasoned to be cautious towards outsiders to suddenly open up. The massive bureaucracy likely will hinder access to necessary information for some time. The lack of information is further complicated by complaints of foreign businessmen that Vietnamese companies frequently breach contracts and miss deadlines.[295]

Vietnam must commit itself to creating favorable economic conditions in order to attract significant levels of investment; this commitment will require sound economic planning and efficient use of re-

292. *See* Shihata, *supra* note 34, at 680.

293. *See* Richburg, *Hanoi Promotes "New Vietnam"*, Wash. Post, Feb. 13, 1988, at 310, col. 2.

294. However, it has been reported that a new spirit of openness (*cong khai*), which resembles the concept of *glasnost* in the U.S.S.R., currently is promoted as part of the new-style leadership.. Pike, *supra* note 26, at 249.

295. *See* Hiebert, *supra* note 119, at 80; Hiebert, *Vietnam Enacts Investment Law to Draw Capital, Aid Economy*, Wash. Post, Dec. 31, 1987, at A14, col. 3 [hereinafter *Vietnam Enacts Investment Law*].

sources. The economic development stage combined with continued good economic performance determine the general long-term opportunities for investment. At the December 1986 Sixth Communist Party Congress, the Vietnamese leaders acknowledged the serious failures of past economic policies and advocated bold reform and purification of the party and the government.[296]

Nguyen Van Linh gained acceptance of his first major economic reform package at the April 1987 plenum of the Communist Party of the Vietnam Central Committee.[297] The goal of the announced reforms was to reduce the central control of the economy and allow more room for the profit motive.[298] The government announced additional reforms on December 28, 1987, including expansion of the banking industry, introduction of wage scales based on productivity, incentives for workers, quality control and shareholding.[299] Additional reforms were announced, including limits on wage and price increases to abate inflation, government subsidy cuts, budget deficit cuts and initiation of an attempt to establish a foreign exchange rate.[300]

This pattern of economic reform demonstrates Vietnam's serious effort to develop sound economic planning and policies. However, the nation faces formidable challenges in rectifying its past inefficient use of resources and poor economic performance. In April 1987, factories were operating at only 50% of capacity.[301] In May, inflation was reported at 700% annually and per capita income at $180 annually.[302] Hanoi's official records showed a budget deficit of $150 million for 1986.[303] Vice Premier Vo Van Kiet reported to the National Assembly in December 1987 that economic failuires included sagging production, high unemployment, a rapidly growing population and critical shortage of goods and capital.[304] He revealed that per capita consumption of rice had decreased in the last three years, because the population grew by 2% (about one million people) annually, but rice production continued at the same level of eighteen million tons.[305] He also reported that only 40% of the one million young people entering the labor force

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296. *See Vietnam: Economic Failures Admitted*, FACTS ON FILE, Dec. 26, 1986, at 965.
297. *See Vietnam: Economic Reforms Unveiled*, *supra* note 111, at 339.
298. *Id.*
299. *Vietnam: Domestic Economic Policy Altered*, FACTS ON FILE, Dec. 28, 1987, at 1004.
300. Hiebert, *supra* note 119, at 80.
301. *Vietnam: Economic Reforms Unveiled*, *supra* note 111.
302. *Id.*
303. *Id.*
304. Hiebert, *supra* note 119, at 78.
305. *Vietnam Enacts Investment Law*, *supra* note 295.

annually find jobs.[306] The 1987 triple digit inflation increased by 50% by the year's end.[307] The United Nations ranking puts Vietnam among the ten poorest countries in the world.[308] Vietnam's alliance with Moscow provides little relief; the Soviet Union provides economic aid at the rate of only about two billion dollars annually.[309]

In spite of this grim picture of the economy in the 1980's, the reforms appear to be having positive effects. Inflation was measured officially for the first time by the price movement of a basket of commodities in 1989, and was determined to be only 82% per annum, based on the first few months of 1989. This is in sharp contrast to the high rates of inflation in 1987 and 1988.[310] Wages, on the other hand, remained relatively low and appeared to be declining. The government calculated that during early 1989, the national income was between U.S.$130 and U.S.$150 per capita, keeping Vietnam among the world's poorest countries.[311]

Vietnam has resources which are not fully utilized and which will attract foreign investors, including cheap labor, a skilled labor force, rich natural resources and a tropical climate conducive to agricultural production.[312] However, at least for the near future, many prospective foreign investors likely will conclude that Vietnam does not offer favorable economic conditions and will await further progress in Vietnam's attempts at sound economic planning and more efficient use of resources. The dilemma for Vietnam, however, is that the foreign capital, technology, know-how and management skills are needed now to realize economic progress.

