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Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi

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VIETNAM'S STRUGGLE TO BALANCE SOVEREIGNTY,
CENTRALIZATION, AND FOREIGN INVESTMENT
UNDER *DOI MOI*

*Luke Aloysius McGrath**

INTRODUCTION

Vietnam¹ is a nation under renovation.² Beginning in 1986, the Vietnamese Communist Party³ ("VCP") initiated a series of economic reforms to transform Vietnam from a centralized⁴ to a market⁵ economy.⁶ The VCP labelled this program of economic,

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1. See JOHN T. MCALISTER, JR. & PAUL MUS, *THE VIETNAMESE AND THEIR REVOLUTION* 34 (1970)). "Vietnam did not just happen: she occupied her territory only at the price of incessant wars." *Id.* The present state of Vietnam has adopted the name the Socialist Republic of Vietnam and was formed in 1976. *Id.* at 22. "[The hostilities with the United States ended in 1973] and on July 2 the two halves of the country were formally united . . ." *Id.* at 22. "September 2, 1945, the Viet Minh forces recaptured Hanoi, declared Vietnam's independence, and established the Democratic Republic of Vietnam, with Ho Chi Minh as its President and Minister of Foreign Affairs. . . . In 1976, Vietnam was reunified under the name of the Social Republic of Vietnam." Viet V. Le, *Vietnamese Re-Education Camps: Do They Violate both Traditional and Modern Vietnamese Criminal Law?*, 11 ARIZ. J. INT'L & COMP. L. 145, 150 (1994).

2. UNDP HANOI, BRIEFING NOTE ON THE SOCIALIST REPUBLIC OF VIET NAM 2 (July 1994) [hereinafter UNDP REPORT]. "One of the most striking characteristic of today's Viet Nam is the fact that a communist regime is promoting radical renovation (known in Vietnamese as "Doi Moi") in their economic strategy." *Id.*

3. See MICHAEL C. WILLIAMS, *VIETNAM AT THE CROSSROADS* 19 (1992). "The Vietnamese Communist Party was founded by Ho Chi Minh in February 1930 in Hong Kong. The party was a fusion of existing revolutionary groups, its main component being the Thanh Nien (Revolutionary Youth) association, which had been formed in 1925." *Id.* The VCP came into power in Vietnam in two stages: 1945-1954 in the North, and in 1975 in the South. *Id.* at 18. After unification, the VCP changed its name from *Lao Dong* (Vietnam Worker's Party) to the Vietnamese Communist Party. *Id.* at 22. "The new government held an election for the National Assembly on April 25, 1976 and merged the Worker's Party of North Vietnam and the People's Revolutionary Party of South Vietnam to form a single Communist Party of Vietnam." Le, *supra* note 1, at 150.

4. UNDP REPORT, *supra* note 2, at 2. "Following reunification, the Government of the Socialist Republic of Viet Nam attempted to organize the country's political and economic system along orthodox Soviet lines." *Id.*

5. WILLIAMS, *supra* note 3, at 40 (citing Adam Fforde, *The Political Economy of Reform in Vietnam - Some Reflections* (Mar. 19, 1991) (paper presented at Harvard Institute for International Development)). In a market economy, most capital is "controlled by economic units that primarily seek to use it for commercial ends, that is to buy and sell in markets profitably." *Id.*

6. F. Gayle Connor, *Vietnam: Trading with the Enemy or Investing in the Future?*, 25 L. & POL'Y BUS. 481, 482 (1994).

political, and social renewal *doi moi*.⁷ The central tenet of *doi moi* is rapid industrial growth and development through increased foreign investment.⁸

In pursuit of the objectives of *doi moi*, the VCP has proposed legislation that establishes a legal framework attractive to foreign investors.⁹ Vietnam's National Assembly¹⁰ has enacted basic laws on tax, property, and exploitation of natural resources.¹¹ In the most recent legislation under *doi moi*, the National Assembly

After more than a decade of failed economic policies, Hanoi, following the example of Soviet glasnost and perestroika, embarked upon a course of reforms known as *doi moi*. This process was launched at the Sixth Party Congress in December of 1986, and involved an ambitious program of shifting the economy away from central planning while attracting foreign investment to facilitate the development of a market economy.

Id.

7. Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 PAC. BASIN L.J. 221, 223 (1993). "Structured and cautious legal reform emerged as a priority in Vietnam in the late 1980s, shortly after the Vietnamese Communist Party initiated its policy of *doi moi*, or renovation, in the economic sphere." *Id.* "This process was launched at the Sixth Party Congress in December 1986 Since the congress was to be broadcast live across the country, the party used it . . . as a launching pad for *doi moi*." Connor, *supra* note 6, at 482.

