

The Emerging Legal Framework for Private Sector Development in Viet Nam's Transitional Economy

Pham van Thuyet

Private (especially foreign) investors find Viet Nam's legal framework the most serious impediment to investment. Policy changes to reverse the former command system may be enough to initiate the transition. But without an appropriate legal framework, they will be insufficient for long-term development.



Summary findings

A major objective of Viet Nam's transition to a market economy has been to reactivate the private sector in a mixed economy. Several new laws have been introduced in the past five years to implement this policy and to create an enabling environment for the private sector.

Thuyet reviews some of the more important laws and regulations that affect Viet Nam's private sector activities, including laws on real property, intellectual property, companies, domestic investment, foreign investment, bankruptcy, contracts, and dispute resolution. Anti-monopoly law has not yet been introduced in Viet Nam. The issue of competition is addressed in the context of trade law, the relative roles of the state and private sector, and restrictions in company law. These areas all establish the foundation of a legal framework for a market economy. Among Thuyet's conclusions:

- Viet Nam's legal framework, like China's, is still influenced by ideology, which causes problems in such areas as private ownership of real property and with such fundamental legal concepts as "due process of law."

- The private sector is constrained by the lack of an independent judiciary, the absence of private land ownership, other uncertainties in property law that limit the development of financial markets, and the inherent bias of the system in favor of the state sector (and collective ownership).

- A law-abiding attitude, equally important to development, has been slow to develop.

- Viet Nam's foreign investment process is too complicated, and its company law too restrictive. A first priority should be to streamline regulations.

Viet Nam has been slow to privatize its state enterprises, another step essential for development. Trade policy also needs to be liberalized.

- Export processing zones may be a useful interim instrument to attract foreign investment but should be phased out over time. More important in the long term is a good investment climate resting on a strong legal foundation.

This paper — a product of the Transition Economics Division, Policy Research Department — is part of a larger effort in the department to understand the legal and institutional requirements for transition from socialism to a market economy. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Grace Evans, room N11-041, telephone 202-458-5783, fax 202-522-1151 (48 pages). July 1995.

The Policy Research Working Paper Series disseminates the findings of work in progress to encourage the exchange of ideas about development issues. An objective of the series is to get the findings out quickly, even if the presentations are less than fully polished. The papers carry the names of the authors and should be used and cited accordingly. The findings, interpretations, and conclusions are the authors' own and should not be attributed to the World Bank, its Executive Board of Directors, or any of its member countries.

The Emerging Legal Framework for Private Sector Development in Viet Nam's Transitional Economy

Pham van Thuyet

CONTENTS

INTRODUCTION	1
I. The Emerging Private Sector	1
Structure	2
Foreign Investment	3
Relative Roles of Private Sector and State Sector	4
Does Legal Framework Matter?	5
II. Private Ownership of Real Property	6
Fundamental Concepts and Current Reform	6
The New Land Law and Problems in Land Use Rights	6
Changes in Housing Policy	8
Law on Private House and Ownership of the House	8
Financing the Acquisition of Property	9
Commercial property	9
Residential property	10
III. Intellectual Property and Transfer of Technology	11
The Law on Intellectual Property	11
Characteristics and Issues	13
Enforcement of the Laws on Protection of Intellectual Property	13
Relevance of law on intellectual property	14
IV. Company Law	15
The Need for Legal Forms to Develop Private Business	15
Law on Private Business and the Law on Encouragement of Domestic Investment	15
Company Law	16

The author is grateful to Cheryl Gray for her encouragement, comments, and suggestions made throughout the preparation of this paper. Alan Gelb and Sarath Rajapatirana read the final version, and their valuable comments are gratefully acknowledged.

The Shareholding Company (or Société Anonyme, SA)	17
Capital and Share Requirements	17
Corporate Governance	18
The Société à Responsabilité Limitée (SARL)	18
Regulatory Issues Beyond the Company Law	19
V. Foreign Investment Law and Regulations	20
The Emerging Legal Framework for Foreign Investment	20
Entry and Exit Laws	20
The forms of FDI	20
A Complicated Process of Sanctioning FDI	21
Termination and Liquidation of Joint Venture	22
Repatriation and Remittances	22
Profit Remittances	22
Repatriation of Capital	22
The Incentives System	23
Incentives Package Versus Sound Investment Climate	23
Resolution of Disputes	25
Other Issues and Recommendations for Further Reform	25
Corporate Governance	25
Subsector Preference for FDI: Encouragement List and Priority List . .	26
Slow Implementation	26
VI. Contract Law and Dispute Resolution	27
Evolution of Viet-Nam's Contract Law	27
Current Status	28
Problems of Economic Contracts	28
Resolution of Disputes	29
VII. Bankruptcy Law	30
Features	30
Issues	31
VIII. Issues on Competition	33
Dominance of the State Sector	33
Subsector Restrictions	33
Capital Requirement Restrictions	33
Trade Policy Restrictions	34

IX. Judicial Institutions	34
Unstructured Legal Environment	35
Source of Law and Judicial Review	36
Source of Law	36
Judicial Review	37
The Court System	37
Procuracy	38
CONCLUSIONS	39
BIBLIOGRAPHY	41
Appendix I: Viet-Nam's Process of Foreign Investment Approval	45
Appendix II: Procedural Laws and Due Process of Law	47
Procedural Law	47
Due Process of Law	47

INTRODUCTION

A major objective of Viet-Nam's transition to market economy is to reactivate the private sector within a "multi-component economy" or mixed economy. Several new laws have been introduced in the past five years to implement this policy and create an enabling environment for the private sector to formally engage in business in many areas.

Viet-Nam's private sector has considerable potential for rapid growth that has been realized in successes in agriculture, trade and services, and is only beginning to make its presence felt in some light industry subsectors. Factors crucial to this success have been Vietnamese entrepreneurship, a literate population, and a comparative cost advantage in labor intensive industries. Unlike other transitional economies in Eastern Europe or China, the southern half of Viet-Nam is still familiar with the workings of a market economy — clearly an added advantage for easier transition. However, considerable impediments remain for further development of the private sector. Private investment remains quite low; less than 10 percent of GDP in 1993 and only slightly improved in 1994. A deficient legal framework made up of complicated regulatory laws and uncertain substantive laws is perceived by the private sector as one of the most serious obstacles to its expansion.¹

This paper will review some of the more important laws and regulations in Viet-Nam affecting private sector activities — including the laws on real property, intellectual property, companies law, domestic investment, foreign investment, bankruptcy, contracts, and dispute resolution. Although anti-monopoly law has not yet been introduced in Viet-Nam, the issue of competition will be addressed in the larger context of current trade law, the relative roles of state sector versus private sector, and the restrictions in the company law. The above areas establish the foundation of a legal framework for a market economy. The paper will also discuss Viet-Nam's judicial institutions, including its civil code tradition and socialist orientation, the capacity of its court system, and the efficiency of law enforcement. As in China, Viet-Nam's legal framework is still influenced by ideology, which causes problems in several areas, such as private ownership of real property, and can affect fundamental legal concepts such as "due process of law".

I. The Emerging Private Sector

Viet-Nam's transition to a market economy began in 1989 with a reform program called Renovation or Doi-Moi. Initially, the program focused on price reform including exchange rate liberalization and abolition of subsidies to state-owned enterprises (SOE).

¹ Viet Nam: Private Sector's perceptions of Impediments to Industrial Development - A survey done by the Center for Investment and Foreign Trade Development, for World Bank's Financial Sector Mission. Ho Chi Minh City, April 1994.

Subsequently, the Law on Private Business, promulgated in 1991, formally allowed the private sector to be involved in business activities for the first time in many years. Prior to the Reform(1989), all industry and trade were state-owned, and agriculture was collectivized.² The emergence of the private sector, reborn in the new legal framework for transition, has changed the structure of the economy significantly. The cooperative sector flourished when the economy was centrally planned but collapsed during the years following the 1989 Reform program. The cooperative sector contribution to industrial output fell from 42 percent in 1989 to less than 2 percent in 1993. By contrast, private sector involvement has grown in many subsectors, particularly agriculture, trade, and trade services. SOEs, however, continue to dominate the industrial sector.

Structure

Household business units in the trade sector were the first private undertakings to emerge in the urban areas following the Reform. They now number about 300,000 units and form the core of what may be considered Viet-Nam's informal sector. Under Viet-Nam's Company Law (see Section IV), these household business units are registered as "individual businesses" or sole proprietorships. In the "organized" or "formal" sector defined as non-household businesses, 6,024 units were registered by March 1994. About half of these businesses were trade and half were industrial.

Most private industrial units are small. More than half of the total 2,557 units in private industry have equity capital of less than dong 500 million (US\$50,000), and fewer than 500 have equity capital exceeding dong 5 billion (US\$500,000). Under the Company Law of 1991, the private sector began incorporating into two French-type limited liability companies: (i) shareholding companies or Société Anonyme (SA); and (ii) limited liability companies or Société à Responsabilité Limitée (SARL). Most of the smaller companies (2,531 units) incorporated as SARLs to restrict ownership and to preserve their tight management, while most larger companies (91 units) incorporated as SAs.

² In the North, the economy was centrally planned in 1955-1956. In the South, following the reunification in 1975, industry, trade were nationalized and farming was collectivized in 1977-1978.

Table 1.1

Viet-Nam's Organized non-Agricultural Private Sector: Corporations (SAs and SARLs) and Sole Proprietorships (as of March 3, 1994)		
Sector	Number of Units	Registered Capital (dong million)
Manufacturing	2,557	622,318
Trade	2,913	965,127
(Foreign Trade)	(14)	(67,948)
Transport, Tourism, and other Services	554	574,366
Total	6,024	2,161,811

Source: State Arbitration Authority, Hanoi; unpublished data provided during mission.

Private sector involvement in the industrial sector grew rapidly in 1989-90. A series of failures led to a consolidation in 1991-92, reducing both the total number of private units and their output. As a result, private industrial output growth has averaged a modest 6 percent p.a. during the last three years. Unlike other transition economies in Eastern Europe, Viet-Nam's private sector has not been enlarged by privatization of state-owned enterprises. Only three SOEs have been designated to be privatized in a pilot program.

In general, Viet-Nam's industrial sector is still dominated by SOEs, although the private sector is more active in the trade and service sectors. The dynamism of the trade sector is evidenced by the increasing number of new shops throughout the country and, more importantly, by their increased earnings. Private sector activities in the trade sector are, however, limited to domestic trade. Current trade laws and regulations practically give SOEs a monopoly in foreign trade. Although some 3,000 foreign trade permits were issued recently, only 14 were given to the private sector.

Foreign Investment

A policy milestone in Viet-Nam's transition toward a market economy was the new Foreign Investment Law enacted to attract foreign capital and technology. The revision of the Foreign Direct Investment (FDI) law in 1990 and amendments in 1991, 1992, and 1994 (including an important provision to allow 100 percent foreign-owned investment) formed a basis for facilitating FDI. Viet-Nam's incentives package for FDI is standard, more or less

comparable to FDI incentive systems of other East Asian countries (see Sec. V, Table 5.1). Despite these developments, however, Viet-Nam's FDI remains constrained by an uncertain legal system and by complicated regulations regarding investment sanctioning. Foreign investment has been most active in two subsectors: oil and gas and hotel construction. Project implementation is slow (Table 1.2) with about 25 percent of the total US\$6.7 billion net (excluding licenses revoked or expired) foreign investments approved through February 1994.³ In manufacturing, only a small number of projects have been implemented of the total US\$1.7 billion approved. Most of these are joint-venture projects (mainly with Korea and Taiwan) with short gestation periods involving garment subcontracting, consumer electronics, and scooters. An improved regulatory and legal framework may encourage other foreign investors to start implementing projects that take longer time to develop.

Table 1.2

Foreign Investment, 1988-1993 (US\$ million)						
	1988	1989	1990	1991	1992	June 1993
Cumulative Capital Registered (FDI approved)	364	903	1,503	2,726	4,663	6,214
Cumulative Inflow of FDI (Investment implemented)			400	600	900	1,500

Source: State Committee for Cooperation and Investments (SCCI), and Viet Nam: **A Developmental Perspective**, prepared for the (Paris) Donor Conference, Government of Viet-Nam, Hanoi, September 1993.

Relative Roles of Private Sector and State Sector

One of the chief issues with Viet-Nam's legal framework for the emerging private sector is the focus on control rather than on promotion. Despite the broad policy to promote a mixed economy ("multi-component economy"), the current laws attempt to circumscribe private sector development without encouraging its growth. Ideology still influences the legal system which is biased against the private sector. A weak legal infrastructure, including institutions unwilling or unable to implement the laws, adds to an uncertain, unstable legal environment. Domestic investors in the private sector have to operate in a more restrictive regulatory framework than foreign investors do, in part because the government continues to struggle with the philosophical issue of how far a liberated economy and an expanded private sector can be compatible with a socialist political structure. Viet-Nam's policymakers do not

³ Implementation seems accelerated somewhat in 1994 but overall implementation over five years is still slow. According to provisional data \$3.5 billion or 30% of a total \$11 billion approved by the end of 1994 were implemented.

have the same clean slate as their colleagues in Eastern Europe to promote private investment and private sector. The new Constitution of 1992, while introducing a "multi-component economy" (or mixed economy), still proclaims that "people and collective ownership" (in the form of state-owned enterprise and cooperatives) must be the foundations of such an economy (Art. 15). Furthermore, "the state sector will be strengthened and developed and is to keep the lead role in the national economy, particularly in crucial areas" (Art. 19). As a result, domestic investors are not given comparable incentives to those received by foreign investors, and the process of investment approval for domestic investors is not as clearly defined as for FDI. Investment approval for projects wholly supported by Vietnamese also involves a time consuming period of investigation including security clearance prior to registration preceding project evaluation. Beyond approval, domestic investors, like foreign investors, have to face a host of regulations affecting implementation including import/export restrictions, land regulations, utilities problems, a deficient banking/credit system, and an uncertain legal framework. The two new laws, the Company Law and Private Business Law, are quite restrictive. These laws may have helped clarify the forms of doing business, but they do not help promote decontrol/deregulation.

Does Legal Framework Matter?