B. *Financial and Administrative Institutions in Vietnam*

The low level of sophistication of the financial and administrative institutions, including the administrative procedures for investment, raises the issue of whether the Vietnamese institutions have developed to an extent that they can adequately handle the demands of an aggressive foreign investment program.

The banking system in Vietnam is considered primitive and weak,[313]

306. *Id.*

307. *Id.*

308. Dawson, *supra* note 18, at 7.

309. *Vietnam: Economic Failures Admitted, supra* note 296, at 965.

310. *Vietnamese Struggle with Liberalization of Economy*, Asian Wall St. J., May 16, 1989, at 6, col. 1.

311. *Id.*

312. Hiebert, *supra* note 119, at 79.

313. Murray & Enock, *Vietnam Turns to the Capitalists*, BUS. TRAVELLER, Mar., 1987, at 17; Hiebert, *supra* note 119, at 79.

although some recent developments indicate improvement.[314] Vietnam opened its first commercial bank in July 1987, with partial capitalization from private shareholders.[315] And in December, 1987, new economic policies announced included expansion of the banking industry.[316]

One major problem is that Hanoi has not set an official foreign exchange rate.[317] Article 24 of the 1988 Foreign Investment Law provides that the State Bank of Vietnam will announce the official exchange rate. However, it appears that this institution does not have the capability to determine such a rate, and Vietnam has turned to the International Monetary Fund (IMF) for assistance in setting a reliable exchange rate.[318]

In anticipation of the September 1989 Vietnamese pullout from Cambodia, world banking authorities began necessary preparations to restore assistance to Vietnam. The IMF made preparations to open a resident mission in Hanoi during the autumn 1989, and the World Bank scheduled its first official mission to Vietnam in ten years for late August 1989 to assess the nation's economic needs.[319] An international group led by France and including Japan, Sweden and the Netherlands also has been formed to help Hanoi pay its debts. Negotiations reportedly were completed by the summer of 1989 to have France provide bridge loans for Vietnam to pay off its arrears of U.S.$130 million to the IMF, with the expectation that a subsequent IMF loan would be used to repay the French.[320]

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314. In early spring 1989, Vietnam requested assistance from France in drawing up tax reform proposals and new accounting legislation, and in reforming the banking system, statistical services and the customs regime. *Vietnam: Reforms in the Making*, E. Asian Exec. Rep., May 15, 1989, at 7.

315. *Vietnam: Ho-Ho, Ho Chi Minh*, *supra* note 87.

316. *Vietnam: Domestic Economic Policy Altered*, *supra* note 299, at 1004.

317. *Hanoi Woos Foreign Capital with Workforce*, *supra* note 290, at 51.

318. Hiebert, *supra* note 119, at 80. Vietnam has lacked a viable exchange rate. Currently, there have been multiple exchange rates for the Vietnamese *Dong* for various purposes, including an official rate for trade, a rate for tourists, a rate for overseas Vietnamese remitting money to relatives within the country, and a rate for the ubiquitous black market exchange (which runs several times the official trade rate). White, *Vietnam Campaigns to Attract Investors*, Asian Wall St. J., Jan. 19, 1988, at 3, col. 1. Recently, Vietnam has begun to devalue its currency and has attempted to establish a unified exchange rate in an effort to attract hard currency through expanded trade relations, and to capture some of the hard currency that currently escapes through the black market. *Vietnam Devalues*, E. Asian Exec. Rep., Jan. 15, 1989, at 7.

