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A Survey of Viet Nam's Legal Framework in Transition

Natalie G. Lichtenstein

A survey of the laws and decrees that Viet Nam has begun to enact in company law, contract law, banking law, laws on foreign investment, and other priority areas.

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Summary findings

Viet Nam is trying to preserve its sociopolitical system while moving gradually toward a different economic system, recognizing that law is a valuable instrument for effecting orderly change.

It has begun to enact the laws and decrees needed in such areas as company law, contract law, banking law, and, especially, laws on foreign investment. Further progress toward a market system will require more legislative activity. Lichtenstein highlights four areas of special priority:

- Thoroughly implementing the new *land law,* by issuing detailed regulations to "marketize" the leasehold system, clarify land-use rights in liquidating state enterprises or making them corporations, and establish a firm basis for mortgage financing.
- Deepening state enterprise reform through a new *legal framework for state enterprises,* to be established under a revised company law, to permit state enterprises to operate under the same framework as nonstate enterprises. This should be accompanied by a new state enterprise law and regulations for the state's management of its shares in enterprises.
- Revising the framework of *company law* and *foreign investment law* to implement and expand pilot corporatizations.
- Finalizing the *civil code and commercial law* to provide rules of the game for everyday business transactions and for resolution of the disputes that will inevitably result from them.

Other areas less far-reaching in impact but important for market development include regulations to implement bankruptcy law, competition law, and securities law.

In addition, Lichtenstein notes the need to guard against separate legal regimes for state enterprises, nonstate enterprises, and foreign-invested enterprises, as this would interfere with efficient competition among enterprises with different ownership structures.

It is also important to coordinate foreign legal assistance and to accommodate Viet Nam's legal traditions and preferences, especially in such areas as dispute resolution.

This paper — a product of the East Asia and Pacific Division, Legal Department — is part of a larger effort in the departme to share with interested parties legal research done as part of the department's operational work. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Malini Rangarajan, 100 MC6-367, extension 81710 (61 pages). April 1994.

A SURVEY OF

VIET NAM'S LEGAL FRAMEWORK

IN TRANSITION

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FOREWORD

This survey of Viet Nam's legal framework is of particular interest for a number of reasons. As the author explains, the present Vietnamese legal system is the product of various legal structures of very disparate origins. Furthermore, Viet Nam provides a unique example of a country which attempts to preserve its socio-political system while moving gradually towards a different economic system - a situation where law becomes a valuable instrument of affecting an orderly change. Little is also known outside Viet Nam of the intricacies of its legal system.

For these reasons, this study is well qualified for wider distribution and deserves attention by all those concerned with the vital role law plays in the development process.

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A SURVEY OF
VIET NAM'S LEGAL FRAMEWORK IN TRANSITION

A. INTRODUCTION

1. In Viet Nam, as elsewhere, the transition from a socialist planned economy to a market economy requires corresponding changes in the legal framework for economic activity. Where economic actors may have once relied on government agencies for the overall management of their economic transactions and for the resolution of any consequential disputes, they will need to be able to rely instead on the rules and recourse provided by a legal system independent from government interference. To offer sufficient reliability for these actors to make efficient decisions, the legal system must come to be perceived as predictable, transparent and fair.

2. This general need for the development of a legal framework to support market development is seen more specifically in the areas of law most closely related to economic transactions. There are many areas in which reforms are necessary:

(a) The legal basis for different kinds of property ownership must be clearly established.

(b) The ownership structures and governance processes for different kinds of enterprises must be defined, in company and business laws and regulations.

(c) Increasing reliance on market-based transactions among independent contracting parties requires a functioning system of commercial law, including contract law, with adequate means for enforcing contract performance and protection of intellectual property rights.

(d) Development of a competitive environment requires bankruptcy and competition laws, promoting fair and effective competition among

autonomous enterprises and ensuring that the public interest continues to be protected even without direct state management of enterprises.

(e) For access to necessary resources (finance, land, labor) through a market-driven system rather than through a planning mechanism, reforms are needed in financial laws, such as securities law and securities regulation, and development of the banking system and banking law along market lines; in land law to define land use rights, the means for transferring, valuing registering and mortgaging these rights, and the scope of land use rights, public regulation of land use; and in labor laws, to create a labor contract system, as well as systems for the provision of workers' rights and benefits which are not tied to the particular employer.

(f) To take full advantage of financial and natural resources, the recent legal framework for foreign investment and environmental protection must also be strengthened.

(g) To make all of this reliance on legal mechanisms workable, legal institutions and dispute resolution processes are essential, including court litigation and arbitration as well as administrative enforcement of appropriate government regulatory powers.

This paper surveys the current stage of development of Viet Nam's legal system in each of these areas, and suggests future legislative requirements. In the process, the legal framework for state enterprise reform is reviewed in some detail, with a view to assessing the legal structures necessary for Viet Nam's state enterprises to progress through the transition to a market economy.[1]

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[1] For a comparison of similar developments in other transition economies, see, e.g., Natalie Lichtenstein, "Enterprise Reform in China: The Evolving Legal Framework", World Bank Working Paper No. WP 1198 (World Bank Legal Department, September 1993), and Cheryl W. Gray and Associates, "Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe", World Bank Discussion Paper No. 209 (1993).

3. This survey must be viewed in the context of the current stage of Vietnamese legal reform. To begin with, Viet Nam's legal system blends together several important legacies: a centuries-old Vietnamese legal tradition, seventy years under French-influenced codes and forty years of socialist legislation, with a measure of U.S. common law influences in the pre-1975 period. Against this backdrop, Viet Nam's lawmakers, economists and lawyers alike, have been charged with creating a new legal framework for market transactions and forms of economic activity that, are themselves new to the Socialist Republic of Viet Nam. As economic reform has progressed in a gradual process over several years, so has the legal framework proceeded gradually, with laws and ordinances legislating some areas (e.g. land, contract, foreign investment) and governmental decrees and circulars governing others (e.g. state enterprises). And, of course, the difficulty of obtaining ready translations of older laws and many government decrees and circulars has necessarily imposed limits on the scope of this review. Nonetheless, the body of legislation reviewed here is substantial enough to give credence to the silhouette that emerges, and each passing session of the National Assembly or its Standing Committee brings new laws and ordinances to provide a more detailed picture.

4. The context of Vietnamese legal reform also includes the larger landscape of economic reform.[2] Law alone is not enough to bring about economic changes, much as it is a necessary element. Moreover, law cannot play its full role in facilitating and enshrining economic change if it remains only a prescription in lawbooks and is not implemented in reality. While the survey that follows is based predominantly on legislation and addresses economic reality only sporadically, it is still important to bear in mind that the full effect of the legal framework on Viet Nam's economy in its transition to the market can only be assessed in the broader context of the economic reforms.

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[2] For a discussion of the current state of economic reform in Viet Nam, see "Viet Nam - Transition to the Market," published by the World Bank (Country Operations Division, Country Department I, East Asia and Pacific Region) in September 1993.

B. PROPERTY RIGHTS

5. The legal basis for different types of property rights in Viet Nam stems from the Constitution. Until 1992, the Constitution provided for two main sectors of the national economy: the state sector (representing ownership by the whole people) and the collective sector.[3] At the same time, the development of the co-operative sector of the economy was recognized, along with limited private activity in agriculture, handicrafts, small industry and services.[4] Explicit recognition of private property was limited to the rights of individuals to lawfully earned income and savings, to housing and other personal property and to the means necessary to engage in private activities permitted under law.[5]

6. In April 1992, a new Constitution was approved by the National Assembly which not only clearly permitted private ownership but also enhanced the protection offered by the State for such ownership. This Constitution establishes three basic types of ownership: by the whole people (State ownership), collective ownership, and private ownership, with the first two as the foundation.[6] Moreover, all three types of ownership receive legal protection from the State.[7] The nationalization of private property rights of individuals and organizations is prohibited, while the necessary taking of property must be compensated.[8] As under the 1980 Constitution, the rights of inheritance and transfer are also provided for in the current Constitution.[9]

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[3]Constitution of the Socialist Republic of Viet Nam (1980), Article 18.

[4]Constitution (1980), Articles 23 and 24.

[5]Constitution (1980), Article 27.

[6]Constitution (1992), Article 15.

[7]Constitution (1992), Articles 19-22.

[8]Constitution (1992), Article 23.

[9]Constitution (1992), Article 58; Constitution (1980), Article 27.

7. The development of private property rights, usually considered a necessary element of a market economy, began much before the constitutional revision in 1992--evidence of increased private sector activity could be seen throughout the preceding few years. However, from the point of view of the legal system, creating a clear basis in law for the ownership and transfer of private property is important for two reasons. First, the formal approval by the legislature sends a signal to potential private entrepreneurs and investors that private economic activity is officially sanctioned. In making the move from plan to market, this kind of official sanction could be expected to carry some weight. Second, those individuals who would, on the basis of this official sanction, seek to initiate private economic activity can rely on the legal protection of their future acts in carrying out their business. It is worth noting here that in the case of China, which had very similar constitutional provisions to the 1980 Vietnamese Constitution on the subject of ownership, a constitutional amendment was also enacted in 1988 to permit and protect private property rights in an expanded way and the move to a socialist market economy was further enshrined in the Chinese Constitution in March 1993.[10] In a civil law system such as Viet Nam's, provisions on ownership could also be found in the Civil Code (or a law on ownership of property), so additional treatment of the ownership regime in Viet Nam may be found in the Civil Code slated for enactment in 1994.

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[10]Constitution of the People's Republic of China, as amended April 1988, Article 11. The 1988 amendments to the Chinese Constitution also permitted the transfer of land use rights and leasing of land which had previously been restricted. Article 10. See also the amendments to the Chinese Constitution approved by the National People's Congress in March 1993.

C. STRUCTURE AND GOVERNANCE OF ENTERPRISES

8. The introduction of the renovation policies and the further development of a market economy requires a legal framework for the establishment, operation and termination of enterprises. Such a framework is necessary to give private investors sufficient confidence that the rules of the game are generally transparent and reliable. For state enterprises, such a framework is necessary to stimulate state enterprise efficiency by separating state ownership from management and putting state enterprises on a level, competitive footing with non-state enterprises. So far, the legal framework for state and non-state enterprises has developed separately, while enterprises with foreign investment are under yet another set of laws and regulations. This multiplicity of legal rules complicates transactions and takes away from the clarity that the legal framework could otherwise offer. It also has the potential for leading to inefficient economic structures if different ownership combinations are arbitrarily prohibited.

1. Companies and Private Businesses

9. Legislative background. While the formal recognition of broader private ownership came only in the 1992 Constitution, two important laws were enacted by the National Assembly in December 1990 that provided the structure for legal entities outside State or collective ownership: the Law on Private Business and the Law on Companies. These laws laid the groundwork for individuals (either singly or jointly) and legal entities to invest their resources in various kinds of economic activity. Looking at the stated objectives of the two laws confirms the legislative intent behind their enactment. The Law on Private Business was enacted:

> in order to implement a basis for the development of a multi-sector commodity economy, encourage investment and business, protect the lawful interests of private entrepreneurs, and enhance the

> efficiency of State management in respect of all business activities.[11]

The Law on Companies was enacted for the following similar purposes, although here reference to management by the State is notably and appropriately absent:

> in order to develop a multi-sector commodity economy; mobilize and use, in an effective way, all national sources of capital, labor and natural resources; create further employment; protect the lawful interests of those who invest capital; accelerate the speed of economic development; increase the efficiency in management of all business operations conducted in Vietnam.[12]

While predating the official sanction of the subsequent constitutional revisions, these laws could be seen to offer assurance to investors that private investment was acceptable and encouraged. For those who would then wish to invest, the two laws also provide similar protection for the businesses operated under them: a recognition of their long-term existence and development; equality with other enterprises before the law; lawful generation of profits; freedom to carry out business and make business decisions independently, within the scope of the law; and protection of the right of the owners, such as to own means of production and inherit capital and assets.[13]

10. Types of enterprises. These two laws and the decrees implementing them created the legal rules for the establishment, operation and State regulation of three new forms of enterprises: private business, limited liability company and shareholding company. A private business under the law is similar to a sole proprietorship, owned by one Vietnamese individual who is liable for the

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[11]Law on Private Business, preamble.