China has experienced continuing economic (growth) success in spite of an imperfect legal framework. In contrast, CEE countries' poor economic performance despite their better legal framework seems to lessen the role of legal framework. In the case of Viet-Nam, policy changes to reverse the command system involving making new laws without improving law enforcement and strengthening other aspects of the legal infrastructure may have been sufficient to initiate the transition, but are not enough for long-term development. A stable legal framework to translate policy into a set of rules of law will be necessary to sustain long-term growth because frequent changes in the legal framework prevent investors from making long-term commitments. Likewise, effective enforcement of the laws, requiring an independent and competent court system, is equally important for a stable and reliable legal framework.

Viet-Nam's high growth in the last three years (1991-94) has been concentrated in agriculture, mostly in rice production, crude oil, and services. Manufacturing industries, on the whole, have shown mixed performance as some industries grew significantly (e.g., the traditional export industries such as processed seafood and garments under subcontracting arrangements), while others stagnated or declined. Unless Viet-Nam can turn into an oil-based economy, further economic growth would depend on an expanded foreign trade and a diversified manufacturing sector where legal framework does indeed matter. Legal/regulatory reform is essential for faster and more diversified investment, both foreign and domestic.

The case for Viet-Nam to strengthen its legal infrastructure appears to be even stronger if it hopes to attract more foreign investment from the West now that the U.S. trade embargo has been lifted. Most of foreign investment implemented so far was from Asian investors with Taiwan in the lead. These investors share some of Viet-Nam's culture

common to Asia and are reputedly skilled in dealing with an informal, unstructured legal system. The case for Viet-Nam to strengthen its legal system seems to be more necessary than with China where about two-thirds of FDI have been from overseas Chinese (particularly from Hong Kong and Taiwan) who can function in an informal legal environment. Yet, the Chinese government also recognized the urgency of completing the legal framework to support the developing market economy.⁴

II. Private Ownership of Real Property

Fundamental Concepts and Current Reform

Viet-Nam's "property law" is made up of a number of statutes and decree-laws (law passed by the Standing Committee of the National Assembly when the latter is in recess) including the Land Law, the Housing Law, the Decree on Urban Land and Urban Housing and some relevant parts of the Family Law. As Viet-Nam maintains its socialist political system while opening up its economy, it retains much of its socialist regime of real property rights, particularly the principle of indivisibility of state ownership of land, as stated in the new Constitution (1992) and the new Land Law of July, 1993. Partial ownership rights are recognized in the form of the rights to use, to usufruct but not to dispose (e.g., sell, donate).⁵ In order to initiate transactions in real properties, the government attempts to circumvent this legal constraint by allowing "rights to use" for extended periods of time.

The New Land Law and Problems in Land Use Rights

The new Land Law, promulgated on July 24, 1993 and its attendant application decree, gives details on the hierarchy of types of property ownership and sets out the regulations on the right to use, to inherit, and to transfer this right. As in other areas of law, land law went through an evolution in response to reality and to changing economic, if not political, orientation. Prior to 1989 Reform, a property law on land was not necessary because private, individual farming was not allowed in rural areas while private business was almost nonexistent in urban areas. All land management was done through administrative decisions at local government levels.

⁴ See Peter Harold and Rajiv Lall, China: Reform and Development in 1992-93, World Bank Discussion Paper No. 215, August 1993.

⁵ From a legal point of view, a complete ownership would include the right to use (usus) to have usufruct (fructus) and to dispose including selling/buying (abusus). See for example Mazeau & Charles Leçons de Droit Civil (Tome II, Vol. II: Droit de Propriété), 7^e édition, Montchestien, Paris 1992. The right to abusus is not recognized in Vietnam or in China. Article 73 of Vietnam's Land Law recognizes the right to use, to transfer the right to use and the right to usufruct.

The Land Law categorizes six types of land for the purposes of charging fees for the right to use, for property tax, rentals and compensation in case of retrieval (re-expropriation). The six categories are 1) agricultural land, 2) forest land, 3) rural settlements, 4) urban land, 5) land for specialized uses, and 6) unutilized (green field) land. There is a basic rent schedule for each region which may change over time. The law spells out the land use right consisting of (a) the right to use, (b) the right to transfer land use rights, and (c) the right to usufruct (to enjoy the fruits of labor, the return to investment in the land.) In practice, until recently most home owners in urban areas paid property tax on land but not fees for the right to use. The government, however, charged a 20 percent fee for the transfer of the right to use when the house is transferred. The fee was paid by the seller. These fees varied according to the zone but were not excessive as compared to the land value in comparable cities elsewhere. Two new laws, in the form of decree/circulars, have changed the land use rights situation in Viet-Nam. Land use for business purposes, industrial enterprises, and commercial construction are especially effected. The first law, Circular No. 02 by the Finance Ministry, requires the collection of 100 percent of fees assessed for land use rights to be paid by the rights holder or seller. The new fees charged for land use rights are very high. In some areas in Ho Chi Minh City (Saigon), the fee may be as high as \$1300 per square meter. This decision has caused strong protests from homeowners. The city of Saigon has petitioned the central government to review and rescind the circular. The new decision has also frozen the real property market because the new regulation on land use rights has pushed up real estate prices enormously.

The second law, Decree No. 18, February 13, 1995 and applicable retroactively to January 1, 1995, requires all land use rights on commercial properties to be transformed into land lease (rentals) and has caused an even stronger protest and created considerable confusion. The new regulation retrieved or re-expropriated the land already given to business people. These people had paid fees for land use rights when they were "assigned" the land for long term use, but now they have lost these rights. The new regulation nullifies the quasi-ownership of the land intended under the concept of long-term land use rights. The new regulation is causing disturbances in the financial sector because banks no longer accept land use rights as collateral for loans. In fact, some banks have started to recall loans previously made on the basis of land use rights. The new regulation also raised the issue of land contributed as equity by the Vietnamese counterparts in joint ventures with foreign investors (see Section V). Now, this value is reduced to the rentals the Vietnamese have to pay to the government, not the land use rights whose value normally is greater than the rents.

The land use policy as embodied in the new Land Law is still tentative. While the provisions on the right to use rural land are fairly clear, the provisions affecting urban land are vague and undetermined reflecting difficult, unresolved problems (e.g. multiple titles on the same property) involved in urban land policy.

The new regulation on land use rights on commercial properties has made the land law more unstable. The law provides a renewable 20 years period of land tenure for annual

crops and 50 years for perennial crops (art. 20) but has no similar provisions for urban land. In the rural areas, each family can be allocated a maximum of three hectares for annual crops. In the South, where land is still abundant, this restrictive provision may impact negatively on agricultural output and productivity as it would prevent efficient use of mechanized agricultural machinery and implements. The area limit for a perennial crop is to be determined, presumably case by case. Land allocation for settlement in the rural areas is set at a maximum of 400 square meters for each family or 800 square meters for the more traditional, multi-generation family. Again, this provision may be appropriate for the densely populated rural areas in the North but seems too restrictive for the rural areas in the South.

Changes in Housing Policy

Socialist reform campaigns undertaken in the 1950s in the North and late 1970s in the South brought under state ownership large commercial properties throughout the country and redistributed residential housing, causing major redistribution of wealth. As a result of each reform campaign, each family was allocated or reallocated a dwelling of the size proportional to the number of members in the family. Multi-family houses are especially common in Hanoi where new housing construction cannot keep up with a fast growing population. For forty years prior to the Reform, there was virtually no real estate market in the North where land belongs to the State and housing is provided by the State either free or at a subsidized rent. These properties were not transferable.

The 1989 Reform changed the housing policy and made individuals responsible for their own housing. A provision in the new law on urban land and urban housing (see below) allows those currently occupying allocated housing to re-register and to be issued a certificate of ownership. This transforms the status of tenant to homeowner for the majority of people in the North. Since the ownership is transferable, the new law creates a real estate market for the first time in the North.

In the South, the more gentle socialist reform campaign in the late 1970's brought to state management (expropriation) for redistribution not all real properties as happened earlier in the North but only those belonging to the refugees, high official of previous nationalist governments, and large properties of rich people. Perhaps up to 40 percent of the total value of real property in urban areas have been affected this way. Most homeowners who stayed in the country after the Northern government took over the South can still keep their houses. Therefore, a limited real state market always existed in the South, and transactions in the past were often done by private sale act ("acte sous-seing prive"). Under implementation of the new law on urban land and housing to re-register all real properties, this and similar types of private transaction documents will likely become a source of litigation.

Law on Private House and Ownership of the House

The Law on Private House (Housing Law), promulgated on March 26, 1991, defines the ownership for the construction and improvements (the "habitation" or house) on the

tenured land including the right to use, to transfer, and to mortgage the property⁶ (art. 17). Because all land belongs to the state, a person can own a home but not the land underneath. But even ownership of the house continues to be an issue for a large number of properties as a result of successive socialist reform campaigns that redistributed housing without any formal, legal documentation.

A central objective of the Housing Law is to clarify the ownership status of private dwellings by listing the kind of ownership papers to be accepted as legal titles. But the law apparently failed to settle ownership controversies arising out multiple titles situations. A new law on Urban Land and Urban Housing in the form of a decree (Decree 60/CP, July 5, 1994) attempts to address the issue in greater detail. Both the law and the decree explicitly deal with the status of a great number of houses expropriated (or "managed" by the State) in the South following the reunification in 1975. These houses and the land to which the houses are attached used to belong to former South Vietnamese government employees, army officers who were taken to Reeducation Camps, or former business people whose properties were subject to the 1979 "socialist reform of private property" (expropriation) program. Parallel to the "Renovation" Reform Program implemented in 1989-90, these properties are in principle to be returned in part or in their entirety to the original owner if the properties have not been sold. In practice, few were returned because most had been transferred one or more times. Attempts by previous owners to recover their expropriated houses are still ongoing. The Housing Law also "regularizes" property right for occupants of houses taken from absentee owners (people who left the country without permission — mainly "boat people", people who had to donate their houses to the government prior to leaving the country legally, etc., Chapter V of Housing Law). To acknowledge their contribution to public service or to revolutionary causes, the new occupants, usually government/party officials, were subsequently allowed to purchase the property at prices lower than market price. (A schedule of discounted prices is published.) With these provisions, the net effect of the Housing Law is to legalize a de facto redistribution of real property in the urban area. In the past two or three years a great number of these houses have been sold several times, thus creating a market for higher end real properties in major urban areas.

Financing the Acquisition of Property

Commercial property. A system of formal finance for real property is not well developed in Viet-Nam in part because of the absence of clear law and regulations on urban land use rights. Commercial property development is lagging behind the demand derived by increased investment in other sectors. As a result, most of the recent increases in construction of commercial properties were made of small scale renovation of existing commercial units and financed by retained earnings. The few large commercial properties currently under construction or being planned are all joint-ventures between SOEs and foreign investors where the land use rights are well documented because they belong to a

⁶ Article 17: "owner of the house has the right to use, to rent, to mortgage, or to transfer ownership to other people".

state organization. In most joint-ventures in Viet-Nam, the local partners contribution to equity is always some land use rights to be evaluated in dollar equivalent. The value of such land use rights is the subject of bargaining between the local partners and the foreign investors as there is no criteria for appraisal. In this way, a limited market for land use rights has been created, but this market provides no reliable information on land value in general as the land is often overvalued in joint venture contracts. The practice of substituting land (or land use rights) for equity by SOEs has distorted real property markets.

Viet-Nam's laws do not distinguish between commercial properties and residential properties. In principle, the mortgages of real property are legally possible for both. The legal basis for such mortgages can be construed through the Land Law (Art. 3) for pledging the right to use, the Housing Law (Art 7) for pledging the house attached to the land. In practice, mortgages have been rare because of the difficulties in ascertaining title and problems involved in foreclosures. The problem of multiplicity of titles is most serious in urban areas of the South where a real property may carry several titles, all authentic or 'authenticated' by different government agencies following the reunification of the country in 1975. The new Law on Urban Land and Urban Housing attempts to establish clear title for each real property by way of re-registration. The law specifies the types of previously issued ownership papers that are acceptable for the purpose of re-registration. A new certificate of ownership (or title) will be issued to replace all the other ownership papers issued under previous laws and governments. Since the law is new, it is not possible to gauge whether it will effectively resolve the issue of titles on urban properties. Likewise, it will be some time before the new law will have an impact on expanding commercial property financing.

Some domestic banks in Ho Chi Minh City started on an experimental basis to accept ownership papers on residential houses and commercial buildings to establish collateral for short term loans. Similarly, land use rights have been used on a trial basis by a few banks, in part because the law on urban land is only recently introduced. A system of recording and documenting the rights to use a specific piece of land is still to be developed and detailed procedure on mortgages is still to be drafted. All three real property laws, namely the Land Law, the Housing Law and the most recent Law on Urban Land and Urban Housing, only state the principle of mortgageability of real estate with no clear procedure on how this can be done. The new regulation on land use rights, as mentioned above, effectively disrupted banks from using land use rights as collateral.

Residential property. Financing for both existing and newly constructed residential property has been made by cash through savings or informal credits. As with commercial properties, mortgages are rare. Until the transfer of land use rights become more familiar and the issue of clear titles is resolved, transactions will continue to be on a cash basis. Term financing by banks generally has not been developed significantly in Viet-Nam; for housing it is virtually nonexistent. Currently three banks lend to the housing sector, but they

make very few loans for housing purchases⁷. Primarily they finance working capital for construction firms who are often shareholders of the banks. Examples are the new Buidebank and Habubank. The largest housing bank, the Bank for Investment and Development of Viet-Nam (BIDV), receives funding mainly from the budget and makes medium- and long term-loans to SOEs. Private construction firms, like individuals, have had little access to formal housing finance. Following a scheme practiced in France ("Plan d'Epargne"), the Habubank and BIDV introduced saving-for-loan schemes intended for households to buy or build housing. The schemes require participants to save for at least one year at which time they can withdraw their saving and borrow an equal amount. The schemes are functioning on a modest scale because the level of private saving is generally low.

Mortgages on residential houses are practically unavailable because the laws are deficient and confusing and because of difficulties in foreclosure of collateral. The laws on mortgages and pledging properties are not at all clear. They are treated under "Economic Contracts" (Art. 2) where the jurisdiction belongs to economic arbitrators (now economic courts) and under "Civil Contract" (Arts. 30-34 of a separate law) where litigations are to be handled by the regular People's Courts. Difficulties in foreclosures, particularly enforcement of court orders, is reportedly a more serious problem that discourages banks from financing real estate. The lack of experience and inadequate legal training of the judges and arbitrators contribute to the weakness of Viet-Nam's current law enforcement. The few commercial banks that offered loans secured by collateral based on real property preferred to come to the People's Committee at the district level (district government) instead of the court to enforce the foreclosures.