319. Chanda, *The Rewards of Retreat*, FAR E. ECON. REV., July 6, 1989, at 52.

320. *Id.*

The State Organ for Management of Foreign Investment is the administrative agency authorized to solve foreign investment operation problems; to provide assistance, approval and incentive for joint venture contracts and private enterprises financed with foreign capital; and to monitor, control and analyze the execution, operation and activities of foreign investments.[321] However, the daily work of the State Organ will be carried out by low-level bureaucrats. Similarly, government investment agencies are staffed with functionaries who have little experience with Western investors.[322] The State Organ supposedly will follow "democratic centralism," meaning that regional economic entities will independently administer foreign investment, all of which have inadequate experience in dealing with foreigners or foreign business concepts.[323] Efficient administration cannot be predicted with any degree of certainty in light of poor capability and other problems with the bureaucracy.[324]

However, it should be noted that Vietnam is gaining this experience rapidly, as evidenced by the number of both Asian and Western nation businesses that already are developing trade and investment ties. Additionally, the central and southern Vietnamese in particular have considerable practical experience in dealing with Americans (and frequently have English language skills as well) because of their extensive contacts with Americans during the war.[325] Thus, in spite of the obvious deficiencies Vietnam suffers as a relative newcomer in the international trade and investment markets, it likely will adapt rapidly if it can overcome the bureaucratic inertia so typical of socialist systems.

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321. Law on Foreign Investment in Vietnam, *supra* note 28, arts. 36-37.

322. *Hanoi Woos Foreign Capital with Workforce*, *supra* note 290.

323. *Id.*

324. Although party leader Linh has been held back in his efforts to reform the nation's economy by intransigent bureaucrats and holdovers from the old hard line leadership, recent developments have further strengthened his hand. In March, 1989, it was reported that Phan Van Khai was promoted to Minister of Planning, in charge of the powerful State Planning Commission, signifying high-level support for more rapid implementation of the economic reforms. *Vietnam: Job Changes Signal Speedier Reforms*, E. Asian Exec. Rep., Mar. 15, 1989, at 6. During the same period, senior party official Vo Dong Giang relinquished his post as Vice Minister of Foreign Trade to head the newly formed State Commission for Cooperation and Investment for attracting foreign investment to Vietnam. Vo Dong Giang formerly was mayor of Ho Chi Minh City. *Id.*

325. One of the significant political changes in recent years is the emergence of a "southern predominance" among the new leadership, with virtually all of the major figures in government now having long and intimate career associations in the south. Pike, *supra* note 26, at 248. This is important, because those leaders may be better able to mobilize the significant economic potential in southern Vietnam.

C. *Vietnam's Infrastructure*

Another major consideration for prospective investors is Vietnam's infrastructure. Prospective investors must assess the existence and condition of physical facilities and human resources. Physical facilities requirements include an adequate transportation system, including railroads, roads, harbors, and airports; power, water, and sewer systems; telecommunication systems; housing; and natural resources. Additional considerations are the existence of free trade zones and industrial estates. The human resources requirements include adequate skilled labor, technical and managerial personnel and labor-management discipline.

Companies with business experience in Vietnam report that the infrastructure is not adequately developed to contribute to a favorable investment climate.[326] The transportation system is underdeveloped,[327] the roads are in poor condition[328] and administration of ports, dominated by socialist shipping lines, is inefficient.[329] As late as 1988, Ho Chi Minh City only had a maximum of three international flights leaving daily.[330] Railroad improvement is underway with the assistance of the United Nations and India.[331] Power supplies are insufficient and undependable.[332] Communications generally are deficient, and the telecommunications system is primitive. There are only seventy thousand telephones for three and a half million people in Ho Chi Minh City.[333] A joint venture with a French company, Alcatel, plans to provide a new telecommunications system,[334] but the nation's telephone service will remain primitive for some time. Telex machines are manual and few in number. Long-distance telephone calls depend on single-sided radio. Morse Code transmissions are still the mode in many telegraph offices. Foreign investors will face additional communications problems in certain parts of the country because fluent translators and interpreters are scarce and the government has first choice of foreign-language graduates.[335]