[12]Law on Companies, preamble.

[13]Law on Companies, Articles 5-6; Law on Private Business, Articles 3-4.

activities of the business to the extent of the individual's total assets.[14] A **company** is an enterprise in which members (Vietnamese individuals and legal entities) contribute capital and share proportionately in the profits and losses, to the extent of their capital contribution.[15] A **limited liability company** is a company in which shares are not issued and transfer of ownership to non-members is restricted.[16] A **shareholding company** is a company which issues equal shares, freely transferable, owned by at least seven shareholders and which may apply to issue shares publicly.[17] None of these forms currently permit foreign ownership, which is only permitted under foreign investment vehicles (para. 52).

11. Governmental role. While the laws and the regulations implementing them create a legal framework for non-State enterprises to be established, operated and dissolved, there are still ample requirements for Government approval and intervention in the process. Under this framework, governmental approvals are required in the stages of establishment (including limitations on fields of business) and dissolution and registration is required at the time of establishment or changes in operations. Many non-socialist systems require business registration as an administrative act, so this should not be seen as a limitation to market development. However, where there is no state ownership

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[14]Law on Private Business, Article 2.

[15]Law on Companies, Article 2. The Law is less clear about the actual ownership rights of members. Article 8 provides that members of a company have the right to "own the undivided part of the assets of the company which is proportionate to their capital contributed to it." In most legal systems, the members (shareholders) own a share of a legal entity, the company, and the assets are owned by the company. Even in dissolution, the shareholders receive the proceeds from sale of the assets but would be unlikely to hold actual legal title to any corporate asset.

[16]Law on Companies, Article 25. Transfers to non-members require unanimous approval from members representing at least 75% of the company's charter capital.

[17]Law on Companies, Article 20. Named shares, held by the founding members and the members of the board of management, are generally not transferable; all other shares are bearer shares and are freely transferable. Approval of the people's committee where the head office is located is required for a company to issue shares publicly. Law on Companies, Article 34.

interest involved, the need for the various governmental approvals described below is far less clear, and could have a limiting effect on enterprise autonomy.

(a) Establishment. In the case of establishment, for instance, the approval of the appropriate level people's committee is necessary to establish either a private business or a company. A decision by the people's committee not to approve an application for establishment can be appealed to the higher level economic arbitration. Establishment of a branch or representative office outside the original jurisdiction also requires approval of the people's committee of the jurisdiction in which the branch or representative office is to be located.[18]. The grounds for granting such approvals or denying them are not specified in the law.

(b) Registration. Once the people's committee has approved, registration with the economic arbitration[19] at the appropriate level must follow. Issuance of a certificate of business registration by the economic arbitration is the final step permitting the private business or company to commence operations.[20] Moreover, this last governmental intervention has important legal consequences, since a company acquires legal personality when that certificate is issued, becoming a legal entity. Private businesses also require a certificate to operate, although they do not acquire legal personality as a result.[21] After

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[18]Law on Private Business, Article 14; Law On Companies, Article 20.

[19]The economic arbitration is a government body, organized as the State Economic Arbitration and provincial and district offices, which has responsibility for registration of enterprises and contract arbitration, among other matters. Some of these functions may be shifted to the newly established economic court system.

[20]Law on Private Business, Articles 8-12; Law on Companies, Articles 14-18.

[21]Law on Companies, Article 18. The Law on Private Business clearly omits a similar reference to acquiring legal personality in its Article 12, which is otherwise identical to Article 18 on companies. That would seem to rule out legal personality for private businesses, although there is a statement that the State recognizes the equality before the law of a private enterprise and other enterprises. This may be an area where clarification is necessary.

registration, basic details about the enterprise must be published in appropriate newspapers, and subsequent changes in objectives, capital, line of business and other items in the original business registration must be registered with the economic arbitration and published.[22]

c) Scope of operations. In addition to the government approval and registration necessary for the establishment process generally, private businesses and companies may not be established to carry on businesses prohibited by law. This limitation makes it more difficult for those who wish to establish private businesses and companies, since the laws do not specify what is prohibited, nor who decides. Moreover, approval by the Council of Ministers is mandatory for either private businesses or companies to conduct business in seven listed areas: manufacturing and distribution of explosives, poison and toxic chemicals; mining of precious minerals; production and supply of electricity and water on a large scale; manufacture of information transmitting facilities, postal and telecommunication services, broadcasting, television and publication; ocean shipping and air transportation; specialist export and import business; and international tourism.[23]

(d) Capital and sectoral limitations. Governmental intervention is also apparent in the provision of minimum capital requirements for certain fields.[24] The government has also offered incentives (favorable consideration of land use, priority in borrowing capital, reduction or exemption of duties, import-export facilitation) for private businesses

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[22]Law on Private Business, Articles 13, 15; Law on Companies, Articles 19, 21.

[23]Law on Private Business, Article 5; Law on Companies, Article 11.

[24]A list of the minimum legal capital required for private businesses and companies in certain fields, such mining, electricity, metallurgy, mechanics, electronics, chemicals, textiles and consumer goods was issued in conjunction with Decree of the Council of Ministers on the regulation of concretization of some articles in the Law on Private Business, No. 221-HDBT, July 23, 1991 and Decree of the Council of Ministers on the regulation of concretization of some articles in the Law on Companies, No. 222-HDBT, July 23, 1991.

and companies to invest in certain specified fields. These fields include: production of daily necessities and export goods (including foodgrains and foodstuffs, import-substitution products, textiles, leather and handicrafts and agroprocessing); production and repair of transportation means; and building infrastructure.[25]

(e) Dissolution. The dissolution of a company or private business also requires governmental approval, in the form of people's committee approval of an application to dissolve the enterprise. Moreover, both laws stipulate the circumstances in which dissolution is possible. In the case of private business, the prerequisites for the owner's application for dissolution are that the owner guarantees full payment of all debts and complete settlement of all contracts which the private business has signed.[26] In the case of companies, application for dissolution is permitted in any of the following circumstances: expiration of the term of the company; achievement of its objectives; inability to achieve its objectives, profitably or otherwise; loss of 75% of its charter capital or insurmountable difficulties; and a "reasonably based request" is made by members representing two-thirds of the charter capital.[27] The law does not clarify how the judgment of "reasonableness" will be made.

(f) Bankruptcy. Both laws provide for petition for bankruptcy which requires approval by the economic arbitration. Bankruptcy is defined as the situation where a company or private business "has encountered difficulties or incurred losses in its business operation to such an extent that, at a given point of time the total value of its remaining

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[25]Decree of the Council of Ministers on the regulation of concretization of some articles in the Law on Private Business, No. 221-HDBT, July 23, 1991, Articles 7-8; Decree of the Council of Ministers on the regulation of concretization of some articles in the Law on Companies, No. 222-HDBT, July 23, 1991, Articles 6-7. These decrees also set out the procedures for Council of Ministers approval in the fields required under the Laws.

[26]Law on Private Business, Article 16.

[27]Law on Companies, Articles 22-23.

assets is not sufficient to meet all of its due debts."[28] Either the creditors or an authorized body, or, in the case of a private business, the owner, may apply for bankruptcy on grounds that this situation is met. Both laws also provide that the procedures for bankruptcy and the payments to creditors in that event shall be governed by the law on bankruptcy. That law was enacted by the National Assembly at its December 1993 session, along with the law on economic courts, which is necessary to implement the law. (A discussion of the provisions of the Bankruptcy Law, which take effect from July 1, 1994, begins at para. 38.)

(g) Restriction on investment by government bodies or civil servants. Direct government investment in private businesses and companies is limited by law. Public servants and officers on active duty are prohibited from establishing or managing private businesses or companies. Moreover, government bodies are prohibited from using State assets or public funds as capital contributions to a company or from participating in company establishment for private profit.[29] From the perspective of separation of government from enterprises and the actual management of the economy, such limitations can be seen as a positive development.

12. Corporate governance. A basic structure for corporate governance has been provided for companies as these are considered separate legal entities, whereas the governance of private businesses is not legislated since they do not have legal personality separate from the individual owner. The corporate structure in companies includes the separate legal powers and duties of: members (shareholders), acting individually and through the shareholders' meeting; and director or general director. For limited liability companies with twelve or more members and for all shareholding companies, there is also a board of management and inspectors. In such companies, the shareholders' meeting exercises supreme decision making power, including election of the board of management and inspectors, distribution of profits and approval of annual business plans and

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[28]Law on Private Business, Article 17; Law on Companies, Article 24.

[29]Law on Private Business, Article 7; Law on Companies, Article 6.

balance sheets. The inspectors seem to exercise auditor's functions; inspecting the company's accounts, reporting to shareholders, and investigating emergency financial events[30]. Setting up clear legal rules for the separate exercise of ownership and management rights in companies and the use of boards of management to represent the members in larger companies should provide some confidence for company managers in utilizing their autonomy in an efficient manner while also providing for management accountability to the company's owners. The absence of a similar framework for private businesses highlights the legal distinction that private businesses are not legally separate entities from their owners, as already noted.

13. Future development. The introduction of this legal framework for private businesses and companies on enterprise establishment has been reflected in the establishment of enterprises. As of March 1993 (two years after the passage of the private business and company law), the State Economic Arbitration reported the following registrations of private businesses and companies:

	Number	Total Capital (billion Dong)[31]
Private Business	3469	389
Limited Liability Company	1169	836
Shareholding Company	75	456
State Enterprises	1429	4326
TOTAL	6142	6007

Of these registrations, more than half occurred between December 1992 and March 1993. This acceleration in registrations can be partly attributed to the increase in the number of economic arbitration offices accepting registrations, which increased from 11 in 1991 to 36 in June 1992 to 48 in January 1993.

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[30] Law on Companies Articles 37-43.

[31] 1 billion Dong equals approximately U.S.$ 90,900.

14. Of course, it is difficult to attribute these numbers entirely to the introduction of a legal framework or to determine whether more enterprises would have been established if the legal framework had been improved. Certain improvements could be expected to support a fuller development of the market economy, such as the reduction in government approval and intervention outlined above in the areas of establishment, permissible fields of investment, dissolution and governance. Detailed analysis in light of actual circumstances may also show areas in which the governmental limitations act to inhibit private investment--for example, where minimum capital requirements for private business may be unduly high. To the extent that state enterprises are also operating in these sectors, the governmental role in non-state enterprise establishment and regulation can be expected to have some anti-competitive effects.

15. Similarly, common rules and procedures for boards of management and for company directors and the issuance of model corporate by-laws would offer clarity and certainty to corporate governance in enterprises, and would clarify legal responsibilities, rights and obligations. Clarifying the legal personality of private business would facilitate transactions with private businesses; clarifying that members of a company own a proportionate share of the legal entity but not its assets would reinforce the artificial corporate structure that permits limited liability.[32] Finally, lifting the explicit limitation of company shareholders to Vietnamese individuals and organizations and the implicit exclusion of State investment in companies would also open up additional sources of investment and diversification of ownership for companies. It would offer as well the efficiencies of using the same corporate form and rules and regulations for entities of different ownership, including state enterprises.

2. State Enterprises

16. The continued existence of the state enterprise sector, even with a reduced role in a market economy, still requires state enterprises to be governed under a legal framework, whether or not that framework is limited to state enterprises.

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[32]See note 15.