III. Intellectual Property and Transfer of Technology

The Law on Intellectual Property

Viet-Nam's new Law on Intellectual Property and Foreign Investment Law (see Section V) were the first legal reforms designed to attract foreign investment. The government realized during reform debate the importance foreign investors attach to intellectual property protection. The government wanted to attract back the multinational companies (MNC) that had operated in the South but left the country in 1975 following the reunification of Viet-Nam. These MNCs were mainly in pharmaceutical, brand name consumer goods, and others whose proprietary technology and brand names require effective

⁷For more detail see **Viet-Nam: Financial Sector Review**, Sept. 1994, World Bank Report No. 13135-VN, Chap. VI, Section D. Section C of the same chapter discusses the problems of term financing for industry/trade as mentioned above.

protection. Viet-Nam's new law on protection of intellectual property, promulgated in 1989, has features common to Western countries' laws. The country is also a signatory of international agreements on intellectual property (see below).

The new legal framework for intellectual property protection is broader than the pre-reform system. Many elements like patents were either not treated under the old, "traditional" socialist legal system⁸ or treated differently from the market oriented laws, e.g., the concept of copyrights. Under the traditional socialist system of Viet-Nam prior to 1989, author's works are the property of the state which pays stipulated fees — usually per page — for the writing. In the general area of intellectual property, Viet-Nam's legal reforms roughly parallel China's efforts⁹ both in areas covered and in terms of timing (around 1989–1990).

In addition to trade marks which are the most important intellectual property in the present context of Viet-Nam's transition, various ordinances and decrees¹⁰ protects four other intellectual properties: inventions/patents, utility solutions, industrial designs, and appellation of origin of products.¹¹ Another category called "industrial secret" (trade secret) was added in the Decree 201 HDBT, December 28, 1988 on Transfer of Technology through licensing although this category was not defined as the other five. Current laws provided the rights to possession, to use, and to transfer over the protected objects.

⁸ Prior to the country's unification in 1975, South Viet Nam with its market economy had since 1950s a comprehensive legal system protecting intellectual property and, as a result tens of thousands of trademarks and patents has been issued. North Viet Nam also had its first laws in the late 1950s to regulate trademarks but implementation rules were not promulgated until 1980s and data on the number of trademarks registered during the war time are not available.

⁹ See for example Ralph H. Folsom, John H. Minan and Lee Ann Oho, Law and Politics in the People's Republic of China, West Publishing Company, 1992, Chapter IX.

¹⁰ All five categories are governed by Decree 84 HDBT, March 20, 1990 on Protection of Intellectual Property and Decree 201 HDBT, December 28, 1988 and Arrête 49 HDBT, April 3, 1991 on Transfer of Technology amending the original decree 197 HDBT, December 14, 1982. These texts establish both substantive and procedural laws for intellectual property protection.

¹¹ *Trademark*. A symbol that is used to distinguish goods or services of the same kind from different production or commercial units;

Inventions. A technical solution that presents "world-wide novelty" and represents an inventive step applicable in a socio-economic field;

Utility solutions. The application of an old (patentable) technology in a new and previously unused way in Viet-Nam. A registrant can obtain a certificate which protects the new application for six years;

Industrial designs. The specific appearance of a product embodied by lines, three-dimensional forms, colors or a combination of these, which is new on a world-wide basis and capable of serving as a pattern for a product of industry or handicraft; and

Appellation of origin. The geographical name of a country or locality which serves to designate the origin of a product manufactured in that county or locality, provided that its qualities and characteristics are due exclusively or essentially to the geographical environment, including natural or human factors, or a combination thereof.

Under the new laws, about 40,000 trademarks have been registered. Other categories registered include less than a thousand each. All trademarks filed with the Government of South Viet-Nam prior to 1975 have to be refiled at the National Office of Invention (NOI) in Hanoi, which is in charge of intellectual property protection.

Characteristics and Issues

Viet-Nam's system of intellectual property protection adopts the "first to file" rule for the most part while most other countries adopt the "first to use" rule. The use of the "first to file" rule could create litigation over an intellectual property that was pirated but "properly filed" prior to the filing by the real, authentic foreign owner. Two measures were taken to deal with this problem: 1) those who have utilized the property prior to and independently of the applicant for protection will have the right to continue the use of the property but are not allowed to extend the period for utilization or transfer it; 2) a period of grace was given by the government for foreign owners to file their trademark on the basis of evidence of their being the "first to use" to accommodate the legal practice of their home country. This measure, of course, will not settle the problem.

As in other legal fields of Viet-Nam, socialist features in this area can be viewed as of a cosmetic nature but can also be used to create substantial regulatory impediments. For example, as the law stipulates, an owner of an intellectual right "is required to use or transfer intellectual property in Viet-Nam in a way compatible with the need of social and economic development of the country" (Article 13, Obligations of Intellectual Property Owners — Decree-Law No. 13 LCT/HDNN8, November 2, 1989). The letter and spirit of this type of legal language are open to wide discretion for implementation agencies to infringe upon the rights to protection.

Another potential problem lies in the provision that intellectual property can be expropriated if the Chairman of the State Committee for Science —now the Minister for Science and Environment—who is charged with overseeing the implementation of government policy in this field, "considering it necessary to use the protected invention, utility solution or industrial design for Viet-Nam's national defense or security or the prevention of treatment of human diseases or for other vital interests." Despite a provision for adequate compensation, the possibility of expropriation casts a shadow of uncertainty on Viet-Nam's policy on intellectual property.

Enforcement of the Laws on Protection of Intellectual Property

Apart from some socialist elements as mentioned, Viet-Nam's laws and regulation on intellectual property rights have followed principles that are common to Western laws. The duration of protection is generally 15 years from filing date (China also has 15 years duration). Viet-Nam is a signatory of the Paris Convention, the Madrid Agreement, and the

Stockholm Convention.¹² In order to activate any of these agreements or any bilateral agreements for securing protection or negotiation over technology transfer, the foreign party has to mention its adherence to these specific agreements in the application letter. Because of the newness of the field in relation to the country's transition to market economy, Viet-Nam's legal documentation on intellectual property protection is confusing and should be strengthened. Currently a foreign owner of the intellectual property has to refer to numerous laws and regulations, including both the Decree-Law on Intellectual Property Rights and the Law on Technology Transfer, and to make several application arretes for adequate coverage of the subject. The Law on Technology Transfer also overlaps with another law on "Acquisition of Technology through Licensing."¹³

Enforcement of the laws on protection of intellectual property is probably the weakest of all as evidenced by the proliferation of faked brand name consumer goods in the markets of major cities. In principle, protection against infringements can be sought first through the NOI which has no power to grant compensation for loss but can grant injunctions against the infringer and prevent future infringements. For compensation, remedies in principle can be sought through the People's Court system. As Viet-Nam has just begun to reintroduce its market-oriented legal system, its courts have but limited experience in dealing with these and other commercial matters.

Relevance of law on intellectual property

Research on intellectual property protection has focused primarily on industrial economies where the need for and the laws of protection are most relevant.¹⁴ At its present stage of development where research and development (R&D) activities are underdeveloped, Viet-Nam would benefit little from the laws including the international conventions and agreements, other than for a range of small patents to protect the results of home grown research activities. Regarding transfer of technology, the issue is not so much

¹² The Paris Convention for the Protection of Industrial Property (March 20, 1883) allows the owner of a trademark to claim a priority in a foreign country to the date of the initial filing in its home country. At present, there are more than 80 signatories to the Paris Convention. The Madrid Agreement (April 14, 1891) allows signatory parties who have registered a trademark in their home countries to register the trademark in all member countries by depositing a certificate of registration with the central registration bureau in Berne, Switzerland. The Stockholm Convention (July 14, 1967) established the World Intellectual Property Organization (WIPO), a UN organization which offers registration services for intellectual property and which facilitates the transfer of intellectual property from developed countries to the developing world.

¹³ Several economic issues on this subject are discussed in Technology Transfer to Viet Nam: An Interim Report, Research Policy Institute, University of Lund, Sweden, and Institute for Science Management, Hanoi, Vietnam. Discussion paper No.181, 1987, and Technology Transfer to Vietnam, Historical and Conceptual Aspects, by Nguyen Than Ha, Research Policy Institute, University of Lund, Sweden, June 1989.

¹⁴ For a Survey of Literature see Wolfgang E. Siebeck (editor), Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature, World Bank Discussion Paper No. 112, 1990. The Study has a very extensive bibliography.

legal as it is economic. Viet-Nam's current low absorptive capacity due to deficient technological infrastructure (R&D) and deep-rooted inefficiency of SOEs make it difficult to transfer and to master new technology. Adhering to international protection conventions and introducing its own laws to protect intellectual property, on the other hand, would facilitate the flow of FDI and transfer of technology in the R&D-intensive sub-sectors such as pharmaceutical and other chemicals where a good legal framework to protect proprietary technology is critical.

IV. Company Law

The Need for Legal Forms to Develop Private Business

Company laws modeled on French laws (*Droit de Société*) were in application in both North and South Viet-Nam prior to the socialist government coming to power. These laws were never formally abrogated but became irrelevant and remained dormant during the decades of a centrally planned economy where private companies were dissolved or expropriated. In keeping with socialist tradition, practically all trade and production activities were organized into large state corporations ("general state corporations") or cooperatives formed by administrative decisions. Real private sector economic activities were reduced to an insignificant level.

Following the 1989 Reform, the private sector re-emerged even though SOEs still dominate important sectors of the economy. The surge of private sector activities in trade and in light industries in urban areas, especially in cities of the South, raised the need to reintroduce company law in order to regulate private business. Company law is also needed to organize local businesses in proper form in anticipation of joint ventures between the private sector and foreign investors. Currently, most joint ventures are being formed with SOEs.

Law on Private Business and the Law on Encouragement of Domestic Investment

The re-emergence of private businesses in Viet-Nam was initiated by the Law on Private Business (enacted December 2, 1990 to take effect on April 15, 1991). This law recognizes the right of the citizens to engage in private commercial activities. In effect, the law recreated Viet-Nam's private sector that had been virtually wiped out during the long years of a centrally planned economy.

In addition to allowing the private sector to do business, the law establishes the rules for setting up business under sole proprietorship. As with corporations, the law on sole proprietorship is very restrictive. For example, a business license for sole proprietorship to engage in a routine activity such as an import/export trading enterprise or an agency for international travel requires approval by the prime minister. Furthermore, there is a list of required minimum capital for all business/professions in eighteen groups, and it covers

hundreds of subgroups from services to restaurants (\$2,500 equivalent) to mechanics workshops (\$8,000 equivalent). This list is to be updated from time to time and is used as criteria to determine if a private business is subject to this law. Businesses having a capital smaller than these minima are regulated separately, presumably by local government decisions. Under the Law on Private Business, 8,000 sole proprietorships, primarily small family businesses, have been registered.

To the extent that the country still remains socialist, a law that permits private business perhaps makes sense as it legalizes private business in spite of socialist ideology. In a more mature market economy, such a law is simply redundant as private business is a matter of "natural law" and routinely practiced. As Viet-Nam's emerging market economy matures with time, this law should be abrogated as a further step toward private sector deregulation.

Beginning January 1, 1995, domestic investors could benefit from tax incentives set forth in the Law on Encouragement of Domestic Investment (Domestic Investment Law). The law was passed on June 22, 1994, to take effect January 1, 1995, and was enacted to respond to complaints from Vietnamese business people about a bias in favor of foreign investors. Tax incentives for domestic investors are: 1) A one to two year reduction of 50 percent of the tax rate for corporate income tax. In addition, investments in underdeveloped regions such as highland areas may receive an exemption for one to two years. 2) A three year income tax holiday is given for distributed dividends. 3) Duty-free imports of machinery and equipment are allowed. As with foreign investments, many priority industries where special incentives are to be given are also included in the law. On the whole, the incentives package for domestic investors is not as generous as for foreign investors but reduces bias against domestic private business. The law also allows overseas Vietnamese to invest in Viet-Nam as domestic investors, but they have the right to transfer capital and profits back overseas.

Company Law

Enacted in December 21, 1990 to take effect on April 1991, Viet-Nam's new Company Law, modeled on the French concept of the corporation, sets out two types of companies: the "shareholding company" similar to the "Société Anonyme (SA)"- and the "limited responsibility company" similar to the "Société à Responsabilité Limitée SARL".¹⁵ Both types of companies are limited liability companies. The Private Business Enterprise (PBE) is a third form of business regulated by a separate law, and essentially it is a form of sole proprietorship. Unlike the French company law on Sociétés Commerciales, Vietnamese law and regulations on corporations are restrictive and add to the many impediments already constraining an otherwise promising private sector. All three forms of

¹⁵ See for example Georges Ripert & René Roblot, Traité de Droit Commercial, Paris, Librairie de Droit et de Jurisprudence, 1991.

companies are not open to foreign investors who are regulated separately by the Foreign Investment Law (see Section V).

Despite considerable restrictions by the law, 11,200 private companies have been formed in the three years since the promulgation of the Company Law. A few of these emerging private firms have been fast-growing, using thousands of workers. The majority of these newly formed companies are in the South where a considerable pool of private entrepreneurship still existed despite 17 years of a centrally planned economy.

The Shareholding Company (or Société Anonyme, SA)

Several of the provisions of the Company Law, including regulations regarding business registration, changes of business category, and dissolution, are applicable to both the SA and the SARL. While the SARL, with its simplified regulations and reporting requirements, is intended for small/medium companies, the SA is the form normally adopted by larger enterprises where the shares can be transferred more easily.¹⁶ With the development of the stock market in perspective, the SA is also the more important form of corporation because its shares are freely transferable. Currently, about 100 large enterprises have been formed as SAs, mostly in the South. Like sole proprietorships and SARLs, shareholding companies are subject to several subsector restrictions reflecting a policy leaning more on control than on promotion. To make the SA and other forms of incorporation useful instruments to expand the private sector, these restrictions should be removed.