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326. *Vietnam Enacts Investment Law, supra* note 295.
327. *Hanoi Woos Foreign Capital with Workforce, supra* note 290, at 52.
328. *Vietnam Enacts Investment Law, supra* note 295, at A14, col. 3.
329. *Hanoi Woos Foreign Capital with Workforce, supra* note 290, at 52.
330. Dawson, *supra* note 18, at 7.
331. *Vietnam: Ho-Ho, Ho Chi Minh, supra* note 87, at 26.
332. *Hanoi Woos Foreign Capital with Workforce, supra* note 290, at 52.
333. Dawson, *supra* note 18, at 7.
334. Heibert, *supra* note 119, at 79.
335. *Id.*

Among the investment advantages touted by Vietnam are rich natural resources and a skilled labor force, but companies with experience there say there are few trained managers.[336] Nevertheless, the work force reportedly is highly disciplined and inexpensive.[337] The 1988 Foreign Investment Law raises the issue of whether costs will continue to be low for the foreign investor. Article 16 of the 1988 Law contains ambiguous language which requires that Vietnamese salaries, wages and fringe benefits be paid in Vietnamese currency, but "originating from foreign currencies."[338] Moreover, the real costs of labor will depend upon the setting of an official exchange rate.

Clearly, the prospective foreign investor must weigh carefully the costs, delays and other inconveniences that will be occasioned by Vietnam's infrastructure. However, one of the areas of investment specifically encouraged by the 1988 Law is building of the infrastructure.[339] Accordingly, the nation's need to build its infrastructure creates many opportunities for some types of investors.

D. *Vietnam's Legal Factors*

The current status of Vietnam's legal system will be a major consideration for prospective investors. The elements of a legal system necessary to create a favorable investment climate include the existence of an adequate body of published rules, including rules regulating foreign investment, domestic legal relations, and international agreements. Secondly, there is a need for a fair and equitable dispute resolution procedure applicable to foreign investors, their Vietnamese partners, and the host country, addressing both domestic and international issues and remedies.

Vietnam's motivation for drafting the 1988 Law is the development and modernization of the economy, which is in shambles after years of Stalinist-style management.[340] Vietnam is seeking more trade, investment and aid to improve its economy.[341] The heavy emphasis on export expansion poses a potential conflict with the common interest of foreign investors in gaining access to the "last virgin market" for consumer goods in Southeast Asia.[342] Encouragement of export expan-

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336. *Vietnam Enacts Investment Law, supra* note 295.
337. *Id.*
338. Law on Foreign Investment in Vietnam, *supra* note 28, art. 16.
339. *Id.* art. 3.
340. *Glastnost Takes a Slow Boat to Vietnam, supra* note 84, at 51.
341. *Id.*
342. *Vietnam Enacts Import Law, supra* note 295.

sion may be tantamount to an export requirement under the 1988 Law. Joint ventures are required to export to cover their foreign currency needs.[343] All foreign investment enterprises are required to pay Vietnamese salaries, wages and benefits with foreign currency exchanged to Vietnamese currency.[344] A foreign investor may not gain much access to that "last virgin market" if required to export in order to cover labor costs and realize a profit.

The investor may look for creative solutions, such as those used to solve this same problem by joint venturers doing business with the Soviet Union or China. These solutions include, for example, extracting profits in the form of products, and then selling the products outside of Vietnam (assuming there is a market elsewhere);[345] using profits to buy Vietnamese raw materials to be used or sold elsewhere; or exporting the intermediate products of production.[346]

E. *The Role of Human Rights and Democratic Reforms*

Even if the United States restores economic relations with Vietnam, human rights practices of Vietnam may impede warm economic relations. The questions of political prisoners surely will pose an issue. It is impossible to obtain reliable statistics on the number of political prisoners arrested by the Vietnamese government since the United States armed forces left the country. Accounts based upon public admissions of the Vietnamese government (40,000 in the late 1970's alone) and former government officials emigrating to the West (340,000 in South Vietnam alone) vary widely.[347] Many of the South Vietnamese who worked with the American military forces have been imprisoned. Even upon their release, many have found that it is difficult to get a job or secure other benefits because of government-imposed discrimination.[348] Additionally, freedom of religion reportedly is repressed in Vietnam in spite of some efforts by Nguyen Van Linh to appease foreign religious interests.[349]

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343. Law on Foreign Investment in Vietnam, *supra* note 28, art. 11.