Moreover, several important elements of state enterprise reform are facilitated by the establishment of a legal framework for state enterprise establishment, operation and termination. The separation of ownership and management can be put into effect by giving the state enterprise legal personality and a corporate structure in which ownership rights are clearly differentiated from management rights. Managerial autonomy, in turn, can be enhanced by the reduction or elimination of central planning decisions in state enterprise operation and by the transfer of investment decisions to the management. At the same time, managerial accountability to the state as owner (and representative of the whole people) can be strengthened by legal provisions for monitoring state enterprise performance and sanctions for illegal (if not inefficient) acts. Not all of these elements have been introduced into Vietnamese law as yet, but the set of state enterprise reform decrees dating back at least as far as 1987 provides a starting point in many areas. The existing legal provisions for state enterprise autonomy, ownership rights and liquidation are analyzed below, in comparison with the non-state framework just described, followed by a discussion of the resulting package of state enterprise reforms. Many of these legal provisions will be subject to strengthening or replacement, when the State Enterprise Law is enacted, possibly in 1994.

17. Autonomy. Perhaps the first innovation that can be traced in the state enterprise decrees is the granting of autonomy to state enterprises in certain areas of planning and management. Under the "Stipulations on Renovation Policies of Planning and Socialist Business Accounting Policies for State Enterprises,"[33] state enterprises were given a number of specific rights.

(a) State enterprises were granted the autonomy to formulate and implement short, medium and long term plans for production and business operation, within the framework of the state plan as it existed at the time. With respect to the plan for production and product consumption, state enterprises were also given the right to subcontract; with respect

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[33]Decree No. 217-HDBT issuing Stipulations on Renovation Policies of Planning and Socialist Business Accounting for State Enterprises, Council of Ministers, November 14, 1987 (Decree 217).

to the plan for capital investment, state enterprises were given the rights to purchase and renew machinery and equipment and to handle unused assets through sale, lease or transfer. If large investments could be shown to have great efficiency, the possibility of state budget funding was also included.

(b) Towards the stated goal of moving to "material and products purchasing and selling according to economic contracts," the state would give priority in selling material to production units with high product quality, efficiency and contribution to the state budget. For output, a distinction was drawn between products subject to mandatory planning, which were required to be sold to the state, according to the plan and under contracts; and those outside mandatory planning, which would be sold to state trading organizations unless there was no demand from such organizations, in which case products could be sold to others.

(c) State enterprises were given the right to determine prices in limited circumstances, mainly for products and services outside the state list, single sales and test items and intermediate products within an enterprise or union.

(d) Provisions were included for changes in socialist business accounting (e.g., depreciation) and state enterprises were given the right to select a bank branch and open an account there and to handle foreign exchange. The right to recruit labor directly was added, with the goal of moving to a labor contract system.

The implementation of this set of new rights for state enterprises was not without problems. An order of the Chairman of the Council of Ministers a few years later[34] identified failure of enterprises to consult with the supervisory bureaus as the principal shortcoming in the implementation of increased state

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[34]Order by the Chairman of the Council of Ministers on the Continued Strengthening of the Auditing and Economic Accounting Activities of State Enterprises, Council of Ministers No. 408-CT, November 20, 1990 [or 1991].

enterprise autonomy, and went on to exhort and require better consultation and implementation. This order was followed by a circular from the Ministry of Finance setting out more detailed rules for state enterprise plans, auditing, accounting, savings and payment of taxes.[35]

18. Financial autonomy of state enterprises has been addressed with greater specificity in several state enterprise decrees. Following a pilot project to transfer the right to use and the responsibility to safeguard operating capital to state enterprises,[36] Decree 332 established the rights of state enterprises to manage their assets and the concomitant obligations to maintain and repair them.[37] Under this decree, all proceeds from the sale, transfer or liquidation of fixed assets can only be used by the state enterprise for reinvestment in fixed assets. Furthermore, any deficit due to "subjective reasons" must be funded by the state enterprise from its production development budget or its share of profits, while any deficit due to objective reasons shall be reported to the supervisory bureau for permission to reduce capital. At the same time, the governmental structure for financial management of state enterprises in the Ministry of Finance and other agencies was to be realigned to reflect this new division of financial responsibilities between government and enterprise.[38]

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[35]Circular on Implementation Guidelines for Ordinance No. 408-CT, Ministry of Finance, No. 05/TC-CN, January 9, 1991.

[36]Directive of the Chairman of Council of Ministers on the Pilot Project to Transfer Power to Use and the Responsibility to Safeguard Operating Capital in State Enterprises, Directive No. 316-CT, September 1, 1990, promulgating Temporary Regulations on the principles and contents of assigning to state enterprises the capital use right and responsibility for maintaining and developing capital. This directive provided for a pilot program under which capital would be assigned to the enterprise and, after evaluating and determining the capital amount, the enterprise would have the right to manage the capital under state supervision.

[37]Decree No. 332-HDBT, On Maintaining and Developing Business Capital in State Enterprises, Council of Ministers, October 23, 1991.

[38]Instruction of the Chairman of the Council of Ministers, Restructuring the institutional structure of financial management in State Enterprises, No. 33-CT, October 23, 1991.

19. Ownership rights. While the state's rights as owner in state enterprises still lack the precise clarification that share ownership under a company law would provide, the introduction of rules for state enterprise establishment and termination can be seen as a beginning in the definition of ownership rights. The Regulations on Establishment and Liquidation of State Enterprises, enacted by Decree 388 in 1991,[39] provided legal rules for the process of state enterprise formation and the objectives for their operation.

(a) Legal status. Under the State Enterprise Regulations, a state enterprise is a business institution established by the state, invested with state capital and managed by the state as owner. State enterprises are equal with other entities under the law, and a state enterprise becomes a legal entity once it has registered with the economic arbitration and a certificate of business registration has been issued.[40] The same definition of legal status pertains to companies under the Law on Companies.

(b) Objectives. The objectives of the state enterprise, which are stated differently from the company objectives quoted in para. 9 above; include:

(i) operating as a business in the particular trade and with the particular objectives registered at establishment;

(ii) protecting and developing assigned capital;

(iii) implementing duties and taking responsibilities assigned by the State;

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[39]Decree 388-HDBT, Promulgating Regulations for the Establishment and Liquidation of State Enterprises, Council of Ministers, November 20, 1991 (Decree 388) and Regulations on Establishment and Liquidation of State Enterprises (State Enterprise Regulations).

[40]State Enterprise Regulations, Articles 1 and 7.

(iv) implementing labor allocation, looking after workers and cadres material and moral life and improving technical levels of workers and cadres; and

(v) maintaining the enterprise, protecting production and the environment, maintaining political and social security and fulfilling national defense tasks.[41]

Under this provision, the economic functions of the state enterprise are somewhat limited by the state, as in objective (i) where there is no autonomy to change trade or objectives. In addition, social and political functions are added to the administrative burden of state enterprises, a possible disadvantage in competition with private business and companies which are not similarly burdened. Moreover, the mixed objectives of such an enterprise are often found elsewhere to have a negative effect on efficiency.

(c) Approvals. Establishment of a state enterprise must be proposed by a minister (for central state enterprises) or the chairman of the People's Committee (for local level enterprises) and decided upon by the Chairman of the Council of Ministers or his or her designee. If approved, the initiating agency becomes the enterprise's supervisory bureau. The establishment of state enterprises with large asset values, large turnover or extremely important roles in the state economy must be proposed by the Chairman of the State Planning Committee.[42] Though the need for governmental approval of the establishment of companies and private business can be questioned, it is appropriate here where the state as owner should properly have its representative agree to new investment.

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[41]State Enterprise Regulations, Article 2.

[42]State Enterprise Regulations, Articles 4 and 6. There are requirements for registration within 60 days of approval and publication of details in the newspapers, as with companies and private businesses.

At a minimum, the State Enterprise Regulations provide for legal personality for state enterprises and a discernible process for their establishment. What is lacking is any structure for corporate governance, such as a board of directors and defined management responsibility, which could give real definition and limitation to the ownership rights while enhancing managerial responsibility. There is no analog to even the minimal corporate governance provisions found in the Law on Companies.

20. Liquidation of state enterprises. Making liquidation or termination a possible consequence of inefficient state enterprise operation provides important incentives for their efficient management as well as contributing to the level playing field with non-state enterprises. It also sends an important signal that the management of state enterprises is separable from the ownership, so that other players in the market should not expect the state as owner to support its enterprises regardless of performance. Liquidation procedures for state enterprises were introduced in a comprehensive manner as part of the reorganization of production and business in the state sector under Decree 315 in 1990.[43] The reorganization process under Decree 315 involved reviewing and assessing the potential of state enterprise units established by the Council of Ministers, the Ministries and People's Committees and those funded under the state budget, and determining future business plans for those with potential to operate autonomously under state supervision. Those enterprises with continuous losses were to be classified by importance of output and level of efficiency, and where feasible, these could be merged or "returned" to the collective or private enterprise sector. Otherwise, those enterprises with continuous losses were to be dissolved pursuant to the State Enterprise Liquidation Regulations promulgated by Decree 315, which set out procedures for and priorities in state enterprise liquidation. While the new Bankruptcy Law will also apply to state enterprises

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[43]Decree 315-HDBT, Reorganizing Production and Business in the Public Sector, Council of Ministers, September 1, 1990 (Decree 315), promulgating Regulations on Liquidation Procedures for State Enterprises "Seriously Lost" (State Enterprise Liquidation Regulations).

when it takes effect in July 1994,[44] it is still relevant to review the State Enterprise Liquidation Regulations for interim activities:

(a) Enterprises subject to liquidation. The State Enterprise Liquidation Regulations apply to state enterprises which cannot sell their products, cannot fulfill their business purpose, have continuous losses, cannot repay their debts or cannot overcome current financial difficulties. The decision to liquidate must be made by the government supervisory bureau. At the time Decree 315 was issued, only decisions on the liquidation of small and medium state enterprises in non-essential lines of business were authorized. Left outside the scope of the Regulations was the liquidation of large state enterprises or those providing important products or whose dissolution would have a "bad influence" on other fields or enterprises.[45]

(b) Liquidation procedure. Enterprise Liquidation Committees (or liquidation boards under them) were to be established by the various ministries and People's Committees, with membership and powers set out in the Regulations. An Enterprise Liquidation Committee is responsible for enterprise operation once the decision to liquidate has been taken, it has the obligation to conserve enterprise assets, and its decisions supersede those of the former state enterprise director.[46] Detailed procedures for the role of banks and for financial regulations in implementation of state

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[44]See discussion of the Bankruptcy Law beginning at para. 38.

[45]State Enterprise Liquidation Regulations, Articles 1-2.

[46]State Enterprise Liquidation Regulations, Articles 5-9.

enterprise liquidation were set out separately by the State Bank and Ministry of Finance.[47]

(c) Secured debt. Secured debt is treated separately, so that repayment to secured creditors is given priority, and if the asset is to be sold to repay the debt, the creditor has two months after the liquidation date to sell it by public auction. Thereafter, the Committee has the right to sell the asset itself by public auction.[48] No new secured debt is to be incurred after the assets have been listed for liquidation.[49]

(d) Forms of liquidation. Liquidation under the Regulations takes one of several forms: total or partial merger with other state enterprises; total or partial sale of assets to other enterprises (public or private); lease or bidding. If an individual or institution is willing to buy the enterprise as a going concern, then priority should be given to reducing the total price.[50]

(e) Priority of claims. The Regulations initially provided that proceeds from liquidation would be distributed in the following order of priority, after liquidation costs were paid:

(i) unpaid salary and social insurance for workers and cadres;

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[47]The State Bank circular provided for State Bank and state commercial bank participation in Enterprise Liquidation Committees and for detailed procedures for banks to calculate and account for debts to liquidating enterprises, and required that both interest and principal should be repaid to the lending bank. Circular on implementation of Decree 315, State Bank of Viet Nam, December 12, 1990. The Ministry of Finance issued basic financial regulations for the sources and uses of funds in liquidation and for pricing by Enterprise Liquidation Committees. Circular guiding financial settlement in state enterprise liquidation, Ministry of Finance, November 13, 1990.

[48]State Enterprise Liquidation Regulations, Articles 8 and 13.

[49]State Enterprise Liquidation Regulations, Article 10.

[50]State Enterprise Liquidation Regulations, Article 12.