Capital and Share Requirements. A major restriction is the minimum capital requirement ("statutory capital") as distinct from paid-in capital, specified for each type of business (eighteen groups). The actual or paid-in capital (called "legal capital" in the law) is to be 30 percent of the statutory capital for SA, but 100 percent for SARL. Capital contributions can be either in cash or in kind. For an SA, the minimum capital requirement ranges from \$5,000 equivalent for animal husbandry to \$50,000 for most small/medium industries, to \$150,000 for mining and metallurgy industry. The ownership structure as specified in the law is not totally flexible because the SA founders must subscribe an aggregated minimum of 20 percent of total shares value, and the remaining can be opened to public subscription. The SA cannot issue bonds or debentures immediately but only two years after the "company has been efficiently managed" and "proves its necessity to embark on debt financing due to expansion." This provision in effect prevents all initial leverage financing, except perhaps by way of direct project financing by financial intermediaries. The provision can also be open to corruption as the permission to issue bonds or debentures will

¹⁶ Shares in a SARL are called "part social" can be sold to outsiders only with agreement by 3/4 of shareholders. Shares in a SA are called "action" can be freely transacted, therefore, the name of SA for Société Anonyme [Anonymous (Shares) Company]. The Vietnamese change this name and called Shareholding Company.

be based on judgments made by government bureaucrats as to whether the enterprise is sufficiently efficient to warrant expansion.

Corporate Governance. In the case of Viet-Nam in transition where a capital market is yet to develop, legal framework affecting direct monitoring and control by shareholders is the most important mechanism of corporate governance. Viet-Nam's law treats the all important issue of voting rights with no details other than stating that "shareholders have the right to vote and their number of votes is proportional to their capital contributed"(Art.8, Company Law). Presumably this means a system of one share one vote. Under the Company Law on SAs, a board of directors of three to twelve members is elected by the general assembly of shareholders which requires a very high quorum of 75 percent which would give minority shareholders greater veto power. This may not be appropriate for an efficient decision making process of the company if the mode of privatization results in a dispersed ownership. The law relegates the majority rules for voting to the company by-laws which in the current context of Viet-Nam may not be appropriate because the legal profession is not well developed. For the time being, these rules should be written in the law itself.

The law does not explicitly provide for inclusion of outside directors although this can be accomplished by a "nominal" acquisition of shares. Including outside directors would be useful in the case of a company privatized by selling shares only to the company's employees as envisaged in Viet-Nam. The Board of Management is not involved in day-to-day operations which are assumed by a Director General, a position sometimes is overlapping with that of the Board Chairman. Viet-Nam's Company Law provides for independent controllers elected by the General Assembly to assess the company's financial accounts. In this sense, the controller's job resembles the function of an independent auditor.

The Société à Responsabilité Limitée (SARL)

Viet-Nam's name for the second type of corporation, "CONG-TY TRACH-NHIEM HUU-HAN," is a textual translation of the full French phrase for SARL. Conceptually, the SARL has intermediate characteristics between the French concepts of corporation of persons (*société de personnes*)¹⁷ and corporation of capital (*société de capitaux*) such as the SA. In terms of liability, the SARL is similar to the SA. Unlike an SA which can choose any name for the corporation, a SARL must use its main activity designation (e.g. "Trading Co") or the names(s) of its shareholders for the company name. As with other forms of company, a SARL is subject to minimum capital requirement for each type of business. The amount of minimum capital specified for SARL is about 75 percent of that required for a similar business under SA. Transfer of SARL shares to outsiders requires approval of shareholders who represent at least three-fourths of total statutory capital. In part because of its simplified regulations and reporting requirements, SARL has been the most popular form of corporation

¹⁷ For details, see for example, Alfred Jauffret, Manuel de Droit Commercial, Paris, Editions LGDJ, 1991 or G. Ripert and Roblot, Traité de Droit Commercial, Op.Cit.

among domestic investors. About 2,500 companies have been formed under SARL since 1991 when the Company Law became effective.

Corporate governance of a SARL under the Vietnamese Company Law differentiates between a small SARL of less than 12 members and a larger SARL of 12 or more members. A small SARL is directed by a manager to be appointed by a majority of SARL members, generally through consensus. The manager can be a shareholder of the SARL or an outsider whose actions are binding to third party. For the larger SARL of 12 or more shareholders, corporate governance must follow the same rules as for an SA, that is a Board of Directors to be elected by the General Assembly with the same quorum of 75 percent of total shares value, two controllers for internal audits, and so forth.

Regulatory Issues Beyond the Company Law

With the Company Law, Viet-Nam has created legal forms for private sector activities. This is a good beginning to create a legal framework for the emerging private sector, but many regulatory impediments remain which constrain actual investment. A recent survey of domestic investors' perceptions of impediments to investment reveals that bureaucratic regulations, the legal system, and corruption are three of the five most serious obstacles to investment. (The lack of financing and export difficulties are the other two impediments listed.) Predictably, complicated administrative regulations have been found a more serious problem than the broad "laws" such as the Company Law.

A myriad of administrative regulations affect both domestic and foreign investors at all phases of business operations, but domestic investors are burdened with more bureaucratic red-tape. They are not given the same incentives as FDI. Viet-Nam investment policy is inherently biased against domestic private investors. In terms of process, the principal documents required of domestic investors are found in Article 4 of Circular No. 141/PLDS-KT, dated March 3, 1992, by the Ministry of Justice, but "concerned ministries" often require supplemental documentation. The approval process is prolonged by the detailed nature of these requirements and by the multiple steps involved. (1) Application documents must be prepared and should include a "business plan" and project proposal (for industrial investment) to be submitted to the concerned Department/Directorate. (2) Such Department renders an opinion and forwards it to the local People's Committee. (3) This opinion is considered by the local People's Committee. (4) An escrow account should be opened. (5) The local People's Committee issues a license. (6) The business must register with the Arbitration Authority. (7) An application must be made to the Police Department for a security clearance. (8) A public announcement appears in the newspaper. And (9) A business license tax is paid. A permit for the establishment of new business units is supposed to be granted in two months, but the actual steps detailed in the approval process above always require much longer to complete. As a result, approvals can take as long as a year particularly if the applicant is unfamiliar with the procedure and does not handle the steps personally.

V. Foreign Investment Law and Regulations

The Emerging Legal Framework for Foreign Investment

Viet-Nam introduced its Foreign Investment Law in 1987, before the promulgation of a more comprehensive reform program in 1989, reflecting the important role in the government attached to foreign investment in the transition. The law, amended in 1990, constitutes a legal island in that a special regime featuring both privileges and restrictions was created to govern only FDI. The legal enclave strategy is augmented by the real, physical enclaves in the form of fenced Export Processing Zones (EPZ)¹⁸. However, despite a special incentives package reserved to foreign investors, Viet-Nam's legal framework in general has been perceived by foreign investors in a recent survey as the most serious impediment to their investment plans in Viet-Nam.

Some of the more important aspects of Viet-Nam's laws and regulations for FDI as set out in the Foreign Investment Law of 1987, amended in 1990 and 1992, are reviewed in this section. Because this law does not cover all aspects of legal framework for FDI, relevant parts of other laws and regulations (e.g., Land Law, Housing Law, Company Law, etc.) will also be discussed.

Entry and Exit Laws

The forms of FDI. The legal enclave is structured around three specific forms of business enterprises for FDI are Joint Venture Enterprises, Contractual Business Cooperation (CBC) and recently, enterprises with 100 percent foreign-owned capital. From a legal point of view, contractual business cooperation enterprise, which in a way resembles a partnership, differs from joint ventures and 100 percent foreign ownership in that contractual business cooperation does not have a "judicial person" or legal person whereas under the other two forms of FDI, a new judicial person is created. One legal implication is that contractual business cooperation (CBC) enterprises are also governed by, in addition to the Foreign Investment Law, contractual laws. Ironically however, a CBC in principle is not allowed to enter any "economic contract" because it is not a juridical person (see Section VI). But this is only one of the anomalies in Viet-Nam's new legal framework. An important economic implication is that only joint venture is entitled to tax exemption and tax holidays which explains in part FDI concentration in joint venture enterprises.

To form a joint venture, the FDI contribution must be at least 30 percent of total capital. The FDI contribution should be made in foreign exchange, while the local contribution can be in local currency. As in China, about 80 percent of all FDI in Viet-Nam are joint ventures, and the great majority are with state owned enterprises (SOE). Foreign investors prefer to have SOEs as their local partners mainly because of their having

¹⁸ Viet-Nam's EPZ system was discussed in detail in Viet-Nam: Economic Policy for Transition To Open Market, a Trade Policy report by World Bank/UNDP, September, 1993.

substantial assets and considerable political clout. Less than 5 percent of FDI's are 100 percent foreign owned and about 15 percent are in contractual business cooperation enterprises. The latter are formed to carry out short-term, often "one shot," businesses (e.g., one shipment of import or export cargo, often under semi-barter transactions).

Viet-Nam's company laws (Law on Companies and Law on Private Business) generally are not applicable to FDI enterprises. As a result, FDI cannot be undertaken under sole proprietorship as provided in the company law but should be under joint venture or incorporated as 100 percent foreign owned. Foreign investors cannot own shares in a Vietnamese company (except in the banking sector where a recent decision allowed foreigners to participate up to 30 percent of a bank's equity) since the company laws require Vietnamese citizenship for shareholders. This, together with other regulatory requirements such as the submission of an economic feasibility study, can be construed to prevent FDI entry through portfolio investment. Under the current laws and regulations, FDI should come in as a discreet project reflecting government's policy preference for "productive" undertaking (often understood as green field projects) as opposed to commercial "commodore" ventures.

A Complicated Process of Sanctioning FDI. A major problem with Viet-Nam's current regulatory framework for FDI is its complicated process of approval. The basic law on FDI, the Foreign Investment Law, sets out only the principles and establishes the State Committee for Cooperation and Investment (SCCI), headed by a cabinet minister, to be in charge of FDI. Subsequent regulatory laws create a complicated *process* for FDI approval. These laws are primarily in the form of decree, arrete, and circular for application and create a myriad of paperwork. Like China with its complicated FDI bureaucratic process, but unlike Eastern Europe where there is either no process or a simplified process for FDI¹⁹, Viet-Nam has a system of sanctioning investment that involves too many approval agencies both at the central government²⁰ and local government levels. This multiplicity of approvals, resulting from overlapping authority, takes a long time, much longer than the mandatory three months from the date of the application as stipulated in the FDI law. Change in the law and regulations are needed. Currently the central authority (Project Evaluation Committee) in Hanoi evaluates the proposed projects according to nine criteria, recently consolidated into six, some of them already on the list of five criteria used by provincial governments (e.g., legal status of the company, project sponsor's financial situation, and so forth. See Appendix I.). These provincial governments, like those in China,

¹⁹ See Cheryl Gray and William Jarosz, Foreign Investment Law in Central and Eastern Europe, *opt. cit.* For China, see Zatar Shah Khan, Pattern of Foreign Investment in China, World Bank Policy Research Working Paper No. 1111, March 1993.

²⁰ At the central government, approvals are required from eight agencies including the State Planning Commission, Finance Ministry, Ministry of Commerce and Trade, Ministry of Science, Ministry of Construction, State Bank (Central Bank) and "other Ministries relevant to the sub-sector in question" (Cabinet Decision No. 366 HDBT, November 7, 1991).

at times seem jealous over their new found authority as a result of decentralization. In December, 1994 (Decree 191/CP, December 28, 1994) the government began to address this issue of overlapping authorities and issued new guidelines to streamline FDI approval process. It remains to be seen whether the latest guidelines will be implemented effectively.

Ideally, the best way to deal with process problems resulting from procedural laws is to have no process—as currently the case in many CEE countries—for there can be no "optimal" process in a large bureaucracy. The second best solution is to streamline the process to a minimum by cutting out as much as possible the institutional layers and their attendant regulatory requirements.

Termination and Liquidation of Joint Venture. An FDI enterprise is established for a period of 20 years. The duration can be extended up to 50 years for projects requiring long gestation periods and large investments. Apart from bankruptcy mechanism (see Chapter VII), the joint ventures may be terminated by mutual agreement or upon expiration of the 20 year period. It is not clear whether this time-bound contract is automatically renewable. The procedure for dissolution of joint ventures, whether at expiration or prior to expiration of contract, consists of the appointment by the Board of Directors of a three member liquidation committee to settle all pending obligations and liabilities of the enterprise. In the case of liquidation at expiration, the committee should be in place six months prior to expiration date. (Foreign Investment Law and Application Decree No. 28-HDBT, June 2, 1991)

Repatriation and Remittances

Profit Remittances. Foreign investors may transfer their share and should do it in the year in which profit is actually made (in practice it has to be made the following year to affect the profits actually realized). Foreign workers in FDI enterprises may also transmit their income overseas. As the Vietnamese currency (the Dong) is not convertible and the law does not explicitly guarantee the conversion, there may be a practical problem of foreign exchange availability for the purpose of repatriation and remittances.

Repatriation of Capital. Upon completion of the liquidation process, the remaining capital can be transferred abroad over three years in equal installments. This transfer policy reflects government's concern over an orderly management of foreign exchange and foreign capital flows. Exceptions, however, may be made to allow the transfer over a shorter period if the proposed remittance is small, currently one million dollars or less, or if the FDI enterprise has achieved 80 percent of foreign exchange earnings budgeted. Because FDI laws are new, the credibility of this transfer policy for capital as well as for profit remains to be tested as FDI matures.

The Incentives System

Incentives Package Versus Sound Investment Climate. Viet-Nam's incentives package for FDI is standard, more or less comparable to other Asian countries' FDI incentives systems (see Table 5.1, Vietnam: Direct Foreign Investment, Comparative Incentives) to include in the main (a) a guarantee against nationalization or expropriation and a guarantee for repatriation of capital and profits, and (b) a fiscal incentives package consisting of a tax holiday of up to two years plus another two years at 50 percent of the tax level, and a preferential corporate income tax rates between 10 percent — 15 percent (as against the normal 21 percent — 25 percent rates) for FDI in the "priority sectors." In addition, machinery, equipment and raw materials (if used for export industries) are exempted from import duties. Tax incentives can be important as they would affect the financial rates of return of project. However, foreign investors often feel that incentive packages are not as important to them as a good investment climate where a policy environment does not constrain private sector development. This policy environment is created by a stable legal framework, a transparent and decontrolled regulatory framework, a relatively liberal labor regulation, easy access to utilities, good physical trade infrastructure (export facilities, custom clearance), and a reasonably favorable living environment. In the case of Viet-Nam, while the last item applies, other factors, particularly the legal framework and other policies affecting private sector development, remain to be perfected.