344. *Id.* art. 16.

345. Brady, Galuszka, & Lewald, *Ivan Starts Learning the Capitalist Ropes: Western Partnerships Are Teaching Soviet Managers the Rules*, BUS. WK., Nov. 2, 1987, at 154.

346. Brady, Comes & Galuszka, *Soviet Union: Letting Western Business In*, BUS. WK., Apr. 20, 1987, at 40.

347. Morris, *Vietnam's Unreformed Gulag*, Asian Wall St. J., Oct. 9-10, 1987, at 10, col. 2.

348. *See, e.g.*, Sutton, *Pilgrimage to Fort Courage*, ARMY, Mar. 1988, at 30, 32. The author's interviews with South Vietnamese formerly employed by the American military forces confirmed such accounts.

349. *See*, Roelofsma, *Vietnam's Wielding of the Faithful*, INSIGHT, Dec. 21, 1987, at 58.

Perhaps one of the most serious domestic political challenges to be faced by Vietnam's reformist administration will be coping with the pressures for political change which typically have accompanied drastic economic liberalizations in the socialist world. The Soviet Union and many of the eastern bloc countries already are struggling with open challenges to the Communist Party's dominance.[350] Showing less tolerance than the Soviet Union has shown to political challenge, the regime of Deng Xiaoping in China used massive force to repress democracy demonstrations in 1989.[351] At the time of this writing, many continue to ask the question whether history will repeat itself and the Soviet Union also will return to the cycle of revolution and repression.[352]

In a new political movement in Vietnam, many of the veterans of the wars with France and the United States recently have been mobilizing the population to pressure the central authorities to improve living standards, introduce basic freedoms, and generally dismantle some of the oppressive features of communism.[353] Calling themselves the "Club of Resistance Fighters," the activists have in fact emerged as a de facto opposition party or pressure group, posing an unprecedented challenge to the Communist Party in Vietnam. By early 1989, the club had twelve branches at the district or suburb level in Ho Chi Minh City, with a total membership of more than 10,000. Reportedly, hundreds of thousands of others participate in club activities and are in the process of joining.[354] Among the membership of the club are important former leaders of the military, including retired Lt. Gen. Tran Van Tra, who in 1982 published his memoirs portraying a highly critical view of the government.[355]

Actions were taken during 1988 to discourage publication of the club's newspaper, which was critical of the regime.[356] Party Secretary Linh, speaking at an important Party plenum during March 1989, stated that "[a]ny scheme to play down or neutralize the Party leadership or create political counterforces to the Party in the society must be prevented."[357]

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350. For the first time, a communist regime in Eastern Europe was peacefully ousted by a rival political party in Poland. *Freedom's Turn*, NEWSWEEK, Aug. 28, 1989, at 16.

351. *See supra* notes 9-14 and accompanying text.

352. Nagorski, *Will History Repeat Itself?*, NEWSWEEK, Aug. 28, 1989, at 23.

353. Wain, *Vietnamese 'Club' Boldly Voices Dissent*, Asian Wall St. J., Apr. 27, 1989, at 1, col. 3.

354. *Id.*, at 20, col. 1.

355. *See* Wain, *Vietnamese General Doesn't Regret Speaking His Mind*, Asian Wall St. J., Apr. 27, 1989, at 20, col. 3.

356. *Id.*

357. *Id.*

F. *Perceptions of Political Risk in Vietnam*

The threat of domestic turmoil, brought on by leftist responses to democratic initiatives of the people, such as occurred in China in 1989, is not the only source of political risk. Vietnam's occupation of Cambodia, which began in 1978,[358] not only imposed heavy economic burdens on Vietnam,[359] but also exacerbated the political risks for foreign investors in that entire region. Vietnam's claims that its final troop withdrawal from Cambodia was completed September 26, 1989, well ahead of its earlier promises of a 1990 pullout.[360] However, until Vietnam's disengagement from Cambodia is recognized as a reality, even non-American foreign investors probably will conclude that the unrest in Cambodia poses too great a political risk for major investments in Vietnam, especially in light of the pressures generated by the American embargo.