(ii) debts from creditors taking part in distribution (the budget, banks, other); and

(iii) "material benefit" for employees (under Decree 176-HDBT).[51]

If the funds were insufficient to cover item 3, the provincial or city budget would be expected to fund "reasonable amounts"; if not all debts were paid off after item (1), then the debts were not to be considered settled. After one year of implementation of the Regulations, they were amended to provide for the following more detailed order of priority, giving support for displaced workers a higher priority:

(i) unpaid salary and social insurance;

(ii) financial support for displaced state enterprise employees (under Decree 176);

(iii) secured creditors (economic institutions and individuals);[52]

(iv) loans from other economic institutions;

(v) principal to banks;

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[51]Decree 176-HDBT on the Reallocation of Labor Force of State Economic Units, Council of Ministers, October 9, 1989. This decree provides for a severance payment to workers laid off in state enterprises of one month salary (including any subsidies) for every year of service, with a minimum of three months' salary. The state enterprises are required to pay this severance allowance, but the enterprise if in difficulty can apply for up to 50% to be paid by the State. The allowance is intended to be paid as a lump-sum, but may be paid in installments if there is a funding shortfall, after consultation with the beneficiary.

[52]It is not clear from the decrees whether this payment to secured creditors is before or after the sale of security.

(vi) capital to state budget.[53]

In this revised priority of claims, items 1 and 2 have the highest priority, and if items 3, 4, and 5 cannot be met, they are to be rescheduled and treated in accordance with "concrete circumstances." Failure to meet item 6 can be handled by an exemption from payment of capital to the state budget.

Implementation of the liquidation procedures as applied to existing enterprises was placed under the oversight responsibility of the National Steering Committee on Debt Clearance.[54] That Committee had been established to deal with the overall problem of state enterprise debt, which is linked both to state enterprise liquidation and to the broader effort of state enterprise reform.[55] Indeed, while the State Enterprise Liquidation Regulations provide a framework for state enterprise liquidation in the future, their primary importance and use has been as part of the state enterprise reform process detailed below.

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[53]Decree 330-HDBT, Revision of Decree 315, Council of Ministers, October 23, 1991.

[54]Decree 330. In implementing the state enterprise liquidation process, primary responsibilities were assigned to the Ministry of Finance, the State Bank and the Ministry of Labor, Invalids and Social Affairs, with the State Economic Arbitration to issue detailed regulations on the relevant business registrations. Instructions of the Chairman of the Council of Ministers on implementing the state enterprise liquidation statute, No. 393-CT, October 25, 1991.

[55]The National Debt Settlement Committee was established for the settlement of all debts of economic units and organizations to perfect the financial relations and credit of state enterprises with the banking system. Its members included vice-ministerial representatives from the Ministry of Finance, State Bank of Viet Nam, State Planning Committee, State Economic Arbitration, under the Chairmanship of the first Vice Chairman of the Council of Ministers, and the vice-chairmanship of the Minister of Finance and the Governor of the State Bank. Decision of the Council of Ministers on Settlement of Debts between Economic Organizations, No. 88-CT, March 30, 1991. A phased program of debt settlement was subsequently announced by the Council of Ministers. Decision of the Council of Ministers on First Phase of Debt Settlement, No. 104-CT, April 10, 1991, promulgating Phase I Program for Debt Settlement between the economic units and organizations.

21. Parity with non-state rules. A number of basic similarities between the legal framework for companies and the framework for state enterprises have been noted, such as the acquisition of legal personality upon registration and the requirements for approvals of enterprise establishment. The provisions for state enterprise dissolution are far more extensive and detailed than those for company or private businesses. On the other hand, the absence of a system of corporate governance in state enterprises is in contrast to even the rudimentary provisions of the Law on Companies for shareholders meeting and a board of directors in shareholding companies.[56] In other respects, state enterprise rules already explicitly incorporate the company law framework:

(a) The State Enterprise Regulations, by their terms, do not apply to state enterprises with capital from domestic non-state sources, which are required to be handled by reference to the Law on Companies. State enterprises with foreign capital also fall outside the scope of these Regulations, but they are to be handled with reference to the foreign investment law and regulations, rather than the Law on Companies.[57]

(b) The minimum capital requirements for state enterprises are stipulated to be not less than those for limited liability companies under the Law on Companies and its implementing regulations. For "re-

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[56]Law on Companies, Article 28 and Chapter IV.

[57]Decree 388. However, there is a somewhat opaque circular on implementation which provides that if a portion of state capital is used in joint venture with non-state or foreign capital, then the remainder (other than the non-state or foreign capital) is subject to Decree 388. It is hard to see how this requirement was meant to operate in practice in equity joint ventures. Joint Circular of the State Planning Committee and the Ministry of Finance on Performance of the State Enterprise Regulations, No. 01-TT/LB, February 2, 1992 (SPC/MOF Joint Circular).

establishment" of enterprises existing before Decree 388, failure to meet these capital requirements is grounds for reconsideration.[58]

(c) The business lines for which establishment of state enterprises requires the approval of the Chairman of the Council of Ministers under Decree 388 are virtually identical to those business lines which companies and private businesses can engage in only with Council of Ministers' approval.[59]

The relationship of the state enterprise framework to the company law framework is important to note for two reasons. First, the eventual creation of a level-playing field for enterprises regardless of ownership will require that similar (and preferably identical) legal rules apply to all types of enterprises. These similarities can be seen as a start in that process. Second, to the extent that various elements of the company law framework are already being applied to state enterprises, it strengthens the arguments for the eventual expansion of the Law on Companies to apply to state enterprises in its entirety.[60] The equal application of the Bankruptcy Law to state and non-state enterprises is also worth noting in this regard.

22. State enterprise reforms. While the legal provisions in the areas of autonomy, ownership rights and dissolution have been discussed separately, as they seem to have come about, they have more recently been drawn together in a package of state enterprise reforms. Under Decree 462, the primary task of

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[58]Circular letter of the Chairman of the Council of Ministers on Implementation of Decrees 388 and 393, No. 34-CT, January 28, 1992. The standards for limited liability companies are found in Decree 222, referred to in note 24 above.

[59]The listed business lines are: explosives, poison, toxic chemicals; rare and precious materials; post, telecommunications, transmission and broadcasting; overseas and air transport; and weapons production and state enterprises under the Ministry of Defense or Domestic Affairs. SPC/MOF Joint Circular, para. 2. The Circular also lists the various ministries responsible for state enterprise establishment in different fields.

[60]See paras. 25-28.

continuing to perfect the policy mechanism, regulate the reorganization and encourage the potential of the state-run and non-state sectors has been refined into several tasks. The first five of these tasks relate primarily to state enterprise reform:[61]

(a) continuing the reorganization of the state-run economy, which includes review and categorization of state enterprises according to decrees 315, 330 and 388 and documents 393 and 34 (treated as a single set of legal requirements), which will result in re-registration of state enterprises with favorable conditions and lease, sale, merger or liquidation of those with continuous losses or unfavorable conditions;

(b) reforming state enterprise sector management, which includes promulgation of regulations on workers' congresses, state enterprise committees, state enterprise management and the activities of trade unions and party units in the state enterprise sector;

(c) continuing the experiment with boards of directors, and then promulgating regulations on boards of directors;

(d) an experiment in state enterprise "corporatization", which can take the form of organizing new joint ventures with foreign investors, selling share of state enterprises to foreigners,[62] selling shares of state enterprises to domestic institutions or individuals or selling shares to workers and cadres; and

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[61]Decree No. 462, Plan to Continue Management Renovation in Basic Economic Units in 1992, Council of Ministers, February 12, 1992.

[62]Sales to foreigners would not be permitted if the state enterprise were organized under the Law on Companies, which only allows for Vietnamese organizations and individuals to invest. Law on Companies, Article 1. This limitation may lie behind restricting the forms of corporatization to sale of shares to employees, domestic economic and social organizations and the general Vietnamese public, with the resulting enterprise to become a company under the Law on Companies. Decree 202, Implementation of Economic Experiments on Transfer of State Enterprises to Corporations, Council of Ministers, June 8, 1992.

(e) strengthening and reorganizing joint enterprises and holding companies.

The sixth task, relating to the non-state sector, also includes the requirement that economic organizations established by administrative units and unions either be re-registered as state enterprises under Decree 388, or as companies or private businesses under the relevant laws, or, if not qualified to continue to exist, be liquidated. Notably, the importance of the legal framework, evident in the preparation of regulations for most of the reforms listed, is highlighted by the last task, the preparation of the bankruptcy law, the state enterprise law and the law on cooperatives for National Assembly consideration.

23. Most recently, a March 1993 Directive spelled out certain aspects of corporatization and state enterprise reform in more detail.[63] Incentives to stimulate corporatization include up to 5 years' credit to employees to buy shares in corporatizing state enterprises, tax reduction of up to 50% for up to two years after corporatization, and sale of shares to non-Vietnamese parties.[64] As for forms of state enterprise reform, leasing and contract-plan were added to sales of assets, mergers and sale of the entire enterprise. At the end of 1993, further plans for corporatization and state enterprise reform were reported to be under consideration, possibly in the form of "equitization" of selected state enterprises with shares held by the state, employees and the public.

24. Assessment. The recommendation for a state enterprise law is particularly welcome. The state enterprise legislation described in the preceding pages, by enhancing managerial autonomy, delimiting ownership functions and permitting enterprise termination, forms the foundation for state enterprise reform. As can be seen from the frequent references to decrees and ministerial instructions, however, to call this disparate set of legal acts a framework of state enterprise

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[63]Directive No. 84/TT, on accelerating corporatization and state enterprise reform, Prime Minister, March 4, 1993.

[64]Currently, the Law on Companies does not allow for non-Vietnamese juridical or natural persons as shareholders, so that an amendment would be necessary to put this into practice. See note 62 above.

legislation implies a degree of comprehensiveness, consistency and coordination that is not evident. In order to ascertain the legal rules for state enterprises currently requires research into a multiplicity of documents, rather than reference to a publicly-available law debated and enacted by a legislature. A legal framework that is knowable, credible and reliable can facilitate the transition to a market economy, of which state enterprise reform is a part, but a framework that is fragmented and subject to frequent revisions offers a much smaller contribution. Moreover, a state enterprise law, enacted by the National Assembly, would be a higher level legal instrument than the decrees and instructions currently in force.

25. The scope of the state enterprise law should be the focus of careful attention, however, since it must be recognized that Vietnamese law already provides a basic framework for the establishment and operation of enterprises of different scope under the Law on Companies. Under the state enterprise re-registration process, the government is now determining which enterprises are to be liquidated, which retained as fully state-owned and which will have private sector involvement in ownership or management. The Law on Companies could be expanded to permit the organization under one law of both the enterprises that are now retained wholly in the state sector as well as those that will have partial or full private sector involvement in their ownership of management. The same Law on Companies could apply to different ownership structures--where the company has only one shareholder (one government body); where several shareholders combine in a limited liability company where transfer of shares is restricted (either all state bodies or a mix of state and non-state bodies, as a domestic joint venture); or where many shareholders participate in a shareholding company.

26. Deciding whether to regulate state enterprises under the company law makes it necessary to consider why the type of ownership of an enterprise should lead to a different registration process, or a different scope of powers of the enterprise's general manager, or a different tax status. With the same registration process, and the same powers for enterprise managers, all enterprises could compete on a legally-equal basis, under the same law. Indeed,

foreign investors could be permitted to be shareholders under the company law, so that foreign-invested enterprises could also compete freely with domestically-owned ones. Moreover, some enterprises may be better operated by the state in the short term, and sold to other investors after a few years. The Law on Companies would make this kind of flexibility in timing fairly simple.