**Table 5.1 — Vietnam: Direct Foreign Investment (DFI)
Comparative Incentives**

<i>ASEAN countries</i>	<i>Tax Incentives</i>	<i>Import Tariff</i>	<i>EPZ and/or other Free trade Instruments</i>	<i>Other incentives and/or conditionality</i>
Indonesia	None	Duty drawback	Bonded zones	Joint ventures required of DFIs
Malaysia	Five-year tax holiday	Exemption for machinery and raw materials for approved projects.	Several EPZs	Loans from government-sponsored banks available R & D expenditures tax deductible
Philippines	Five to eight years tax holiday	- Exemption for machinery - Post-operative tariff protection available	Several EPZs	Tax incentives for projects in underdeveloped areas - R & D expenditures tax deductible
Singapore	Five to ten years tax holiday	- Exemption for nearly all imports including for FDI.	Several Free Trade Zones	- Loans at concessionary rates for targeted industries - R & D expenditures tax deductible
Thailand	Three to five years tax holiday	Exemption for machinery and selected raw materials	Two EPZs	- Tax credits for projects outside Bangkok - Infrastructure support for large projects
<i>Viet-Nam</i>	Two years tax holiday plus another two years tax reduction at 50 percent	Exemption for machinery and raw materials for approved projects	Two EPZs Other EPZs planned	- Lower corporate rates for FDIs on "priority industries" list - 100 percent owned FDIs allowed

Sources: Vietnam: Foreign Industrial Law and Decrees (1991) and 1992 provisions.

ASEAN: ASEAN Fiscal Incentives, Business International and other sources.

Resolution of Disputes

Viet-Nam's Foreign Investment Law allows parties to joint ventures or business cooperation contracts to choose the Vietnamese Arbitration Authority or any other arbitration system as mutually agreeable for the resolution of disputes among themselves (Article 25). Recognizing the weakness inherent in the courts and the traditional arbitration system, the government recently created a special "International Arbitration Commission" associated with the Viet-Nam Chamber of Commerce & Industry to handle disputes arising under the Foreign Investment Law. The commission is headed by a reputed attorney from the South, trained in the French legal tradition and presumably familiar with commercial practice in a market economy. This new institution is too new to provide any evidence that it will work better than the existing arbitrator office or the People's Court system. Regarding disputes between foreign investors and the state, Viet-Nam began to enter bilateral agreements with some capital-exporting countries to set out the mechanism for settlement. As project implementation has been very slow, there have been no major disputes which can test the effectiveness of the system. One or two recent disputes over taxation and transfer of profits earned in some small profitable projects were not brought to formal arbitration but are still in the process of negotiation for an amicable settlement. In general, despite government efforts to improve the credibility of Viet-Nam legal institutions, foreign investors still have little confidence in the system.

Other Issues and Recommendations for Further Reform

Viet-Nam's current legal framework for FDI is a legal island of special incentives and rules created to govern only FDI. In the short run, this enclave-type legal framework may be useful as transitional instruments to attract foreign investment, but it should be phased out over time. For long-term development, a generally good investment climate with a stable legal framework should replace the enclaves.

A recent sample survey (done as part of the Financial Sector Study) indicated that the five most important obstacles to investment as perceived by foreign investors are by order of importance: 1) legal framework, 2) bureaucratic process and corruption, 3) investment climate, 4) inconvenience in financing, and 5) labor management. Despite government efforts to facilitate FDI, several legal and regulatory issues still constrain foreign investors' decisions to invest in Viet-Nam or to implement their already approved projects. Interestingly, notoriously poor infrastructure in Viet-Nam is considered a major problem but not as difficult as policy/legal impediments.

Corporate Governance. Regulations on corporate control and monitoring for FDI enterprises are in the Foreign Investment Law, although this law sometimes refers to the Company Law. The form of management of an FDI enterprise is broadly in line with the provision of the Company Law to include Board of Management (or Board of Directors), Director General, etc., but their prerogatives do not reflect proportionally shareholders rights. Significant differences exist with respect to rules of decision making and other

aspects. For example, in a joint venture, the foreign and local partners appoint members to the board of management in proportion to their capital contribution. However, both parties have to have at least two representatives each on the board of management regardless of their capital contribution. If more than two parties are involved, the minimum number of board members is one seat per party involved. The board of management oversees the operation of the joint venture and according to the law it "shall have the power to make decision on all important matters in relation to the joint venture enterprise." Unlike the Company Law which refers Board's decision making rules to the By-Laws, for joint ventures the Foreign Investment Law stipulates that decisions on "principal matters which relate to the organization and operation of the joint venture, namely its business objectives, business planning, and key personnel," may only be made by a unanimous vote of the board. This effectively gives each party involved the power to veto any decisions on these matters. This veto provision is clearly a major impediment to effective management. All other decisions have to be made with two-thirds majority. The chairman of the board is to be appointed by consensus, but nothing is said in the law about the chairman's powers.

Subsector Preference for FDI: Encouragement List and Priority List. Like China, Viet-Nam has subsector preferences for FDI. While China provides special incentives for FDI engaged in export-oriented industries and high-tech industries, Viet-Nam has a two-tier approach to special treatment for FDI. The first tier is a list of five broad subsectors where FDIs are encouraged and within that list; the second tier is six priority categories eligible for preferential tax and other benefits. The list of five encouraged industries includes:

- (1) large scale industries, export-oriented and import substitution industries;
- (2) high-technology industries using skilled labor, investment for full employment, and exploitation of potential resources available in Viet-Nam;
- (3) labor intensive industries using raw materials and natural resources available in Viet-Nam;
- (4) construction of infrastructure; and
- (5) foreign-exchange-earning service industries such as tourism, ship repair, airport and sea-port services, and other services.

The use of priority lists is not a good idea. As bureaucracy breeds itself, what in the beginning was defined to mean a non-binding list of encouraged industries in many countries has become over time a bureaucratic instrument of FDI screening, particularly for lending purposes by financial institutions. The use of "lists," a by-product of inward-looking development strategy of the 1960s and most popular in South Asia's countries, has proved to be ineffective and counter-productive in the long run. For this reason, these lists should be abolished.

Slow Implementation. Viet-Nam's success in attracting foreign investments must be qualified by the slow inflow of capital actually taking place. Although investment approvals have risen over the past five years, implementation has lagged. As mentioned in Section I, of a net total US\$6.2 billion worth of projects approved as of May 1994, only US\$1.5 billion

or less than 25 percent of the total have been implemented. So far, implementation of foreign investment has been concentrated in the oil and gas sector and in hotel construction where high profits seem assured. Foreign investment implementation in manufacturing has lagged, apart from a few low risk projects in "soft" sub-sectors such as garment manufacturing for export and consumer electronics assembly. Several factors have contributed to slow project implementation including problems in joint-venture relationships, the lack of infrastructure, labor regulation problems, import/export restrictions, banking problems, and also hesitations from project sponsors who still do not have enough confidence in the current investment climate. Projects with long gestation periods will only be attractive to foreign investment, particularly from Western countries, when some of the fundamental impediments such as uncertainties with the legal framework can be overcome or removed.

VI. Contract Law and Dispute Resolution

Evolution of Viet-Nam's Contract Law

Viet-Nam's law and regulations on contracts have undergone several changes since 1955²¹ and reflect changes in the country's economic and political development. During the decades of a centrally planned economy, "economic contracts" of a socialist type (basically a sale or procurement contract between SOEs) was the only type of contract recognized in Viet-Nam; old laws on civil contract remained dormant. The first law on economic contracts, under the form of a 1955 decree on "Temporary Rules on Economic Contract," set out the rules for the private sector to participate in procurement of goods and services to an expanded state industrial sector. This corresponds to the initial stage of socialism adopted in the North following a partition of the country at the end of the "French war."

Following the 1957 socialist reform campaign in the North where private business was practically wiped out, a new set of Temporary Rules on Economic Contracts was issued to regulate contractual agreements between state-owned enterprises which then controlled most of the productive assets in the economy. In further keeping with socialist tradition, a council of state arbitrators was established for the first time to resolve disputes over economic contracts.

Following the 1975 reunification, a revised set of rules on economic contracts was issued (Decree 51CP October 3, 1975) which essentially extended the application of the old rules on economic contracts to the newly socialist South. Like the original Temporary Rules of 1955, the 1975 rules provide a framework for the private sector to enter procurement contracts with the state sector.

²¹ For further details, see Viet Nam Economic Laws (Luat-Kinh-Te-Viet Nam), lectures for legal training courses, Ministry of Trade Printing Film, Hanoi July, 1991 (in Vietnamese by several authors.)

Current Status

Viet-Nam's current contract law is a hybrid system which incorporates a modified socialist concept of economic contract and a Western (mainly French) concept of civil contract. The overlapping of economic contract and civil contract has caused confusion over jurisdiction (see below). Current regulations on economic contracts are based on a 1989 Decree-Law (Decree-Law No. 24-LCT/HDNN8, September 1989) announced about the same time as the adoption of the reform program of Renovation. The new law was intended to facilitate contractual arrangements in a newly created market economy. But as Viet-Nam continues to remain a socialist country, its new contract law, like many other laws, retains some socialist features including: a) a special category of plan-based contracts (contract to fulfill a particular target in the state plan); b) the state ownership of all land limits the scope of contracts particularly regarding sale, transfer, and pledge; and c) disputes over economic contracts are not to be resolved by the court system but by the Arbitration Authority (see below).

In principle, freedom to contract is recognized, but the law on economic contract limits the use of this type of contract to "juridical persons"²², e.g. a company that has a juridical person or between a juridical person and an individual who has a registered business. Failure to register with the Arbitration Authority by a contractual party in an economic contract is one of the causes for nullity.

Problems of Economic Contracts

Viet-Nam's economic contract in its current form resembles a sales contract designed to facilitate market transactions. It was intended to serve as a market-oriented legal instrument to replace administrative directives. However, the current version of economic contracts that originated from the traditional economic contracts between SOEs is not well defined as a separate type of contract to be different from civil contract. In 1991, a Decree-Law on Civil Contract was promulgated which defined civil contract to include agreements on purchase/sale, procurement of service, borrowing/lending, etc. that can be construed as encompassing economic contracts. Economic contract is a category of civil contract and as such the law on economic contract should supplement the general contract law. In the same way the French commercial contract is part of a broader civil contract framework or a commercial contract under Unified Commercial Code (UCC) is part of U.S. contract law. But unlike the French concept which defines commercial contract in terms of commercial acts (*actes commerciaux*) or the U.S.'s UCC which also clearly defines a commercial act, Viet-Nam's law on economic contract is not as well defined. It is "all written agreements to produce or exchange goods and services, to do research and all other contractual agreements

²² An entity to which the law attributes a personality, according to the French concept (also in Louisiana Civil Code) of "*personnalité juridique*". Viet Nam's law on economic contract defines a juridical person is an entity that is legally formed, has its own properties, is vested with the rights to make independent business decisions and to "participate in legal relationships."

serving a commercial purpose" and would qualify most contracts as economic contracts. This will raise the issue of choice of laws and problem of jurisdiction between the Arbitration Authority that controls economic contracts (see below) and civil court that is empowered to adjudicate civil contracts. This confusion adds to a concern of foreign investors who are skeptical of the impartiality of state-appointed arbitrators and, at the same time, do not feel assured of the technical competence of the country's regular People's Courts regarding commercial disputes.

Resolution of Disputes

Until recently, enforcement of dispute resolution over economic contracts was handled by a system of arbitration which included: a) district and provincial arbitration offices, and b) a higher level State Arbitration Office headed by a Chief State Arbitrator and serves as highest court of appeal for contract disputes. The State Arbitrator also hears cases involving an amount five hundred million Dong (or \$50,000 equivalent) or more and all cases involving foreign parties in the contract regardless of the amount. The arbitrators are appointed by the Executive Branch and work under the People's Committees (city or district governments) or Central Government (for State Arbitrators) although their decisions are binding like the court's rulings. This type of adjudication authority clearly is not independent, and it might have worked adequately to mediate contractual disputes among SOEs in a centrally planned economy. However, it may not be sufficient for adjudication purposes in a mixed economy where contract disputes can arise between more diverse parties including the state, the private sector, and foreign investors.

The Economic Court was established in July, 1994 as part of the People's Court system to take over most economic disputes previously decided by arbitrators. The Economic Courts replace the arbitrators and have been staffed in part by the former arbitrators. These courts are intended to function like a circuit court specializing in commercial disputes. But the courts are in a formative stage, and their competence and efficiency remain to be seen.

The laws establishing jurisdiction of arbitrators over contract disputes do not explicitly exclude the courts (the People's Court system) from adjudication over contract matters. Pending a new Civil Code under preparation, Viet-Nam's current civil procedure is based on the Decree Law, July 12, 1989 (15 Chapters, 88 articles), that establishes subject matter jurisdiction of People's Court to cover contract (in addition to property, family law related matters, labor disputes, and approval of election voters listing). In practice, neither the courts nor the arbitrators have much experience in settlements of commercial disputes arising in a market economy. This and the weak enforcement of court orders in general make business people, particularly foreign investors, skeptical of contractual arrangements in Viet-Nam. Anecdotal evidence is prevalent of breaches of contractual obligations by partners in joint ventures with foreign investors. In the past, domestic investors often brought their contractual disputes to be resolved at the District People's Committee (city government) instead of going to court or to the arbitrator's office.

VII. Bankruptcy Law

In the context of Viet-Nam's transition, bankruptcy law will play an useful role in both the emerging private sector and the state sector where thousands of SOEs are in need of being restructured or declared bankrupt. For the emerging private sector, bankruptcy law will provide a mechanism for nonviable enterprises to exit and to repay creditor's claims according to pre-established rules. For the state sector, bankruptcy law has encouraged many SOEs to undertake real restructuring in order to avoid forced bankruptcy. In fact, several SOEs have already been in a state of bankruptcy according to the definition of Vietnamese bankruptcy law because they have long "lost their ability to repay their debts."