Border clashes between China and Vietnam create another political risk.[361] A clash occurred at sea on March 14, 1988,[362] which raised the issue of whether Vietnam and China may in the future engage in more serious warfare. Some foreign investors may conclude that the prospect of repetition of such clashes enhance the political risks beyond the point of reasonable acceptance.

VI. CONCLUSION

Modernization is the only way out of Vietnam's current state of economic chaos. More pointedly, as several Vietnamese interviewees told the author in May 1989, doing business with the United States is considered the key to Vietnam's progress. To make modernization possible, significant political reforms must occur, beginning at the top of the nation's hierarchy.[363] The more progressive elements in Viet-

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358. *Vietnam's Gaze Sends a Shiver through Thailand*, ECONOMIST, Nov. 9, 1985, at 41.

359. The pullout of Vietnamese troops from Cambodia will enable the government to proceed with the planned overall reduction in the armed forces, which constitutes a significant drain on the economy. Two hundred thousand troops were demobilized during 1988, and Hanoi projects discharges of 500,000 more by the end of 1990. This will leave an army of about 600,000 regular troops. The objective is to have a standing army of only one percent of the population. This will reduce the budget share allocated to military spending from the current 20% to only 12%-15% of total expenditures. *Vietnamese Struggle with Liberalization of Economy*, *supra* note 310.

360. Hiebert, *No Love Lost*, FAR. E. ECON. REV., Oct. 12, 1989, at 38; *see also Glasnost Takes a Slow Boat to Vietnam*, *supra* note 84, at 51.

361. *The Power Balance That Keeps Hanoi in Check*, BUS. WK., Apr. 22, 1985, at 57.

362. *Southeast Asia: China, Vietnam Clash at Sea*, FACTS ON FILE, Mar. 25, 1988, at 201.

363. The Vietnamese gerontocracy, which was so successful in mobilizing the country during wartime, has produced an unrelieved record of domestic economic and foreign relations failures.

nam's leadership appear to recognize the dilemmas,[364] and some important first steps have been taken.

Vietnam's new leaders have shown encouraging persistence in carrying out economic reforms. Tough economic measures were adopted beginning in March 1989 that were beginning to show results at the time of this writing.[365] Those reforms were aimed primarily at reducing government spending and cutting the budget deficit. Reform moves included devaluation of the Vietnamese currency to a rate near that of the black market; restrictions on the availability of credit and adoption of realistic interest rates; reduction in subsidies paid to state employees and to inefficient state enterprises; and a refocusing of the nation's tax system to raise taxes on luxury goods, while cutting taxes on equipment intended to boost production.[366] As a result of recent reforms, inflation has been cut dramatically from the official estimates of 200% per month during 1988 to about 3.5% per month during April and May, 1989.[367] As a result of more recent good harvests and the strengthening of the Vietnamese currency, rice supplies have increased and food prices have fallen, eliminating the critical shortages of agricultural goods that threatened famine in recent years.[368]

However, while the reforms have shown some successes in bringing Vietnam's economy under control, they have come with an ideological price. One of the basic hallmarks of communism has been the worker security guaranteed by the state. By spring of 1989, it was clear that massive numbers of employees were not receiving timely payment of salary because of a currency shortage, and employees were being laid off by the hundreds of thousands.[369] Unemployment clearly will exacerbate political pressures on the reformist regime.

The new emphasis on enterprise management responsibility has resulted in a flirtation with another notion usually identified with free

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However, the older ultraconservative leadership largely have been shunted from power, and gradually are passing away. *See Was in Ho Chi Minh's Inner Circle*, N.Y. Times, Oct. 2, 1988, at 21, col. 4. As one observer of the Vietnam scene recently commented, "[T]ime and human mortality are Vietnam's best hopes." Pike, *supra* note 26, at 251.

364. Increasingly, Vietnam's new rulers are recognizing that they must abandon their traditional defensive posture towards outside influence and open up to foreign economic assistance and ideas. *See, e.g., Official Seeks More Open Vietnam*, Asian Wall St. J., Feb. 25, 1988, at 3, col. 1.