27. Paired with the expansion of the Law on Companies in this fashion would be a different type of State Enterprise Law. Under this scenario, the State Enterprise Law would have as its objective the regulation of the state's ownership share in any wholly or partially owned state company. The State Enterprise Law would provide a mechanism for specifying the representative of state ownership (that is, one ministry or several ministries), for requiring performance targets by the company, and for the supervision and monitoring of company performance by the state as owner. The State Enterprise Law could also include the transitional procedures that will be required to transform state enterprises in their current state to a corporate form under Law on Companies, such as valuation of assets and allocation of shares. The State Enterprise Law will need to specify the percentage of ownership required for enterprises to be considered state enterprises. Indeed, it may be preferable to state a test, such as "owned or controlled" by state shareholdings, rather than an absolute limit, such as 50% or more of shares owned.

28. Nonetheless, to use the existing Law on Companies in this way will require further exploration of some detailed questions:

(a) Can government bodies be considered shareholders under the Law on Companies? Article 1 permits shareholding by Vietnamese economic organizations having the status of a legal entity and Article 6 restricts government bodies from using state assets to establish a company for private profit. This seems to imply that government bodies can be shareholders in a company, such as in the current proposal for Legamex, a textile firm in Ho Chi Minh City.

(b) Could the state be the only shareholder in a company? In a shareholding company, there must be at least seven shareholders, but there is no apparent restriction on the minimum number of members of a limited liability company. Even if a minimum of two members were required for a limited liability company, two different government bodies could join together to establish a state-owned company.[65] Indeed, the Law on Companies already permits differentiation among limited liability companies based on number of members, as a limited liability company with fewer than twelve members is not required to have a board of directors.

(c) Could the restriction in Article 2 that a shareholder cannot be liable for debts of the company beyond the capital contributed be used to limit state responsibility for state enterprise liabilities? If so, this would provide the hard budget constraint that is needed for state enterprises to compete efficiently and fairly with other enterprises.

(d) Article 25 (2) already restricts the transfer of ownership in a limited liability company to non-members by requiring approval of a special majority of the existing shareholders. Could this provision be expanded by requiring special approval for any transfers of state ownership, thereby making it possible for the state to control a gradual reduction in the percentage of its holdings over time?

Making amendments to the Law on Companies, if needed, in these provisions would also provide an opportunity to permit foreign individuals and organizations to participate as shareholders in Vietnamese companies.[66]

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[65] The recently-enacted Chinese Company Law provides an unusual solution to a similar problem in China, by offering special rules for a form of "solely state-owned limited liability company" with the state as sole shareholder. Law of the People's Republic of China on Companies, enacted December 29, 1993, effective July 1, 1994.

[66] It would also provide an opportunity to clarify the ownership in Articles 8 (1) and 25 (2), in which the shareholders own a proportion of the company, not an undivided share of the company's assets. See note 15.

3. Other Entities

29. Cooperatives. In addition to private businesses, companies and state enterprises, there are also a large number of cooperatives. The government is in the process of preparing a law on cooperatives, which could be expected to provide a framework for their establishment, operation and termination. It would also be possible to make revisions, if necessary, to permit cooperatives to reorganize themselves as limited liability companies under the Law on Companies, since many of them already have some form of share ownership. In any event, placing cooperatives under the company law framework would have many of the same benefits of the level playing field alluded to in the case of state enterprises above.

30. Unions of enterprises. Another form of entity which needs to be addressed more thoroughly in the legal framework is that of unions of enterprises (general company). These entities combine economic and administrative functions over the state enterprises under their control, and their legal status is unclear. Their re-registration as state enterprises has been put off (maybe until later in 1994), as several issues need to be considered: the necessity of their administrative role, and how to implement it; whether a general company should function like a holding company; and whether they should become service companies, providing services and distributing materials.

D. COMMERCIAL LAW FRAMEWORK

1. Commercial Law

31. The overall framework for commercial transactions and contractual relations, essential to the effective functioning of a market system, has yet to be addressed comprehensively in Viet Nam. A commercial code which would cover many of the provisions necessary to enable and protect fair and reliable market transactions is under preparation by the government. In the field of contract law, however, legislation already exists, both for economic contracts and for civil contracts. While the Ordinance on Economic Contracts was enacted first, in 1989,[67] the Ordinance on Civil Contracts enacted in 1991[68] is broader in scope. The Ordinance on Civil Contracts is likely to be superseded by the Civil Code, when enacted, and the Ordinance on Economic Contracts is likely to need revision to conform to the commercial code, when enacted, and to clarify some of the issues noted below.

32. Economic contracts. Most relevant for the commercial legal framework are economic contracts, defined as written agreements related to production, exchange of goods, provision of services, research and application of scientific and technical know-how or other business. Under the Ordinance on Economic Contracts, economic contracts are only such agreements entered into between two legal entities or between a legal entity and an individual with business registration under the law.[69] This would include an individual registered as a private business under the Law on Private Business and any other types of individuals having business registration. In addition, the Ordinance provides for its application to contracts between legal entities and individual scientists,

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[67]Ordinance on Economic Contracts, State Council, September 25, 1989.

[68]Ordinance on Civil Contracts, State Council, April 29, 1991, effective July 1, 1991. [based on informal translation of draft]

[69]Ordinance on Economic Contracts, State Council, September 25, 1989.

technicians, artists, owners of household business, private farmers and fishermen.[70] In practice, the application of the Ordinance has been expanded to include contracts between individuals.[71]

33. The structure of rights and obligations under economic contracts does not appear limited to the fulfillment of the state plan, as might have been the case before the reforms. There are relatively few constraints on the freedom to contract, and the role of the state under the law is limited. Thus, the parties determine the essential elements of economic contracts, namely, the normal elements of quantity, quality and price, along with the date and names of the parties, along with other terms such as delivery, guarantees and duration. For instance, the parties can determine the price and on its variation during contract performance, which must conform to the government-determined price only where there is one for the particular goods to be supplied.[72] Furthermore, while the state plan is listed as one of the bases for economic contracts, it does not appear to be exclusive.[73] Even where a party has been forced to breach a contract because of action by another body, organization or individual (such as a state enterprise forced to breach by its supervisory bureau), it is the breaching party that must compensate the innocent party, rather than the third party. One exception, however, is where the breach is caused by an emergency order of the Chairman of the Council of Ministers, the chairman of a people's

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[70]Ordinance on Economic Contracts, Article 42.

[71]In discussion with officials of the State Economic Arbitration, it was indicated that the scope of economic contract arbitration had been expanded to include disputes between individuals. Query whether any decree or instruction brought about the change.

[72]Ordinance on Economic Contracts, Articles 12 and 15.

[73]Ordinance on Economic Contracts, Article 10. It is not clear whether all economic contracts must comply with the State plan. If they must, then private freedom of contract would be severely curtailed.

committee or the head of the Central Committee Against Floods and Cyclones,[74] which is listed as one of the conditions of force majeure.[75]

34. One area in which the government does play a major role is in dispute resolution. Disputes under economic contracts are to be resolved either through negotiations between the parties or through economic arbitration.[76] Economic arbitration is undertaken by a governmental agency, the economic arbitration, which is also responsible for enterprise registration. This is the exclusive forum for dispute resolution under economic contracts, and, at present, resort to courts is not provided. To avoid disputes and foster compliance, there are also provisions for mortgaging of property and guarantees to ensure contract performance, penalties (including liquidated damages) and standards.[77]

35. Civil contracts. Civil contracts encompass economic contracts, as civil contracts include those entered into between individuals, between legal entities and between legal entities and individuals. Civil contracts also explicitly include contracts that include one or more parties of foreign nationality, to the extent that Viet Nam's international agreements do not stipulate otherwise. The Ordinance on Civil Contracts sets out a general set of contractual principles (offer and acceptance, effectiveness, remedies for breach) which are necessary for contractual relations to exist on a firm footing. One area treated with some specificity is the use of guarantees and collateral[78].

36. Intellectual property rights. Another aspect of commercial activity which requires an effective legal framework in a market context is the protection of

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[74]Decree No. 17-HDBT, on Economic Contracts, Council of Ministers, January 16, 1990, Articles 21 and 24 (Decree 17).

[75]Ordinance on Economic Contracts, Article 40.

[76]Ordinance on Economic Contracts, Article 7.

[77]Ordinance on Economic Contracts, Articles 5, 14 and 19. Further definition of mortgage procedures can be found in Decree 17, Article 2.

[78] Ordinance on Civil Contracts.

intellectual property rights. To promote the creation in Viet Nam of new goods and processes and the use in Viet Nam of proprietary goods and processes created elsewhere, to encourage the development and circulation of brands with market recognition, to foster the dissemination in Viet Nam of proprietary software as well as literary works -- progress in all of these areas must be based on legal rights and remedies for patents, trademarks and copyrights. Viet Nam introduced patent and trademark protection under the Ordinance on the Protection of Industrial Property Rights, and copyright protection under the Decree on Copyright.[79] Provisions specifically directed at transfer of technology into Viet Nam were also introduced.[80] On the basis of growing experience, further refinements can be expected.

2. Competitive Environment

37. Competition law. An important part of the transition to a market economy is the creation and subsequent preservation of a competitive environment for all economic entities, regardless of ownership. That objective is frequently met by a competition law or set of laws, which does not yet exist in Viet Nam. Competition laws have among their purposes preventing unfair competition in enterprise operations, particularly in market behavior; ensuring that enterprise mergers do not create barriers to entry into the market; regulation of monopolies (which in Viet Nam may include not only natural monopolies but also other strategic sectors which remain in state hands); and protection of consumers against cartel-like behavior of enterprises. Not all of these objectives are necessarily addressed in one competition law, and issues such as unfair competition may well be addressed in consumer protection legislation which would also protect the public against fraudulent or deceptive business practices and unsafe products. In addition to specific legislation promoting competition, it

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[79]Ordinance on the Protection of Industrial Property Rights, State Council, January 28, 1989; Decree on Copyright, Council of Ministers, November 14, 1989.

[80]Ordinance on the Transfer of Technology into Viet Nam, State Council, December 5, 1988; Decree No. 49-HDBT on the Transfer of Foreign Technology into Viet Nam, Council of Ministers, March 4, 1991.

is also important that other legislation be reviewed and revised to remove potential anti-competitive effects, such as requiring people's committee approvals of new entrants to compete with state enterprises under their jurisdiction.

38. Bankruptcy. Another element of the competitive market environment is the threat of bankruptcy, which can act as an incentive to increase efficiency. Of course, bankruptcy law is also an important part of the commercial law framework, as the range of protection offered to creditors can affect the willingness of financial institutions and others to provide financing for business activities. The provisions discussed above for liquidation of state enterprises as well as private businesses and companies have provided some of the framework for bankruptcy, but do not address many of the detailed aspects of bankruptcy or liquidation procedures in as much detail as bankruptcy law would. Even the State Enterprise Liquidation Regulations, which offer more detail than the provisions in the Laws on Private Business and Companies, do not include an analog to the provisions for enterprise reorganization that are frequently found elsewhere. Thus, as part of the reform program, a bankruptcy law was prepared by the government and enacted by the National Assembly in December 1993.

39. The Bankruptcy Law, which does not take effect until July 1, 1994, offers for the first time a comprehensive legal framework for the restructuring or liquidation of insolvent enterprises in Viet Nam. Notably, it applies equally to all forms of enterprise operating in Viet Nam, including in its scope state enterprises as well as enterprises involving foreign individuals and organizations, although special rules will be issued for enterprises providing directly for national defense, security and important public services and treaty obligations must be followed where foreign parties are involved.[61] This equal treatment is preferable to the special rules for enterprises of different ownership which had been suggested during the long process of consideration of the draft law. Similarly, while it was initially suggested that the Economic

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[61]Law on the Bankruptcy of Enterprises, National Assembly, December 30, 1993, Articles 1 and 51.