Features

Viet-Nam's law on bankruptcy, promulgated in January, 1994, to take effect on July 1, 1994, features some of both the French and the U.S. bankruptcy laws. Predictably, it also embodies some of the characteristics of the socialist concept of property law (e.g., land is not part of the company's fixed assets to be evaluated for bankruptcy purposes) and also draws on bankruptcy laws of other socialist countries. The law defines somewhat vaguely that "an enterprise is in state of bankruptcy when it loses its ability to repay its debts despite efforts that have been made to undertake financial restructuring" (Art. 2). The law allows for reorganization under Article 20 which in a way resembles the U.S. Chapter 11. Both the liquidation and reorganization mechanisms are provided in the same law, not as separate procedures but like sequential steps of the same process. Accordingly, a three-step process is involved in a bankruptcy proceedings. 1) The court, upon receiving a request by the creditor to initiate proceeding to declare the debtor under "bankruptcy status," will proceed to categorize the creditors and perform other preparatory procedures. 2) A "reconciliation conference" between debtors and creditors must be held to discuss reorganization as an alternative to liquidation. And 3) only when this conciliation attempt fails to reach agreement on reorganization within 60 days will bankruptcy be declared and liquidation proceed. The assets of the bankrupt enterprise will then be placed under control of a "management task force" (trustees) presided over by a judge of the provincial economic court and made up of representatives of the court, creditors, the enterprise in question, the union, and other relevant agencies and organizations. This is one area where Viet-Nam's shortage of specialized skill will be a problem for receivership.

The law allows both creditors and debtors to initiate proceedings. Creditors can file to force the debtor's bankruptcy after 30 days following the repayment falling due. There is no deadline for the ailing enterprise to file for voluntary bankruptcy. In keeping with socialist orientation, it also allows unions or representatives of workers (if there is no union) to file for bankruptcy of the enterprise if the firm failed to meet the wage bill for three consecutive months. In practice, it is unlikely that labor will exercise this right in view of the current high rate of unemployment in Viet-Nam. The law does not contain an "automatic trigger" clause presumably to prevent massive liquidation of a great number of loss-making SOEs.

Since a reconciliation phase is part of the process, Viet-Nam's law resembles the French bankruptcy law that does not allow liquidation to start before an "observation phase" is concluded. During the reconciliation conference, creditors and the company in question must reach an agreement within 60 days on a plan for debt rescheduling, for paying overdue salaries, and for enterprise reorganization. The law does not have special provision to cover foreign direct investment (FDI) enterprises, although an earlier draft of the law proposed foreign investors can file for bankruptcy with the state arbitrator. The State-Owned Enterprise Law also provides exceptions to protect certain SOE industries: a) sick enterprises in strategic sectors may secure financial assistance from the government and are subject to bankruptcy proceedings only after one year of rehabilitation following government bailout; and b) force majeure cases of enterprises in distress, i.e., due to natural disaster, may seek a time-bound exemption from bankruptcy law coverage.

Issues

The main issue with bankruptcy law in the current context of Viet-Nam's transition involves the lack of a solid legal infrastructure for the reorganization process to work. To be effective, whether the reorganization schemes are under Chapter 11 or the French concept of reorganization under the "observation phase," they require strict legal standards in related legal areas such as contract enforcement, accounting rules, and so forth. This brings home the point about a workable legal superstructure would require a solid legal infrastructure.

Since the private sector began emerging only three years ago, the current bankruptcy law will have greater implications on the state sector. Apart from the normal objectives of a bankruptcy law, the existence of such a law on the books may serve as a threat to sick SOEs and an incentive to restructure themselves. In the long run, this type of law is necessary to provide nonviable enterprises with an orderly way to exit. For the time being, however, the strict application of bankruptcy law for Viet-Nam's SOE sector would probably result in massive liquidation with tremendous attendant social costs because 70 to 80 percent of all SOEs are either loss-making or functioning at a break-even point. Emphasis should be placed on reorganization. Because the draft law has no "automatic trigger" clause, the government should use this opportunity to accelerate its program of SOE reorganization before making the law on bankruptcy operative. During the past three years, progress has been made in this direction. For example, the government has dissolved about half of the SOEs because of their loss-making or being unprofitable. In May, 1994, the total number of SOEs was 6,544 units, down from 12,214 in 1989 at the beginning of the Reform.

Assuming that with time all the legal requisites and safety nets are in place, it appears that Viet-Nam's bankruptcy laws may be improved by introducing an automatic trigger clause to require mandatory filing after, for example, 180 days in arrears. (Current law allows filing for forced bankruptcy as early as 30 days in arrears, and this seems to be too severe a provision.)

Experiences with bankruptcy in socialist countries trying to transform their economies are not extensive because most of them have introduced their bankruptcy laws during the past two or three years, not much earlier than Viet-Nam. Experiences from market economy countries in the West²³ are perhaps more relevant in terms of procedural law than in terms of substantive law as the latter varies considerably among countries. For example, both U.S. and French bankruptcy laws allow both creditor and debtor to file for a bankruptcy proceeding while France also allows the Commercial Court to ask for bankruptcy proceeding on the ailing enterprise. Apparently France's bankruptcy law adopted under the current socialist government places great emphasis on reorganization in consideration of employment. Under the U.S. law, the debtor's management remains in control during reorganization. Under the French law, the enterprise management is placed under a court-approved "administrator" who may actually operate the enterprise during the "observation" phase. Thus different countries have different substantive laws on bankruptcy management, reflecting different choices and legal traditions. The provisions of bankruptcy will have to change when the goals of using bankruptcy as an instrument change along with the development of a capital market and further expansion of the private sector.

As Viet-Nam is moving closer toward a market economy, it may do well to use the bankruptcy law as an incentive for SOEs that have become a burden in the banking sector to undertake real restructuring, not just financial restructuring. For both the state and private sectors, the procedure for voluntary filing for bankruptcy should be elaborated and strengthened. For example, under voluntary proceeding, the company can continue to manage its assets under court's supervision. Currently, the law simply mentions that the ailing enterprise, after unsuccessful attempts at reorganization, should file for bankruptcy, but the law provides no other details.

The law can be improved further in other ways. For example, the law allows the court to inform creditors that a particular enterprise is in a state of bankruptcy when the court discovered this during an unrelated court case, "so that creditors can initiate bankruptcy proceeding against the enterprise" (Art. 10). This provision, introduced on behalf of public interest, may be justifiable in the current context of Viet-Nam where a credit rating system does not exist but will become inappropriate and should be removed when the market economy matures. The treatment of priority among claims also deserves reconsideration. Currently, secured claims receive lower priority than both tax claims and wages (first priority). This provision reflects Viet-Nam's political orientation, but it also constrains the participation of the banking system in trade/industrial financing through secured credits, particularly in term financing.

²³ Apart from literature of bankruptcy on specific countries, a good general discussion can be found in Douglas G. Baird, "A World without Bankruptcy," Law and Contemporary Problems, Vol. 50, No. 2, Spring 1986, T.H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard University Press, Cambridge, 1986.

VIII. Issues on Competition

Viet-Nam's private sector is only emerging, and there is no over-concentration or monopolies. As private industry and trade become more mature, Viet-Nam will need laws to guard against unfair competition. To facilitate exits, Viet-Nam already has its bankruptcy law in place (see Section VII).

Dominance of the State Sector

The dominance of the state sector in several areas of industry and trade perverts the competitive environment and crowds out the private sector. Currently, the state sector accounts for about 70 percent of total industrial output, owns almost all large scale industries, controls 81 percent of capital in the industrial sector, and absorbs nearly 70 percent of total bank credit. The state-owned commercial banks accounted for almost 90 percent of commercial bank operations, and the government still holds a monopoly in the insurance industry. Efforts to improve efficiency of SOEs in certain subsectors and to stimulate competition are often constrained by ideology. Despite the Reform, the constitution continues to stress that "SOEs should be developed particularly in key areas and assume the lead role in national economy" (Art 19) which is in keeping with the spirit of maintaining the "production organization based on state ownership (SOE) as the fundamental form of production in a multi-sectoral economy" (Art.15). Because of ideology, this preference for state owned enterprises will probably remain in the constitution as a matter of principle as long as the country remains socialist. This will continue to cast a shadow over government intentions and policies toward private sector activities.

Subsector Restrictions

Three areas of law and policy can be changed both to expand the private sector and to improve competition. The **first area** is a restriction imposed by the 1990 Law on Private Business (see Section IV) which lists seven sectors that requires permission from the prime minister. Article 5 of this law lists the following sectors requiring the permission of the prime minister: (1) production and trading of explosives, poisons, toxic chemicals; (2) exploitation of all kinds of precious minerals; (3) production and supply of electricity and water on a large scale; (4) production of facilities for communication broadcast, services related to post and telecommunications, radio and TV broadcast, publishing; (5) sea and air transport; (6) import-export trading; and (7) international tourism. Many of these sectors are but routine activities by the private sector in a market economy and should be liberalized.

Capital Requirement Restrictions

The **second area** is the minimum capital requirement (as distinct from paid-in capital) set out in the Company Law for almost every business activity from operating a steel mill to running a barber shop. This provision should be removed because it is an unnecessary, bureaucratic nuisance. If maintained, it should be updated frequently to be accurate. This

updating makes the unlikely assumption that government officials have detailed knowledge of what is the minimum efficient capital for each type of trade or industry. In fact, current data for "minimum efficient capital" prepared by large financial organizations, such as the World Bank, for even major industries for project appraisal purposes are always a matter of running debate. This kind of data should be used as information, not as binding requirements in a law.

Trade Policy Restrictions

The **third area** is foreign trade law and regulations. Viet-Nam's current trade policy is highly protective, featuring both quantitative restrictions and a widely dispersed tariffs structure. Such a highly protective trade regime is both biased against export activities and will not promote efficiency of domestic industry. Viet-Nam's current tariffs schedule contains as many as 25 rates varying from 1 to 150 percent C.I.F. values. Variation in tariffs are harmful—even more harmful than high but uniform tariffs—because they tend to shift resources into inefficient activities. Viet-Nam's trade law is biased also against the private sector because it requires several conditions for the private sector to engage in foreign trade without being producer at the same time. One of these conditions is an approval by the prime minister himself. As a result, foreign trade has become a virtual monopoly of SOEs. Only a handful of private companies (about 14) obtained permits to engage in import/export activities in their own name. Other foreign trade firms have to go through one of 800 SOEs who hold trade permits and act as intermediaries for a fee (officially, a commission of 1 percent is charged). The need for Viet-Nam to liberalize foreign trade has long been a subject of debate within the government and by aid donor countries. The government has taken some initial steps towards liberalization, but further progress will be slowed by resistance from protected interest groups, a mind-set control attitude of policy makers, and their lack of understanding of the complex relationship between trade liberalization and growth. Under these constraints, Viet-Nam's international competitiveness beyond some traditional exports will be slow to improve.

IX. Judicial Institutions

Prior to the 1989 Reform, Viet-Nam's court system played almost no role in commercial disputes. With the transition into a market economy, the court system has been reactivated and new laws promulgated. It will be some years before the revived court system will become efficient because the laws are new to both the people and the judges who, for the most part, lack appropriate training and experience. In view of this deficient adjudication system, commercial disputes often are settled out of court. In the medium term, therefore, Viet-Nam's judicial institutions will do little to advance the development of the private sector. This section reviews some of the main aspects of Viet-Nam's current judicial system focusing on commercial disputes.

Unstructured Legal Environment

Until 1989, most of the legal texts in Viet-Nam were in the form of decree, ordinance, decision, and circular all promulgated or issued by the executive branch (by the prime minister or a minister). These laws and regulations were made on an ad-hoc basis as the need arose, and often they conflicted with one another. In practice, administrative decisions dominated most areas of the legal framework. The National Assembly, strengthened by the 1992 Constitution, began integrating these texts into laws and enacted new statutes, particularly in basic laws, e.g., the 1992 Law on Organization of People's Courts (October 6, 1992).

Despite considerable progress in making new laws, Viet Nam's legal framework remains largely unstructured and informal. During the war years, the government ruled by decrees. But unlike the war years, there is currently a proliferation of laws, particularly regulatory laws. These laws came in avalanches and were replaced by others prepared with little care. As a result, an unstable and unpredictable legal environment was created. The latest example concerns land use rights where the controversial decree No.18, February 13, 1995 created considerable confusion as it attempts to abolish long term land use rights already acquired for business activities and replaces them with leases (see Section II). Overlapping of authority between legislative and executive branches and inconsistent standards set out by multiple levels of government are not uncommon. For example, in the area of real property rights, an administrative circular (Circular 297, October 2, 1991) added to the state property all houses whose owners are absent, including properties that have become state property as a result of various socialist reform campaigns (Art. 3). The circular also requires citizens who leave the country to be reunified with their families to surrender their houses for "state management." Under stricter rules of constitutionalism, this kind of regulation can be construed as encroachment on legislative power as the distribution of real properties between state and individuals and their disposition should normally be in the domain of lawmaking by legislature. More frequent are instances of overlapping regulations issued by different layers of the executive branch, e.g., between central government and provincial governments. For example, in the area of foreign investment, apart from a basic law requiring an investment project be assessed for approval purpose by the Central Evaluation Committee at the central government level, Ho Chi Minh City also issued a People's Committee decision (October 5, 1992) requiring the project to be first examined on the basis of the same criteria as the Central Evaluation Committee. The duplication of authorities resulted in uncertainty and increases in transaction costs.

Poor implementation of the law and weak enforcement of court orders are common in most areas of the law in part because of low efficiency and limited experience of the judiciary. For example, in the jurisdiction of Ho Chi Minh City with the largest number of lawsuits every year, for a variety of reasons including corruption, only less than half of all judgements get enforced. According to data from the Office of Court Decision Implementation of Ho-Chi-Minh City, out of a total of 30,551 court decisions rendered in 1994, only 11,335 or 37% were enforced. (In 1993, only about 30% of court decisions got

enforced). In the banking sector, commercial banks find it difficult to foreclose properties pledged as collateral for bank loans because of poor enforcement of court orders in addition to the lack of foreclosure procedure. The inefficiency of the law enforcement system has frustrated the public in general and led business people to prefer to settle their commercial disputes mostly out of court. It also frustrates practicing attorneys, and "some of them are just not taking the risk of arguing with the judges in court and just use the back door".²⁴ In general, the lack of information, the lack of consciousness of the citizens of their rights, the lack of independence of the judiciary also contributes to the difficulties of Viet-Nam's legal system. Laws and regulations are not often kept secret or unpublished, but they are confusing. In many areas, such as contract law and banking law, the new laws often are legislated in a hurry to meet the need of the transition. They tend to be general in nature and, as a result, have seen wide discretion in their application. In these situations, decisions made by officials in charge of implementation are often personalized as interpretation of the laws vary among government offices and between provinces.