365. Hiebert, *The Pain of Reform*, FAR E. ECON. REV., July 6, 1989, at 53.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

market capitalist systems: enterprise bankruptcy. For the first time, some of the state-owned factories were being allowed to declare bankruptcy in early 1989, although there are as yet no laws dealing with liquidation of assets and other related problems.[370]

The successes of China during the recent decade appear to offer, at least in part, one viable model for Vietnam. But economic reform according to the Chinese model will require the adoption of many Western techniques, including greater market liberalization and a greater receptiveness to Westerners. The 1988 Foreign Investment Law represents a significant step in that direction. The first license for a foreign investment enterprise was granted in July 1988 to a Hong Kong concern to rent cars in the beach resort of Vung Tau.[371] By July 1989, a total of sixty-three foreign investment enterprises had been approved, representing a total capital commitment of about $640 million, with $252 million of it to be raised domestically. Only twenty-seven of those ventures had started operations by July 1989.[372]

Investment by eastern-bloc countries has been relatively modest. The Soviet Union has invested in fishing enterprises, and Czechoslovakia has invested in businesses importing electronic components from other Asian countries, assembling products in Vietnam and exporting them to Czechoslovakia.[373]

The great majority of foreign investments under the 1988 Foreign Investment Law have been from Western nations, and have gone to southern Vietnam, attracted in part by the superior infrastructure developed by the United States-backed administrations that existed prior to 1975.[374] By mid-summer, 1989, the expatriate community of foreign businessmen and business consultants had grown to about 100, including a number of overseas Vietnamese. Most of them opened offices in Ho Chi Minh City.[375]

While the 1988 Foreign Investment Law signals a receptiveness to Western investment, it nevertheless is deficient in many significant respects. Even as supplemented by the Foreign Investment Regula-

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370. It was reported in May 1989 that seventeen enterprises in the southern province of Tay Ninh already had been dissolved, and that province alone still had another 176 state enterprises which were losing money. *Id.*

371. Wain, *Foreign Investors Edge Back to Vietnam*, Asian Wall St. J., July 12, 1989, at 1, col. 3.

372. *Id.* at 7, col. 5.

373. *Id.*

374. *Id.*

375. Wain, *Australian Scouts Vietnam for Business*, Asian Wall St. J., July 12, 1989, at 7, col. 4.

tions, it cannot by itself lure substantial foreign capital, technology, and know-how. Key provisions of the 1988 Law and supplemental regulations need early clarification and amplification to serve as the foundational documents for significant Western investment.

Moreover, the 1988 Law and regulations cannot by themselves offer the stable legal environment needed to attract the necessary infusion of Western capital. The 1988 Law must be part of an integrated and comprehensive legal system which provides an intelligible framework for addressing the myriad questions which will be asked by investors. If Vietnam is to have any success in emulating the Chinese successes, it must, as China has done, launch a major program of legalization. The process of developing even a rudimentary legal system that will be responsive to Western expectations will require years of effort. Finally, if Vietnam is to be successful in keeping Western investment, it must abide by the rule of law and avoid the kinds of oppressive brutality which China exhibited during and after the 1989 Beijing Massacre.

The internalization of legal, political and economic reforms by the Vietnamese rulers and general populace will pose an on-going challenge. Particularly important will be the acceptance by the bureaucracy of modernization and the rules of law. As demonstrated by the experience of both China and the Soviet Union, the most ambitious reforms can be frustrated by the rigidities of a Stalinist-style bureaucracy.

If sufficient Western investment can be attracted, Vietnam does have reason to hope for an economic miracle in the foreseeable future. Those investors who are astute, experienced, and patient enough likewise should have sufficient opportunities to make their substantial efforts worthwhile.

Politically, Vietnam is far from having achieved the kind of overhaul necessary to demonstrate a lasting commitment to modernization. If economic relations with the West are restored, Vietnam's human rights policies and treatment of the nascent democratic movements will be watched with great scrutiny.

The single most significant barrier to Vietnam's success in attracting Western capital is its poor relations with the United States and neighboring countries. So long as it is the target of an embargo by the United States, trade and investment with Vietnam by the West will be stymied. As priorities are being reassessed and reordered under Vietnam's new leadership, few issues can be as important in its economic and foreign relations today as reconciliation of its differences with the United States and its Asian neighbors.