Arbitration would be involved in the implementation of the bankruptcy law, the final bankruptcy law was passed at the same time as the amendments to the law on courts which provided for the establishment of economic chambers.[82] Thus, the implementation of the Bankruptcy Law, as enacted, will be under the jurisdiction of the Supreme People's Courts at the provincial or equivalent level, to be carried out in the economic chambers, with the implementation of court decisions by appropriate execution offices of the Ministry of Justice and provincial departments of justice.[83]

40. While the law states the priority of voluntary reconciliation, it goes on to create a detailed process for bankruptcy, reconciliation and dissolution proceedings. However, it is still vague in the overall standard set for insolvency which must be met in order for any proceedings to ensue. Insolvent enterprises are defined as those "who meet difficulties or business losses and are still unable to settle their due debts after having undertaken necessary financial measures."[84] While failure to meet debts when due is a common standard, the requirement of taking "necessary financial measures" appears to enter a note of uncertainty into the determination. In contrast, the four potential sources of a request to the court to initiate proceedings are clearly defined:

> (a) an unsecured or partially secured creditor whose claim for a due debt has not been satisfied within 30 days;
>
> (b) a trade union representative, or where there is not yet a trade union, an employee representative, where no salaries have been paid for three consecutive months;

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[82]Amendments to the Law on the Organization of the People's Courts, National Assembly, December 28, 1993.

[83]Bankruptcy Law, Article 4. Compliance with the provisions of the law will be under the supervision of the Inspectorate, as is the case with other laws. Article 5.

[84]Bankruptcy Law, Article 2.

(c) the owner or legal representative of the owner, if the enterprise is still in insolvency after trying to overcome its financial difficulties; and

(d) the court can notify the enterprise to file for bankruptcy if its insolvency comes to the court's attention in other proceedings.[85]

Similarly, the definition of three types of creditors (secured, partially secured and unsecured) is made clearly,[86] with different rights enjoyed by each type of creditor.[87]

41. The Law sets up a system in which a reconciliation plan proposed by the enterprise and approved by the creditors meeting is the first and primary focus of the bankruptcy process. Where such a plan (of not more than two years' duration) does not result in the restoration of the enterprise to financial health, or there is no such plan or it is not approved by the creditors meeting, then the court can declare the bankruptcy of an enterprise.[88] For the implementation of the reconciliation process, the law lays out rules for the selection and operation of an asset retaining team, the creditors meeting, the prohibited debtor activities and the definition of assets; for the bankruptcy process itself, the law lays out rules for the selection and operation of the liquidation team and the priorities for disposition of remaining assets (basically, expenses during reorganization, wage payments, taxes, debts, and remainder to owner of private business, shareholders if company and state budget if state enterprise).[89] Consistent with the emphasis on restoration of

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[85]Bankruptcy Law, Articles 7-10.

[86]Bankruptcy Law, Articles 25 and 38.

[87]Bankruptcy Law, Article 3.

[88]Bankruptcy Law, Article 36. If the owner of a private business dies during the reconciliation process, and either has no heir or the heirs are unwilling to agree to continue, then the judge may also declare bankruptcy of the enterprise.

[89]Bankruptcy Law, Articles 15-23 (reconciliation), 24-35 (creditors meeting) and 36-41 (bankruptcy declaration).

enterprises, there is provision for the enterprise to come out of the reconciliation process if its efficiency is restored.[90] Secured creditors can neither initiate the process nor vote at the creditors meeting, instead, their security appears to be given priority treatment in resolution of the bankruptcy process.[91]

42. As with other recently enacted laws, such as the Land Law and the Environmental Protection Law, there will be a need for further regulations to be issued for the actual implementation of the law. In the case of the bankruptcy law, fewer of these are provided for in the law itself (notably the special rules for defense, security and public service enterprises), but detailed implementing rules can nonetheless be anticipated. Not only will these rules be needed, but inasmuch as the whole area of enterprise bankruptcy is largely new for Viet Nam, training and the gradual development of expertise in relevant areas (e.g., valuation of assets) will also be required.

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[90]Bankruptcy Law, Article 35.

[91]Bankruptcy Law, Article 38.

E. ACCESS TO FINANCE, LAND AND LABOR

1. Financial Reform

43. Financial reform has also been part of the economic reform process leading to the development of a market economy. The enactment in 1990 of two ordinances providing a legal framework for the banking system[92] offered a basic foundation for the central bank (the State Bank of Viet Nam) and the commercial banks and other financial institutions to begin to assume the respective functions of a central bank and the financial institutions in market economies. Under these ordinances, the role of the State Bank will move away from the direction of credit through the state-owned banks to the supervision of the ... and other banks and financial institutions on an equal footing. The commercial bank ordinance also provides a transparent process for the establishment, operation and dissolution of financial institutions, with appropriate legal documentation and corporate structures required for each institution.[93] The State Bank has the principal role in this process, and, for example, is empowered to decide upon the establishment of all financial institutions by issuance of a license.[94]

44. An attempt has also been made through the commercial bank ordinance to develop independence for banks in their operations. Accordingly, there is a requirement that credit institutions undertake an appraisal process in lending operations.[95] Moreover, there are rules that limit a credit institution's

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[92]Ordinance on the State Bank of Viet Nam, State Council, May 23, 1990. Ordinance on Banks, Credit Co-operatives and Financial Companies, State Council, May 23, 1990 (Commercial Bank Ordinance).

[93]Commercial Bank Ordinance, Chapter II (establishment) and Chapter III (corporate governance in the form of a board of management).

[94]Commercial Bank Ordinance, Article 7. However, there is no apparent right of appeal of a denial.

[95]Commercial Bank Ordinance, Article 22.

exposure to any particular borrower, both in terms of debt as well as equity.[96] "Corporatization" and reform of the banks may be strengthened, in particular, by instituting a board of management for each state-owned commercial bank.[97] Even with members selected by the government, introduction of this organ of corporate governance will have some of the benefits of separating ownership and management identified above with respect to state enterprises. There remains the risk, of course, that the State Bank may continue to treat the state-owned commercial banks differently from other institutions, preventing the creation a level-playing field that distinguishes on the basis of performance rather than ownership and restricting the ability of the state-owned commercial banks to make effective business judgments and compete with non-state financial institutions.

45. Capital markets. In addition to bank lending for enterprise development, a market-oriented system would also include equity financing and the issuance of enterprise debt. The government intends to develop securities markets which would eventually encompass these and other kinds of financing opportunities. To develop them, laws and regulations for the creation of securities market will be needed. These laws would not only provide clear rules for investors, enterprises and financial intermediaries in securities transactions but would also need to address the regulation of the market and the appropriate market regulation institution. Moreover, as a supplement to contract law and commercial law provisions, securities transactions laws (including negotiable instruments laws) and effective enforcement mechanisms will need to accompany them. It will not be enough to set up securities markets, without also providing legal definition to the instruments traded in the market (whether equity shares or commercial paper) and authority to the government to ensure that market transactions can be relied on for fairness.

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[96]Commercial Bank Ordinance, Article 28 limits the purchase of shares by a credit institution to 10% or less of the capital of the enterprise. Preferential treatment in lending or other activities is also restricted, under Article 30, to related parties, shareholders with more than 10% of the credit institution's shares or of a company which controls the credit institution and controlling companies themselves, among others.

[97]Commercial Bank Ordinance, Article 15.

2. Land Law Reform

46. Creation of markets in land transactions will be an important aspect of the progression to a market system, since land is a key asset for an enterprise's business to develop. There are certain legal principles related to land transactions that need to be enunciated. Under the Constitution, all land is owned by the state as representative of the people, while the right to use land can be transferred to enterprises and individuals.[98] Consequently, the framework for land transactions in Viet Nam relies on a leasehold system in which the land remains under state ownership but the rights to use land first granted or sold by the state to an enterprise or individual can be sold to another enterprise or individual. In a market economy, such subsequent sales or transfers would be unfettered, although there would still be land use regulations which would delimit the potential uses for particular parcels of land.

47. Certain other elements of a leasehold system are crucial to the effective functioning of a land market. The land law should clarify the role of the state in leasehold administration, through the exercise of such principal rights as the right to: make initial allocations of land; determine the price and terms of such initial leasehold (whether administratively or through market mechanisms); administer a system for recording leaseholds and pledges against them (mortgages); administer a system which determines, with flexibility, the permissible uses of particular land parcels (zoning); and promulgate regulations and implementing rules to put the requirements of the law into effect. The land law should also clarify the role of the land user, principally the rights of the user to transfer and sell the leasehold and bear responsibility for any profit or loss and the obligations of the user to abide by the conditions of the leasehold and to return the land to the state when the leasehold expires. As in other areas, proper regulation of the land market will require enforcement mechanisms and dispute resolution procedures. Here, transitional measures will also be needed to determine the terms and conditions of existing leaseholds and

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[98]Constitution (1992), Article 18.

their ownership, with attention given to the differing situations of rural and urban land.

48. Many of these areas were not fully addressed in the 1987 Land Law.[99] After much discussion and consideration at two sessions of the National Assembly, the Land Law was enacted in July 1993.[100] The new law does create a comprehensive framework addressing the essential elements outlined above. Among the most important, it clarifies the general procedures for the allocation of land by the State as well as leasing; the rights of use, transfer and mortgage; and the leasing of land to non-Vietnamese organizations and individuals, Nonetheless, the law contemplates that most of the detailed rules will be provided in subsequent regulations, which will be crucial to the effective functioning of the system. Regulations are anticipated in such areas as taxation on the transfer of land use rights, rights and obligations of Vietnamese organizations granted land use rights by the State, rights and obligations of foreigners leasing land, land valuation and procedures for implementing land use rights, and leasing land.[101] To a large extent, the practical value of the framework set out in the new law will be determined by the drafting and implementation of these regulations.

3. Labor Market

49. As part of the reforms, a system of labor contracts was introduced in 1990. While the legislation does not indicate to what extent the system was broadly introduced, it does specify that it should apply to all employees paid salary by

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[99]Land Law, National Assembly, December 29, 1987.

[100]Land Law, National Assembly, July 14, 1993.

[101]Ordinances on the rights and obligations of Vietnamese granted land use rights and on the rights and obligations of foreigners leasing land are both included in the 1994 legislative agenda for the Standing Committee of the National Assembly.

entities and individuals "in economic branches and sectors".[102] Legal provisions providing for a balance of legal rights and obligations between the employer and employee are included, as is a form of labor contract issued by the Ministry of Labor, Invalids and Social Affairs (MOLISA). Labor contracts must be entered into on a voluntary basis, written or oral, and minimum wages are specified. Employment is divided into three types: of a definite term, of an indefinite term and seasonal or specialized jobs. The Ordinance also provides for conciliation and arbitration in the case of disputes.

50. In addition to the labor contract legislation, the role of trade unions was given legal recognition in the Law on Trade Unions, which predated the ordinance on labor contracts.[103] Moreover, a separate decree on labor in foreign investment enterprises regulates labor contracts in those enterprises more specifically. Working hours, leave, payments of unemployment benefits and social insurance and protection of women and children are all legislated.[104] A comprehensive labor code is also under preparation under the leadership of MOLISA.

4. Foreign Investment Legislation

51. Viet Nam began putting into place a legal framework for foreign investment in 1987, in parallel with but separate from the nascent legal framework for the domestic market-oriented economy outlined in the preceding pages. There is explicit constitutional protection both for Vietnamese enterprises to enter into

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[102]Ordinance on Labor Contracts, State Council, September 10, 1990, Article 2.

[103]Law on Trade Unions, July 7, 1990.