Source of Law and Judicial Review

Source of Law. The current sources of law in Viet-Nam are almost exclusively in legislation (mostly in decree-law, i.e. the statutes passed by the Standing Committee of the Parliament, when Parliament is not in session) and administrative regulations. "Case law" is nonexistent. On the whole, only the laws in the foreign economic sector, particularly foreign investment are going through a process of research/consultations (with international authorities in the field). Law making for the rest of the legal framework, particularly "private laws" governing domestic business and personal relations is lagging behind. Regulatory laws are in abundance not only in "administrative law" as normally expected but also in other traditional fields of civil law and commercial law. The statutes themselves — particularly when they are in the form of decree-law — are often either too broad or poorly drafted, requiring a great deal of explanatory regulations beyond the usual, already detailed "decree of application". For commercial laws, investors, particularly foreign investors, often have to rely more on these regulations than on the law itself for their understanding of what the law requires. Eventually, most of the laws will be codified; for the time being only criminal law and criminal procedure were put in "Codes" (December 12, 1992). For the more complicated areas of civil law and commercial law, it will probably take some years before the relevant planned codes can be enacted. In civil law, a revised draft (draft no. 12) is being circulated among lawyers, legislators, and media. Until all laws are codified, investors and the public will have to continue working with legal texts in various forms.

²⁴ Tai Van Ta Legal Reform for Trade, Investment and Economic Development, Harvard Law School-Mimeograph. Paper presented at the Seminar on "Viet-Nam: The Emerging Tiger". at the University of California at Berkeley, in May, 1994. The paper also reported that in 1992 the court was able to enforce only 11,594 cases out of a total 32,803 judgements rendered.

Precedent cases are not a source of law despite the country's long years of pre-war experiences with using judicial precedent in the context of civil law. Judicial activism is currently neither favored nor practiced. This is in part in keeping with socialist legal tradition, in part due to the background of the judges who often have but simplified legal training. The function of the judge is essentially to apply a predetermined law to the facts of the case. The Supreme Court, apart from being the highest court of appeal, has an additional function of supervising the adjudication by lower courts. In doing this, the Supreme Court sometime tries to explain the law for the application by lower courts, but this authority of interpreting the law formally belongs to the Standing Committee of the National Assembly (Article 91 of the Constitution). Furthermore, the Constitution also allows the National Assembly to overturn decisions by the Supreme Court. (See below).

Judicial Review. Although the new Constitution (1992) provides that "all other laws must be in accord with the constitution (Article 146), Viet-Nam's Constitution does not provide for judicial review of laws. The National Assembly reviews its own legislation; it has the power of "abolishing legal texts promulgated by the chief of state, by the Standing Committee of the National Assembly, by the prime minister, by the supreme court and by the procuracy if these legal texts and decision are deemed unconstitutional or against the laws and/or resolutions adopted by the National Assembly" (Article 84-9 of the Constitution). In practice, the authority to review laws is delegated to the Standing Committee which has the power to "suspend" law deemed unconstitutional and propose for abrogation. This absolute law making authority of the National Assembly is in keeping with its general supremacy in government structure as established in Article 83 of the Constitution. This reflects the adopted concept of "centralized democracy" (Article 6) in which all government branches report to the National Assembly whose members are screened as candidates by the Communist Party or the Father Land Front, an arm of the Communist Party. Because of this election process, the direction of law making in effect rests with the Party.

The Court System

For the purpose of settling commercial disputes, Viet-Nam's adjudication system is confusing. At the beginning of the transition following the Reform in 1989, the government attempted to improve the adjudication system for commercial disputes by introducing new laws to strengthen its arbitration system which existed during the period of centrally planned economy. Soon this piecemeal reform proved to be inadequate to handle complex economic litigations in a market economy. The government recently reverted to the court system and in July, 1994, created a new economic court to handle "economic litigation." Because the definition of "economic litigation" is vague, there is no clear division of jurisdictions between the arbitration system, the economic court, and the ordinary civil court. But often business people tend to avoid the formal system altogether and prefer to settle disputes between themselves.

Viet-Nam's courts are structured into three hierarchies, i.e., courts of original jurisdiction, intermediate courts of appeal at the provincial level, and the Supreme Court. A

central feature of this People's Court system is the collegial adjudication panel of three members including two "people assessors" or lay assessors who have the same powers as the judge. (The economic court has two professional judges and one lay assessor.) In the trial court, the judges as well as the lay assessors decide both questions of law and fact. This is a cause of concern for litigants in disputes involving complex issues of law, such as commercial disputes. As Viet-Nam's system of dispute resolution is basically inquisitorial, as opposed to the adversary system in common law, the quality of the professional judges themselves is crucially important. This is another area of concern as legal training in Viet-Nam is very much in transition and the professional quality of the judges is uneven.

Independence of the judges, the courts, and of the judiciary branch in general is a relative matter in the context of socialist Viet-Nam where the judiciary is not regarded as an equal of the government. The constitution does not state the principle of separation of powers; it also requires the People's Courts to safeguard not only the socialist legal system but also the socialist regime itself (Art. 126). The President of the Supreme Court, as head of the Judiciary Branch, is responsible to the National Assembly. Similarly, the chief judge of lower courts at provincial and district levels are to report to their corresponding local People's Councils. All judges below the rank of the President of the Supreme Court are appointed by the prime minister. This, and the fact that the judges are not appointed for life, does not promote their independence. In real life, private businesses as well as ordinary citizen have long lost their faith in the court system which is perceived as incompetent and corrupt.

Procuracy

Viet-Nam's Procuracy is typical of a socialist legal institution that has no counterpart in any Western legal system. Comparatively, the procuracy has the power far beyond of a U.S district attorney or the French public prosecutor.

According to the Constitution (Art. 137), the People's Procuracy has the power to supervise the legality of all government acts "to ensure that all government's acts and actions are legal, to serve as public prosecutor and to ensure that laws are implemented seriously and uniformly." Unlike the common law, the procuracy can also intervene in a civil law suit (see Appendix II). As such, the procuracy can play an useful role in commercial litigations and can contribute to the functioning of the emerging market economy. But in reality, it is more active in prosecuting criminal cases for which it is better equipped.

The Procurator General (Chairman of the Procuracy) is appointed by and responsible to the National Assembly. As such, the procuracy is, in theory, a government branch of the same standing as the Supreme Court. In practice, the Procurator General is not only the most powerful jurist in the legal system, but also politically influential in view of his role as guarantor of socialist rule of law.

Because of its broad powers, an activist procuracy could threaten party and government control. On the other hand, the procuracy is also required by the Constitution to safeguard the socialist regime which would make the role of the procuracy quite delicate in critical times.

In sum, Viet-Nam's current court system is not independent. It continues to be constrained by ideology. Another salient feature of Viet-Nam's judicial institutions is that despite formal institutions, the legal environment continues to be unstructured and informal. The laws exist on the books, but enforcement is weak. The notion of "due process of law" can be seen reflected in both substantive and procedural laws (see Appendix II), but in practice, few people believe in due process. Because of this, investors and private sector in general often avoid bringing their litigations to courts but prefer settle their disputes among themselves or with the help of the district People's Committee, regarded as more effective than the court. Foreign investors, particularly those from the West, find this unstructured adjudication system unreliable because they are used to a stable, formal legal environment. The government is aware of this and has created an "International Arbitration Commission" to handle contractual disputes involving foreign investors, but the institution is too new to provide any evidence whether it will be more effective than the existing court system.

CONCLUSIONS

1. To facilitate the transition of Viet-Nam toward a market economy, the Foreign Investment Law was introduced in 1989 and amended in 1992. A number of new laws have been introduced since then. Efforts to improve other areas of the legal infrastructure, such as law enforcement, the court system, and resolution of disputes are, however, not comparable with law making. This has resulted in a emerging framework featuring a superstructure made of new laws not adequately supported by a solid legal infrastructure. Viet-Nam's current legal framework remains largely informal and unstructured. It had been that way during a very long period prior to the transition to a market economy. Private investors, particularly foreign investors, have found Viet-Nam's legal framework the most serious impediment to investment. This, in part, explains the slow rate of implementation (25 percent) of foreign investment projects approved. Policy changes to reverse the command system without an appropriate legal framework in place may be sufficient to initiate the transition, but are not enough for long-term development.
2. Ideology continues to constrain the development of a legal structure fully oriented to private sector expansion and market-based economic development in this socialist country. The private sector is constrained in many areas: the lack of an independent judiciary, the absence of private land ownership, other uncertainties in property law which constrain financial market development, and the inherent bias of the system in favor of the state sector (and collective ownership).

3. A good, solid formal legal framework requires a law-abiding attitude which is slow to cultivate. More intense efforts should be concentrated in the areas of law enforcement. It would be a mistake to introduce new laws without parallel efforts to effectively implement them for the laws are only as good as they are enforced. Good implementation of existing laws would contribute to creating a climate of predictability and stability which is crucial to decision making by private investors, in particular foreign investors.

4. Entry laws, particularly the Foreign Investment Law and the Company Law, are crucial to expanding the emerging private sector. However, Viet-Nam's foreign investment process is too complicated, and its company law is quite restrictive. The streamlining of regulatory laws should be the first priority. Many of these regulations may be amended or changed through administrative decree rather than going through the legislative process. Simplifying regulations is particularly important for investment promotion—FDI and domestic investment. An easy, transparent regulatory framework may be more important to a foreign investor than special tax and investment incentives. Investment "process" of approval or sanctioning should be abolished or should change from control-based to promotion-based. Similarly, unnecessary restrictions in the company law should be removed.

5. Unlike Eastern Europe, Viet-Nam's private sector has not been expanded by privatization as efforts to privatize the large state sector have not gone beyond experimentation on a small number of SOEs. The continuing dominance of SOEs in industry, foreign trade, banking, and other sectors is a major impediment to competition necessary for the sound development of a private sector already constrained by a restrictive legal framework. The accelerated privatization of SOEs is crucial to both enlarging the private sector and to increasing competition. Viet-Nam's trade law, with high tariffs and quantitative restrictions also needs to be reformed to strengthen the country's international competitiveness.

6. Legal enclaves, such as export processing zones (EPZs), may be useful in the short term as transitional instruments to attract foreign investment but should be phased out over time. For long-term development, a good investment climate with a strong legal structure should replace the enclaves. While the special incentives system for FDI is maintained in the short run, domestic investors should be given greater attention and treated with comparable incentives.

BIBLIOGRAPHY

Legal Texts:

Most legal texts are published by "Nha Xuat-Ban Phap-Ly, Hanoi" (Legal Text Publishing House, Hanoi) which as its name indicates, specializes in legal texts. The laws, decrees and other legal texts cited in this study were also published by several other publishing houses. Below in parentheses, the Vietnamese titles are followed by the names of the publishing houses.

Land Law in Vietnamese (Luat Dat Dai by Nha Xuat-Ban Thanh Pho Ho-Chi-Minh, 1993)
Banking Laws in Vietnamese (Van Ban Phap-Ly ve Ngan-Hang by Nha Xuat-Ban Phap-Ly, Hanoi, 1993).

Foreign Trade Laws in Vietnamese (Van Ban Phap Luat ve Xuat Nhap Khau by Nha Xuat-Ban Phap Ly, Hanoi, 1992).

Foreign Investment Laws in English and Vietnamese (Luat Dau Tu Ngoai Quoc by Nha Xuat-Ban Phap-Ly, Hanoi 1992. This publication also includes the decree-law on Intellectual Property and the Company Law). The Foreign Investment Law has been published by several other Publishing Houses and are available in most bookstores in Viet-Nam.

Bankruptcy Laws in Vietnamese (Pha San va Xu Ly Pha San by Nha Xuat Ban Thong Tin Chuyen De, Hanoi, 1993).

Company Law and Enforcement Procedure for Civil Court Decisions, both in Vietnamese (Luat Cong-Ty and Phap Lenh Thi Hanh An Dan Su by Nha Xuat-Ban Chinh Tri Quoc Gia, Hanoi, 1993). Company Laws were also published by Arbitration Authority in Hanoi (Trong Tai Kinh Te, Hanoi).

Business Registration Laws in Vietnamese (Nhưng Qui Dinh ve Dang Ky Kinh Doanh by Trong Tai Kinh-Te Long-An, 1992).

Draft of the Civil Code in Vietnamese (Du Thao Bo Luat Dan-Su by Nha Xuat-Ban Tuoi-Tre, March 1995).

Criminal Laws and Criminal Procedure both in Vietnamese (Bo Luat Hinh Su, and Bo Luat To Tung Hinh Su by Nha Xuat-Ban Chinh-Tri Quoc-Gia, Hanoi, 1993).

Administrative Laws in Vietnamese (Phap Luat ve Xu Phat Hanh Chanh by Nha Xuat Ban Thanh Pho Ho-Chi-Minh, 1993).

Civil Procedure in Vietnamese (Cach thuc Khoi Kien va Thi Hanh An Dan Su by Hoi Luat Gia Thanh Pho My-Tho).

Family Laws in Vietnamese (Van Ban Phap Luat ve Hon Nhan va Gia Dinh by Nha Xuat Ban Phap Ly, Hanoi, 1992).

Other references:

Mazeau & Charles, Leçons de Droit Civil (Tome II, Vol. II: Droit de Propriété), 7^e édition, Montchrestien, Paris 1992, Georges Ripert & Rene Robot, Traité de Droit Commercial, Librairie de Droit et de Jurisprudence, Paris, 1991.

Alfred Jauffret, Manuel de Droit Commercial, Editions LGDJ, Paris, 1991, Cheryl W. Gray and William Jarosz, Foreign Investment Law in Central and Eastern Europe, World Bank Policy Research Working Paper No WPS 1111, March 1993.

Cheryl W. Gray and Associates, Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe, World Bank Discussion Paper Series, No 209, July, 1993.

Alan Gelb and Cheryl W. Gray, The Transformation of Economies in Central and Eastern Europe, World Bank Policy Research Series No 17, June 1991.

Alan Gelb, Gary Jefferson and Inderjit Singh, Can Communist Economies Transform Incrementally? China Experience, World Bank Policy Research Working Paper No WPS 1189, October 1993.

Peter Harold and Rajiv Lall, China: Reform and Development in 1992-1993, World Bank Discussion Paper No 215, August 1993.

Ralph H. Folson, John H. Minan and Lee Ann Oho, Law and Politics in The People Republic of China, West Publishing Co., 1992.

Zafar Shah Khan, Patterns of Foreign Investment in China, World Bank Discussion Papers Series, No 130, September, 1991.

Natalie Lichtenstein, A Survey of Viet-Nam's Legal Framework in Transition, World Bank Working Papers Series No WPS 1291, April 1994.

World Bank, Viet-Nam: Financial Sector Review, Report No 13135-VN, September, 1994.

World Bank, Viet-Nam: Transition To The Market, An Economic Report, Report No 11902-VN, September, 1993.

- World Bank/UNDP, Viet-Nam: Economic Policy for Transition into An Open Economy, September, 1993. (This is a report prepared under the UNDP Trade Expansion Program, which focus on trade policy.)
- Wolfgang E. Siebeck (Editor), Strengthening Protection of Intellectual Property in Developing Countries: A Survey of Literature, World Bank Discussion Paper No 112, 1990.
- Research Policy Institute, Univ. of Lund, Sweden and Institute for Science Management, Hanoi, Viet-Nam, Technology Transfer to Viet-Nam: An Interim Report, 1987.
- Nguyen-Thanh-Ha, Technology Transfer to Viet-Nam, Historical and Conceptual Aspects, Research Policy Institute Discussion Paper No 181, University of Lund, Sweden, June 1989.
- Bui-Ngoc-Cuong, Nguyen-Viet-Ty and Nguyen-Khac-Dinh, Luât Kinh-Te Viet-Nam (Viet-Nam Economic Laws), Univ. of Hanoi. Ministry of Trade Publishing House, July 1991. This is a course notes book, focussing on Viet-Nam Arbitration System and some discussion on Viet-Nam company law, particularly its registration process.
- Douglas G. Baird, "A World without Bankruptcy", Law and Contemporary Problems, Vol. 50, No.2, Spring 1986.
- T.H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard University, Press, Cambridge, Massachusetts, 1986.
- Tai-Van-Ta, Legal Reform for Trade, Investment and Economic Development, Harvard Law School, Mimeograph. Draft Paper presented at the Seminar on "Viet-Nam: The Emerging Tiger", at The Univ. of California at Berkeley in May, 1994.
- Sesto Vecchi, "Smoothing the Way to Joint Venture Agreements", International Corporate Law, July/August 1992. Sesto Vecchi, a practicing attorney in Viet-Nam, wrote extensively on new developments in Viet-Nam emerging legal framework, in short articles published in Asia Law and Practice, Legal Times, etc.
- Pham Van Thuyet, "Vietnamese Economy: Performance and Prospects, An Overview", Paper presented at the international seminar on "Conference on The Challenges of Viet-Nam's Reconstruction, Domestic and International Issues". Paper Proceedings published jointly by George Mason University's Indochina Institute (Nguyen Manh-Hung, Editor) and East West Center, Hawaii, December, 1992.
- D.M. Leipziger, Awakening the Market, Viet-Nam's Economic Transition, World Bank Discussion Papers Series, No 157, March 1992.

Phan-Van-Tiem, Nhung Chang Duong Cai Cach Gia, (Stages in Viet-Nam's Price Reform), book published by Uy-Ban Vat-Gia Hanoi, (Price Commission Hanoi), 1992.

Appendix I: Viet-Nam's Process of Foreign Investment Approval

A foreign investment project is to be evaluated according to nine criteria: 1) juridical persons of the project sponsors and their financial situation; 2) the extent to which the project is in line with Viet-Nam's strategy on economic and social development; 3) the rationale of the product mix and appropriateness of the technology; 4) the extent to which the project responds to demands deemed appropriate by government policy; 5) considerations on tax exemptions and rents; 6) economic and social benefits and interests of the local counterparts and of the government; 7) infrastructure available to project implementation; 8) considerations regarding location and construction; 9) environmental considerations. Clearly many of the above criteria are not only complicated but also vague leading to varied interpretations and personalized decisions and corruption.

A new decree issued in December, 1994 (Decree No. 191/CP December 28, 1994, effective January 1, 1995) consolidated the nine criteria into six criteria, but they still contain the same requirements. This decree clarifies what constitutes the "interests of the State of Viet-Nam and the Vietnamese counterparts" in joint ventures. A major change in the regulations involves large projects of at least \$40 million, called category A, which must be approved by the prime minister. Previously, no investment amounts were specified for large projects that need approval by the prime minister. Projects less than \$40 million now have to be approved by the SCCI chairman.

Ho Chi Minh City's provincial circular (October 5, 1992) established a new evaluation unit to exist in parallel with the local State Committee for Cooperation and Investment (SCCI) and the central SCCI. Hence, an FDI project proposal in Ho Chi Minh City has to go through three layers of approval: (i) eight copies of the project proposal should be submitted to the city People's Committee and its local committee for Cooperation and Investment Evaluation (Project Evaluation Committee of the city) for evaluation; (ii) following a clearance from the City People's Committee, the local SCCI will review the project to ensure it is in "good order" before passing on (eight copies) to the central SCCI; and (iii) the central SCCI will approve or reject the project upon recommendation of the Central Project Evaluation Committee chaired by the chairman of State Planning Committee.

A complicated approval process for FDI and for investment in general is not unique to Viet-Nam's transition economy but common to most developing countries regardless of political orientation. However, skepticism and lingering suspicions vis-a-vis "capitalist" investors also play a role in Viet-Nam's control-based FDI approval system. Improvements can still be made along with other procedural streamlining by collapsing the three-step process into a single one in which local governments no longer have a duplicate role with SCCI.

The number of approval agencies at the central level can also be reduced to less than the current eight. For example, the Central Bank (State Bank of Viet Nam) should be

involved, if at all, only at a later stage of implementation, when foreign exchange is required. Similarly the ministry of science may have a role later when transfer of new technology may become an issue. The State Planning Commission should not be burdened with project review when the country has done away with the concept and practice of central planning. The reduction of the number of approval agencies also strengthens the authority of SCCI and is an essential step towards being the contemplated one-door service institution, something only very few developing countries have achieved.

Viet-Nam's FDI law also requires all FDI applications to include a feasibility study. As long as the country still has trade barriers, the government would be interested in the economic analysis (which should be done with the use of proper shadow pricing) to ensure that the project is not "harmful" in the economic sense, e.g., not in negative value-added industries—at world prices. Most, if not all, of the feasibility studies submitted to SCCI are only pre-investment studies: they are subject to further detail engineering studies prior to project implementation. But even if these studies are sufficiently detailed and properly done, these analyses are most useful only to financing institutions which should gauge the financial viability of the project in making their lending decisions. It should be noted however that the whole problem of economic analysis would be immensely reduced by moving the incentives structure close to world prices. In the meantime, feasibility study, particularly economic analysis therein should be required for large projects only but not for small/medium scale projects.

Appendix II: Procedural Laws and Due Process of Law

Procedural Law. Viet-Nam has procedure laws for both civil (decree-law Nov. 29, 1989). With criminal cases (Code of Criminal Procedure IX, Jan. 1, 1989), with the exception of the role of the procuracy, Viet Nam's civil and criminal procedures draw broadly on the French codes. Three features of the Viet Nam's procedure made it distinct from Western legal systems namely: (1) the role of procurator in a civil suit, (2) higher courts can take up at will for their own adjudication any lawsuits being processed at lower courts, and (3) a procedure for retrial by committee of judges, called "directorate adjudication" (giam-doc tham) somewhat akin to administrative review.

As mentioned, the procurator can intervene at any stage of a civil suit (Article 28, civil procedure decree-law) on grounds of safeguarding the socialist (state) properties, of looking after the interests of workers in labor disputes, and of preventing certain unlawful domestic relations, e.g. unlawful marriage. In these areas, the Procurator can himself initiate the lawsuit if no other interested parties seek actions. For an investor, the fact that the procurator can get involved in a civil suit could complicate the litigation process since the investor will have one more party to deal with, the government itself through the procurator.

In terms of subject matter jurisdiction, the trial court is the district court where most of civil law suits, including labor disputes and civil contract disputes (except economic contracts), and tort disputes can be adjudicated except when the law suit involves a foreign litigant in which case the provincial court will have jurisdiction. The Supreme Court can pick up a lawsuit filed at a lower court for adjudication; in this case, the Supreme Court's decision is final. (Article 11 of Civil Procedure Decree-law)

Both civil procedure and criminal procedure allow for retrial through a procedure called "directorate adjudication." The retrial is not done in a regular court but by a panel or committee of judges (Directorate). The grounds for triggering this procedure are more or less the same as for appeals, namely inadequate inquisition (similar to discovery under common law (Article 71, Decree-law of Civil Procedure, Article 242 Code of Criminal Procedure). Action for retrial can be filed within three years following the final judgment. To the extent a final judgment may not be conclusive (as should normally be under the principle of *Res Judicata*), litigants, particularly investors in commercial disputes, will find a sense of legal insecurity as a result of this procedure of retrial. This particular procedure has some similarities with administrative review in the American and some other Western legal systems. It is not found in other socialist legal systems. The rationale for the procedure is perhaps the governmental's desire to add another layer of appeal in order to compensate for any deficiencies in the current court system.

Due Process of Law. Viet-Nam's constitution does not use the term "due process of law" but guarantees citizen's property against nationalization, provides for compensation in case of nationalization, and requires that all arrests and imprisonments be done according to the rule of law. This and other stipulations in the criminal law and procedure also seem to

suggest the equivalent of due process of law. But there are constraints and limits to how and what can be involved to dispute a law. First as mentioned, Viet-Nam has no judicial review of laws. The legislature reviews its own legislation and other laws by other government branches. Even if a law can be disputed, the question of whether or not a legislation be in furtherance of a legitimate governmental objective — a central objective of substantive due process — should be understood in the context of a centralized democracy (Art. 6 of the Constitution) in which the Communist Party is "leading the State and the Society" (Art. 4). The notion of "compelling government interest" as often invoked under the notion of substantive due process, can be broadened by the government under this system of centralized democracy. Similarly a law which may restrict "fundamental rights", e.g., freedom of speech, freedom of association, etc., while considered as violating substantive due process in other societies, may not be inconsistent with centralized democracy. For the same reasons, the notion of procedural fairness or procedural due process can also be subject to government interest considered legitimate by Viet-Nam's government and its particular political system. In other words, due process of law in the Vietnamese legal framework must be related to factual context and ideology. Like in other countries, due process of law, or the equivalent of it, is not a fixed notion. Its content will probably change with time and circumstances. For the time being, Viet-Nam's procedural fairness seems better observed in ordinary criminal cases than in cases involving security. It is also better practiced in major cities than at district and other local levels.

Policy Research Working Paper Series

	Title	Author	Date	Contact for paper
WPS1464	How Does the North American Free Trade Agreement Affect Central America?	Edward E. Leamer Alfonso Guerra Martin Kaufman Boris Segura	May 1995	S. Vallimont 37791
WPS1465	Post Trade Liberalization Policy and Institutional Challenges in Latin America and the Caribbean	Sarath Rajapatirana	May 1995	J. Troncoso 37826
WPS1466	Ownership and Financing of Infrastructure: Historical Perspectives	Charles D. Jacobson Joel A. Tarr	June 1995	WDR 31393
WPS1467	Beyond the Uruguay Round: The Implications of an Asian Free Trade Area	Jeffrey D. Lewis Sherman Robinson Zhi Wang	June 1995	B. Kim 82477
WPS1468	Government's Role in Pakistan Agriculture: Major Reforms are Needed	Rashid Faruquee	June 1995	C. Anbiah 81275
WPS1469	The Role of Labor Unions in Fostering Economic Development	John Pencavel	June 1995	WDR 31393
WPS1470	Pension Systems and Reforms: Country Experiences and Research Issues	Patricio Arrau Klaus Schmidt-Hebbel	June 1995	E. Khine 37471
WPS1471	Pension Reform and Growth	Giancarlo Corsetti Klaus Schmidt-Hebbel	June 1995	E. Khine 37471
WPS1472	Fiscal and Monetary Contraction in Chile: A Rational-Expectations Approach	Klaus Schmidt-Hebbel Luis Servén	June 1995	E. Khine 37471
WPS1473	The Surge in Capital Inflows to Developing Countries: Prospects and Policy Response	Eduardo Fernandez-Arias Peter J. Montiel	June 1995	R. Vo 33722
WPS1474	Are Stable Agreements for Sharing International River Waters Now Possible?	D. Marc Kilgour Ariel Dinar	June 1995	C. Spooner 32116
WPS1475	Decentralization: The Way Forward for Rural Development?	Andrew N. Parker	June 1995	D. Housden 36637
WPS1476	Public Spending and the Poor: What We Know, What We Need to Know	Dominique van de Walle	June 1995	C. Bernardo 37699
WPS1477	Cities Without Land Markets: Location and Land Use in the Socialist City	Alain Bertaud Bertrand Renaud	June 1995	L. Lewis 30539

Policy Research Working Paper Series

Title	Author	Date	Contact for paper
WPS1478 Promoting Growth in Sri Lanka: Lessons from East Asia	Sadiq Ahmed Priya Ranjan	June 1995	A. Bhalla 82168
WPS1479 Is There a Commercial Case for Tropical Timber Certification?	Panayotis N. Varangis Rachel Crossley Carlos A. Primo Braga	June 1995	J. Jacobson 33710
WPS1480 Debt as a Control Device in Transitional Economies: The Experiences of Hungary and Poland	Herbert L. Baer Cheryl W. Gray	June 1995	G. Evans 85783
WPS1481 Corporate Control in Central Europe and Russia: Should Banks Own Shares?	Peter Dittus Stephen Prowse	June 1995	G. Evans 85783
WPS1482 A Measure of Stock Market Integration for Developed and Emerging Markets	Robert A. Korajczyk	June 1995	P. Sintim-Aboagye 38526
WPS1483 Costa Rican Pension System: Options for Reform	Asli Demirgüç-Kunt Anita Schwarz	June 1995	P. Sintim-Aboagye 38526
WPS1484 The Uruguay Round and South Asia: An Overview of the Impact and Opportunities	Nader Majd	July 1995	J. Ngaine 37947
WPS1485 Aggregate Agricultural Supply Response in Developing Countries: A Survey of Selected Issues	Maurice Schiff Claudio E. Montenegro	July 1995	J. Ngaine 37947
WPS1486 The Emerging Legal Framework for Private Sector Development in Viet Nam's Transitional Economy	Pham van Thuyet	July 1995	G. Evans 85783