[104]Decree on Labor for Enterprises with Foreign-owned Capital, No. HDBT-233, June 22, 1990, promulgating Regulations on Labor for Enterprises with Foreign Owned Capital. The enterprise pays monthly 2% to the local labor office for unemployment benefits and 8% to an enterprise social insurance fund to cover health, maternity and funeral benefits. The employee pays 10% to the local social insurance fund for pension, disability and death benefits, to the local labor office or social insurance company. Articles 46-47.

joint ventures and partnerships with Vietnamese and foreign investors, as well as for foreign organizations and individuals who invest in Viet Nam. In addition to the general constitutional protection for individuals and organizations against nationalization of property (save in cases of national security, and then only with compensation), the Constitution expressly provides that foreign invested enterprises shall not be nationalized. Foreign investment is encouraged "in conformity with Vietnamese law and international law and usage".[105]

52. Forms of Investment. Since 1987, the foreign investment legislation has grown to encompass not only a foreign investment law (which has since been amended) and regulations for its implementation, but also detailed rules in many areas of foreign economic activity, such as labor, currency and technology transfer.[106] The legislation provides for three types of investment: business co-operation (a contractual, non-equity joint venture), a Vietnamese-foreign joint venture and a wholly foreign-owned enterprise. Representative offices are not included within these forms but are authorized and regulated by a separate decree and circular promulgating the Regulations on Representative offices of Foreign Economic Organizations.[107] Most recently, the foreign investment law was amended in December 1992 to provide for, inter alia: maximum terms for land use rights for joint ventures up to 70 years; establishment of export processing zones; cooperation agreements and agreements to build, operate and transfer facilities; and an assurance against application of future changes of regulations

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[105]Constitution (1992), Articles 22, 23 and 25.

[106]Law on Foreign Investment, National Assembly, December 29, 1987, as amended through December 1992 (Foreign Investment Law) and Decree No. 18-CP promulgating Regulations on for the implementation of the Law on Foreign Investment in Viet Nam, Government, April 16, 1993 (Foreign Investment Regulations). Many of the detailed regulations can be found in Foreign Investment Laws of Viet Nam, State Committee for Cooperation and Investment, 1992.

[107]Decree No.382-HDBT, on Representative Offices, Council of Ministers, November 5, 1990, promulgating the Regulations on Representative Offices of Foreign Economic Organizations; Circular No. 4-TN-PC of the Minister of Commerce, May 6, 1991.

to reduce privileges of a joint venture.[108] Individuals registered as private businesses are now permitted to participate as a Vietnamese Party in foreign investment.[109]

53. Investment process. The Law, in response to criticism, has succeeded in avoiding unnecessary details and relaxing restrictions, while the Regulations were less successful in this respect. The latter adopt a control-oriented approach where the state authorizes and supervises all the foreign investor's activities with the exception of the everyday running of businesses. In addition, state agencies, especially the State Committee for Cooperation and Investment (SCCI), are given wide discretionary powers in the legislation, in respect of a host of different issues, without providing for independent supervisory control of such powers.

54. One area in which this overly detailed approach can be seen is in the admission conditions and procedures which a foreign investor has to satisfy to enter the Vietnamese market. In general, the legislation has adopted a case-by-case approach where the foreign investor has to apply for admission and obtain prior approval of the application and import licenses and the foreign investment is admitted only after fulfilling certain conditions under a specific procedure.[110] The conditions include the availability of special incentives only for investments in priority sectors.[111] The procedures generally require

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[108]Amendments to the Foreign Investment Law, enacted by the National Assembly on December 21, 1992. See also Foreign Investment Regulations, Article 99, which authorizes the state to make changes in licensed activities, reduce taxes, pay damages and make exceptions to Vietnamese law to make compensation where losses are caused by legislative changes.

[109]Foreign Investment Regulations, Article 3(1).

[110]Foreign Investment Law, Articles 37-38; Foreign Investment Regulations, Articles 9, 10, 11, 20, 23, 46, 49, and 63 (import licenses).

[111]Foreign Investment Law, Article 3; Foreign Investment Regulations, Articles 67-69.

SCCI approval, although the Regulations require the additional approval of other governmental departments in some cases.[112]

55. Treatment standards. Treatment standards for foreign investors under the foreign investment legislation are generally favorable. The legislation in many respects meets the policy goals of investment promotion as well as recommended international standards for the treatment of foreign investment, as reflected in the Guidelines on the Treatment of Foreign Direct Investment issued by the Development Committee in September 1992. The basic standard is that all foreign investors in Vietnam shall be "treated fairly and equitably."[113] More detailed provisions on treatment are on the whole favorable to the foreign investors.[114] However, the requirement of appointing a Vietnamese as a general or deputy general director of joint ventures[115] might be reviewed in light of the Development Committee's Guideline III which emphasizes the importance of guaranteeing the investor the freedom to employ top managers regardless of their nationality. In addition, the "sell down" requirement[116] should be clarified to ensure that the foreign investor will not be disadvantaged by agreeing in advance to the details of the sale of a project which is not yet formed. Finally, the fixing of the minimum wage in foreign invested enterprises by MOLISA at a rate far above the average wage in Viet Nam (US$35 per month) creates another discrimination relative to domestic enterprises.[117]

56. Guarantees. In addition to the constitutional protection against nationalization noted in para. 51, the Foreign Investment law itself also prohibits the requisition or expropriation of invested capital and assets for

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[112]Foreign Investment Regulations, Articles 63 and 71.

[113]Foreign Investment Law, Article 20.

[114]Foreign Investment Law, Articles 16-19, 24, 26-35; Foreign Investment Regulations, Chapters VII-XIII.

[115]Foreign Investment Law, Article 12.

[116]Foreign Investment Law, Article 14 (3).

[117]See note 104.

compensation.[118] However, SCCI retains the power to suspend or revoke a foreign investor's business license or even dissolve a joint venture if there is a breach of law or deviation from the investment objectives or incorporation conditions.[119] This wide authority is not tempered by a corresponding right to appeal SCCI decisions.

57. Dispute Settlement. The foreign investment legislation provides that disputes arising out of foreign investments in Vietnam will, if they cannot be settled by negotiation or conciliation, be referred to such judicial or arbitral fora as will have been agreed by the parties at the time of admission of the investment. However, foreign investors might face problems enforcing international arbitral awards until Vietnam becomes a party to the main international arbitration treaties. An ordinance on recognition and enforcement of foreign arbitration awards is on the list to be enacted by the Standing Committee. Currently, international arbitration facilities are available under the Chamber of Commerce and Industry of Viet Nam, through its Foreign Trade Arbitration Committee and Maritime Arbitration Committee, which are now being merged into the Vietnam International Arbitration Centre.

5. Environmental Protection

58. Environmental protection is a growing area of attention in Viet Nam, not only as part of Viet Nam's investment approval process (both domestic and foreign), but also to preserve and maximize sustainable development of its resources. The legal framework for environmental protection is still at an early stage. An Environmental Protection Law was enacted by the National Assembly in December 1993; new regulations governing and establishing an environmental impact assessment (EIA) regime are also in the drafting process. The Ministry of Science and Technology and Environment (MSTE) has been given the authority to play a central role in environmental decision-making, as well as in preparing the

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[118]Article 23 of the Constitution permits such requisition or expropriation for domestic assets, in the national security interest.

[119]Foreign Investment Regulations, Articles 15 (3), 38 and 52.

national legislation and guiding the preparation of local measures.[120] Various localities, especially Hanoi and Ho Chi Minh City, are introducing legislation to address urban environmental problems, such as industrial discharge, toxic gas and ambient air standards, water quality and noise. Legal provisions aimed at environmental protection are also found in the Forestry Law and the draft water and land laws, as well as the legislation on vacant land and marine environmental protection.[121] In addition, Viet Nam is a party to the Framework Convention on Climate Change, though it has not yet acceded to the Conventions on Biological Diversity or International Trade in Endangered Species.

59. As the legal framework for environmental protection develops, it will be important to eliminate unnecessary duplication of jurisdictional responsibility and establish clear lines of authority. Currently, for example, up to nine national agencies can have a role in decisions on water utilization. In determining governmental authority, it is also essential, whenever possible, to avoid conflicts of interest, by ensuring that the same agency proposing an investment project is not the agency which prepares and reviews the EIA. Development of reputable technical environmental institutes to perform independent EIAs would offer one solution, but further strengthening of the environmental professions (including environmental lawyers) will be needed to make this a meaningful option.

60. Much work lies ahead in designing, issuing and enforcing national and local environmental standards, for old and new facilities, for point-source emissions and for effluents, among other areas, and in devising workable procedures for environmental approval. Both companies and private businesses, for instance, must include in the application to establish the business, information on the

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[120]Order no.73, Prime Minister, February 25, 1993.

[121]Forestry Law, August 12, 1991; Decree No.327, Master guidelines and policies to utilize unoccupied land, barren hill areas, forests denuded beaches and water front, Council of Ministers, September 15, 1992; Regulations on Environmental Protection in Marine Petroleum Operations, promulgated by the Minister of Heavy Industry, September 5, 1990.

environmental protection measures to be taken.[122] For foreign investors, one of the prerequisites for transfer of technology into Viet Nam is that it does not adversely affect the environment.[123]

61. The Environmental Protection Law enacted at the December 1993 National Assembly session provides a new foundation for the protection of the environment in Viet Nam, and should have important implications for both local and foreign business activities in Vietnamese territory. Given the generality of the law's provisions, however, implementing regulations will need to be issued for the law to realize its full impact. It should be noted that the objectives of the law are in line with international thinking in this area, as they include protection of people's health, ensuring the human right to a healthy environment, serving sustainable development of Viet Nam and contributing to the protection of the regional and global environment.[124] The law also makes reference to the promotion of biodiversity and ecological balance, and provides generally for protection against exploitation of land and water sources and inappropriate waste treatment.[125]

62. Various types of business activity are addressed though any standards and norms are deferred to subsequent regulation. Thus, the State is required to provide for the encouragement and protection of legal rights for investment by Vietnamese and foreign organizations and individuals in scientific and technological aspects of environmental protection.[126] Those organizations and individuals who use the environment in productive business may be required to make financial contributions, in accordance with regulations to be issued by the

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[122]Law on Companies, Article 14(5); Law on Private Businesses, Article 8 (5).

[123]Ordinance on the Transfer of Technology into Viet Nam, State Council December 5, 1988.

[124]Law on Environmental Protection, National Assembly, December 27, 1993, Preamble.

[125]Environmental Protection Law, Articles 12-16.

[126]Environmental Protection Law, Article 3.

Government; where such organizations and individuals cause environmental damage, compensation and possibly restoration is required in accordance with the provisions of the Law.[127] Specific regulations are to be issued by the Government on the import and export of products related to environmental protection (such as species, toxic substances, gene sources, and micro-organisms), setting out the fields and items requiring approvals from the state environmental protection agency and others.[128] What is called in translation "environmental criteria" (standards) are to be issued by Government in numerous specified areas, including exploitation of minerals and petroleum, manufacture of goods, toxic chemical and other substances, transportation activities, hazardous waste and nuclear activities, along with special rules on the use of firecrackers.[129]

63. Several other important aspects of environmental protection are also addressed in the law. First, the functions of the state administration of environmental protection are set out in the Law, and include, prominently, the promulgation and implementation of legal documents on environmental protection and the issuance of environmental standards.[130] However, the law does not clarify whether the state administration of environmental protection refers to the current MSTE, its Department of Environment and Natural Resources, the combination of the two, or a new supranational body. Second, environmental connections outside of Viet Nam are given special consideration. Viet Nam's international treaty obligations in the environmental area are given support, and foreign investors and international institutions supporting environmental protection and prevention of environmental problems are given priority.[131] Moreover, environmental disputes involving foreign parties in Viet Nam are to be settled in accordance with Vietnamese law, "taking into account international law

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[127]Environmental Protection Law, Article 7.

[128]Environmental Protection Law, Article 19.

[129]Environmental Protection Law, Articles 20-28.

[130]Environmental Protection Law, Article 37.

[131]Environmental Protection Law, Articles 45-46.

and practice."[132] Notably, prior existing operations will have to submit environment impact reports, regardless of ownership.[133] Finally, while the specification of penalties is left to supplementary environmental legislation, private citizens have the right to petition against environmental violations.[134]

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[132]Environmental Protection Law, Article 48.

[133]Environmental Protection Law, Article 17.

[134]Environmental Protection Law, Article 43.

F. LEGAL SYSTEM: INSTITUTIONS AND IMPLEMENTATION

1. Legal Institutions

64. Legal institutions at several levels are involved in the formulation, issuanc and implementation of the laws necessary for the reform of the economic system. These include: the National Assembly, the country's legislature; the Standing Committee of the National Assembly, which exercises the legislative powers entrusted to it by the National Assembly; the Government, which is the highest executive organ; the Ministry of Justice and other ministries and agencies which are charged with the preparation of legislative and governmental acts; the courts; the State Economic Arbitration, which registers enterprises, and arbitrates economic contract disputes and the procuracy, which supervises the executive in its implementation of laws. The law reforms outlined above will touch upon each of these institutions, some more than others, and their development and capacity building will be essential to the full realization of the law reforms.

65. National Assembly. The National Assembly is elected for a five year term and meets twice a year. It is charged, inter alia, with enacting laws and working out a program for the enactment of laws and ordinances, and with electing the country's President and Vice President, the Standing Committee of the National Assembly, the Prime Minister, the President of the Supreme People's Court and the Supreme People's Procurator. The National Assembly has various working committees under it, including the Law Committee. The Office of the National Assembly serves the committees, and the legal department of the Office of the National Assembly, assists all the committees, including the Law Committee. The Standing Committee of the National Assembly is a permanent body which supervises the implementation of the decisions and enactments of the National Assembly, and, in addition, is entrusted to enact ordinances (also translated as "decree-laws") by the National Assembly. The President and Vice President of the country are responsible to the National Assembly.

66. The Government. The Government was formerly known as the Council of Ministers prior to the enactment of the 1992 Constitution. The Government is comprised of the Prime Minister, the Deputy Prime Minister and the Cabinet Ministers and is the highest executive organ and is charged with implementing the decisions and enactments of the National Assembly. In the course of such implementation, the Government issues such legal instruments as decrees, circulars and instructions. The core functional organ of the Government is the Office of the Government (also known as the Prime Minister's Office), in which the primary responsibility for review of legal decisions and enactments is the Legal Department.

67. Ministry of Justice. Key among the ministries in respect of law-making and law-implementing institutions is the Ministry of Justice. The central coordinating role of the Ministry of Justice is enshrined in a decree, which clarifies that the Ministry of Justice should coordinate the preparation of all legal instruments, including laws, ordinances, decrees and ministerial circulars.[135] Consequently, the Ministry of Justice can be expected to take an increasing role in the drafting and review of legal instruments to support the market economy, as well as in coordinating the drafting and review by other institutions. Moreover, the Ministry of Justice also exercises functions relating to the administration of justice (including courts) as well as training, research and legal education. Because of its central role with respect to both legislative and executive instruments, the Ministry of Justice is at the fulcrum of the law reform process.

68. Courts. Under the 1992 Constitution, as under the preceding 1980 Constitution, Viet Nam has a judicial system comprised of the Supreme People's Court, the local People's Courts and military tribunals. Courts are required under the Constitution to hold public hearings, and lay assessors as well as judges participate in trials, on an equal footing and with equal independence. The Constitution also permits the organization of lawyers' associations to assist

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[135]Decree of the Government on Functions, Duties, Powers and Organization of the Ministry of Justice, June 4, 1993.

defendants and other parties in a case. Two types of enforcement are likely to require action by the judiciary system, criminal and civil. Criminal violations of economic or criminal laws would be punished through the judicial system, including early action by the economic division of the police. On the civil side, while disputes under economic contracts are required to be resolved through arbitration, civil contract disputes as well as liquidation, company law and private business transactions are likely to find their way into the judicial system for resolution. As more of these economic disputes are sought to be resolved under this system, judges and assessors with actual commercial experience will be needed to give the system the credibility and efficacy necessary to enhance reliance on market transactions. In addition, economic courts were established by the National Assembly at its December 1993 Session, with effect from July 1, 1994, to provide a more specialized forum in which to resolve disputes, and to handle resolution of bankruptcy proceedings.[136]

69. Economic Arbitration. As noted above, the economic arbitration offices (State and local) have a number of responsibilities in the legal system. Principally, the economic arbitration is the agency for registration of enterprises and companies, and it is only upon registration that legal personality is required. In addition, arbitration of economic contracts with the economic arbitration is the exclusive means for resolution of disputes under such contracts. Resort to courts is permitted only for civil contracts, thus far. The economic arbitration does not handle foreign trade disputes, for which resort can be made to the Chamber of Commerce and Industry, a non-governmental organization which handles arbitration of foreign trade and maritime disputes.

70. Procuracy. The Supreme People's Procuratorate in Hanoi also has local offices. The procuracy is empowered to supervise the implementation of the law. The procuracy, which is to ensure uniform implementation of the law and initiate public prosecutions where necessary, is an additional mechanism designed to

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[136]Amendments to the Law on the Organization of the People's Court, National Assembly, December 28, 1993.

create a credible judicial system. Its functions and responsibilities are expected to be detailed in an ordinance on the procuracy.

2. Legislative Process

71. Enactment of laws and ordinances. The National Assembly decides on a list of laws and ordinances to be prepared for enactment at its two sessions in each year, as well as those to be formulated for consideration the following year. Also, all ministries of the Government, the Supreme People's Court, the Supreme People's Procurate, the Fatherland Front and other mass organizations have the right to propose laws. Most are proposed by the Government; in 1993, only the civil procedure legislation was prepared by the Supreme People's Court and the administrative and penal legislation was prepared by the procuracy. A drafting committee for each law or ordinance is chaired by the responsible ministry, with participation from other concerned ministries, always including the Ministry of Justice. After the draft is reviewed within the Government, the Prime Minister submits it to the National Assembly. Then the Law Committee will hold hearings and prepare a report to the Standing Committee, and the Standing Committee will meet and hear views from the Law Committee and the Government. Revisions may be required at this stage, before the Standing Committee reports the law to the National Assembly for consideration. (Approval of ordinances is entrusted to the Standing Committee by the National Assembly.)

72. At the National Assembly meeting, the Government (the Prime Minister) makes a presentation on the background and the text of the proposed law, and the National Assembly Law Committee also makes a report. Members speak on the law, and revisions may be made (usually within a few days) so that the law can then be approved in revised form and enacted. Approval by a simple majority is required, except that constitutional amendments require two-thirds majority. Laws must be promulgated by the President and made public within 15 days.

73. Issuance of government decrees and ministerial orders. Decrees and ministerial orders are also prepared by the responsible ministry, and are to be

reviewed by the Ministry of Justice and the Legal Department of the Office of the Government, among others.

3. Implementation and Dispute Resolution

74. Even if all the laws described above were enacted and revised to comport with the rights and obligations necessary for market development, their effect would be minimized if no mechanism existed for private parties to enforce their rights and for government regulators to protect the public interest. Since the Civil Code itself is still under preparation, the system for dispute resolution is not yet comprehensive, but enforcement mechanisms do exist. Three main avenues for enforcement can be found in Viet Nam currently: the court system, described above, arbitration and administrative orders.

75. Arbitration. Arbitration is often preferred over litigation as a method of dispute resolution in the socialist context. In China, for example, arbitration of both marital and contract disputes have long been encouraged as a prerequisite if not a substitute for resort to courts. In Viet Nam, the State Economic Arbitration was established over 30 years ago and has existed in two distinct phases. During the period of the centrally planned economy, the Economic Arbitration was responsible for state management of economic contracts and for settlement of disputes between state enterprises under economic contracts. The 1990 Ordinance which most recently empowered the economic arbitration system provides that its three functions are: determining disputes which relate to economic contracts, dealing with breaches of economic contracts and carrying out state management of economic contracts as provided by law.[137] The Economic Contract Ordinance makes arbitration the exclusive alternative to negotiation between the parties for dispute resolution.[138]

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[137]Ordinance on Economic Arbitration, State Council, January 10, 1990, Article 1.

[138]Ordinance on Economic Contracts, Article 7.

76. The economic arbitration system has a fair degree of independence and power under its Ordinance. Arbitrators have the power to terminate contracts, order disposition of property, order administrative sanctions and payment of liquidated damages and allocate fees. However, there are time limits within which a party must request action and the economic arbitrator must resolve the dispute,[139] While an independent and reliable dispute resolution mechanism which is perceived to be fair could operate under the provisions governing economic arbitration, the law does not ensure that the system in actual operation can meet these goals. While one might expect more disputes as a result of economic market reforms, the disputes settled have actually declined.[140] As non-state enterprise transactions continue to increase, resort to arbitration would be expected to increase, absent any perception by private investors that the mechanism is unfair, unpredictable or unreliable.

77. Administrative orders. As in other legal systems, various Vietnamese laws also provide for the implementing agency to take administrative actions to ensure their enforcement. For example, the State Bank has the right to impose penalties for non-compliance on credit institutions under the commercial banking ordinance[141] while the Economic Arbitration can order payment on an award by the banking system.[142] It will be important to ensure that administrative orders such as these have a firm and explicit foundation in laws or ordinances, in order to avoid the mistaken impression that these are continuing exercises of state economic control instead of proper regulation by the state of a market-oriented system.

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[139]Economic Arbitration Ordinance, Articles 23, 25, 26 and 31.

[140]According to the State Economic Arbitration, more than 6,000 disputes nationwide in 1989 declined to 4,753 in 1991 and 1, 103 in 1992. Many of these related to non-payment by failing state enterprises, which were reduced in number as a result of the state enterprise reform process.

[141]Commercial Bank Ordinance, Article 47.

[142]Economic Arbitration Ordinance, Article 34.

G. SUMMARY

78. The need to reform the legal system to support and reflect the economic reforms has been recognized by Viet Nam, which has begun the process of enacting the necessary laws and decrees in such areas as company law, contract laws, banking laws, and most prominently, foreign investment laws. Further progress towards a market system will require additional legislative activity in the many areas of law outlined in the preceding pages. Of these, one could highlight at least four areas of special priority:

(a) Thoroughly implementing the new land law, by issuing detailed regulations to "marketize" the leasehold system, clarify land use rights in liquidating or corporatizing state enterprises and establish a firm basis for mortgage financing.

(b) Deepening state enterprise reform through a new legal framework for state enterprises to be established under a revised company law, to permit state enterprises to operate under the same framework as non-state enterprises, accompanied by a new state enterprise law and regulations to lay down rules for the state's management of its shares in enterprises.

(c) Revising the company law and foreign investment law framework to implement and expand the pilot corporatizations.

(d) Finalizing the civil code and commercial law to provide rules of the game for everyday business transactions and for the resolution of the disputes that inevitably result from them.

Other areas less than far-reaching in impact but still important for market development would include regulations to implement bankruptcy law, competition law and securities law.

79. Confidence in the legal system as a whole is necessary to support new economic behavior, so that new laws and regulations are required not just in the economic sphere but in all areas in which individuals, enterprises and government agencies rely on the legal system to protect their rights and define their obligations. Individuals cannot be expected to find in the country's system of laws and enforcement sufficient assurance that their investment in a new factory will not be arbitrarily seized if the same system does not provide sufficient assurance that their homes will not be arbitrarily taken to build a new road without clear procedures for adequate consultation and compensation. Similarly, government agencies required to use legal instruments instead of administrative commands to ensure worker safety will be more likely to inculcate the limitations on government authority if they are also subject to legal limitations in their contracts for procurement of office supplies.

80. Some final considerations about the overall scope of this legislative challenge merit attention here. One major concern to be addressed in meeting these different legal needs is to guard against the development of separate legal regimes for state enterprises, non-state enterprises and foreign invested enterprises, as this could interfere with efficient competition among enterprises with different ownership structures. There is also a need to coordinate the different trends in Vietnamese legal drafting, with European Continental civil law antecedents now being mixed with Anglo-American law precedents. Similarly, a balance must be struck in new laws between unnecessary specificity in areas which the government would not regulate in a market economy (such as permissible fields of operation for companies, foreign investors and private businesses) and undue vagueness with specificity offered only in subsequent regulations. Lastly, it is important in designing the various aspects of the new Vietnamese legal framework that foreign legal assistance be well-coordinated, and pay due regard to Viet Nam's own legal traditions and preferences, particularly in such areas as dispute resolution.

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