8. Camellia Ngo, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 72 (1992). "The general purposes behind the enactment of the 1987 [Foreign Investment Law] were to expand economic cooperation with foreign countries, achieve domestic economic development, and step up exports based on effective exploitation of natural resources, manpower, and other potentialities." *Id.* "The key features of this program were: (1) dismantling the collective farm system and returning the land to family farming, (2) removing price controls, (3) promoting the private sector, (4) devaluing the currency, (5) demobilizing the army and reducing subsidies to state enterprises, (6) revising interest rates to fight inflation, and (7) encouraging foreign investment." James Taylor, Jr., *Vietnam: The Current Legal Environment for U.S. Investors*, 25 LAW & POL'Y INT'L BUS. 469, 469 (1994). "In furtherance of its quest for economic prosperity, the National Assembly promulgated on December 29, 1987, its Law on Foreign Investment, the first of a continuing series of reforms to create legal structures conducive to foreign investment in Vietnam's new private market economy." Robert L. Wunker, *The Laws of Vietnam Affecting Foreign Investment*, 28 INT'L LAW. 363, 364 (1994).

9. WILLIAMS, *supra* note 3, at 30. "Many of the laws enacted [by the National Assembly] were closely tied to the economic reforms, which had underlined the need to put in place basic laws on tax, labour and the exploitation of natural resources if Vietnam's economic renovation and its efforts to attract foreign investors were to succeed." *Id.*

10. UNDP REPORT *supra* note 2, at 2. "The National Assembly, designated as the highest representative body of the people, is the only organ with constitutional and legislative power." *Id.*

11. See *supra* note 9 (discussing laws enacted to encourage foreign investment).

codified existing labor regulations¹² in the Labour Code of the Socialist Republic of Vietnam ("Labor Code"), promulgated on June 23, 1994.¹³

The Labor Code creates the requisite environment to attract foreign investment under *doi moi*, while extending the socialist principles of Vietnam enunciated under the Vietnamese Constitution¹⁴ ("1992 Constitution").¹⁵ The provisions in the

12. Ho Tien Dung, *Finding Your Way*, VIETNAM ECON. TIMES, May 1994, at 12, 21 [hereinafter *Guide to Hiring Labour*]. Existing regulations include: 1) Decree No. 389-HDBT (Nov. 10, 1990) (Vietnam); 2) Circular No. 03-TT-LB (Apr. 8, 1991) (Vietnam); 3) Decree No. 233-HDBT (June 22, 1990) (Vietnam); 4) Ordinance on Labour Contracts (Aug. 30, 1990) (Vietnam); 5) Circular No. 238-HTDT-VP (May 17, 1991) (Vietnam); 6) Decree No. 165-HDBT (May 12, 1992) (Vietnam); 7) Decree on Regulations of Collective Agreements (Dec. 26, 1992) (Vietnam); 8) Circular No. 19-LDTBXH-TT (Dec. 31, 1990) (Vietnam); 9) Law on Trade Unions (July 7, 1990) (Vietnam); 10) Decision No. 242-LDTBXH-QD (May 5, 1992) (Vietnam). *Id.* "Subscribers should note that, notwithstanding the provisions of [A]rticle 197 of the Code, the earlier decrees, regulations and circulars contained in the Section IV remain in force to the extent that they are not inconsistent with the Code. The Code is largely a reiteration of existing law." LABOUR CODE OF THE SOCIALIST REPUBLIC OF VIETNAM (Phillips Fox 1994) (Vietnam), trans. n., at IV-173 [hereinafter LABOR CODE].

13. LABOR CODE, *supra* note 12. The Labor Code was the main legislation addressed by the 395-member parliament, and sparked heated debate both on the floor of the Assembly and throughout the nation. Nguyen Tri Dung, *Controversial Labour Law goes to Parliament*, VIETNAM INV. REV., May 30, 1994, at 1. The current Labor Code, which consists of seventeen chapters and 202 articles, went through 30 drafts over a period of three years before enactment. *Id.* at 12. "During the several past months widespread debate has taken place in Vietnam over the proposed legislation. People from all walks of life and from every social strata [participated in the debate], showing a wide gap in opinion, particularly on articles of the labour code concerning the rights and duties of labourers and employers." *Id.* Legislators received input from interests groups such as employers, the national women's union, and the national trade union. See Phu Vinh, *Labour Disputes*, VIETNAM INV. REV., May 9, 1994, at 1 (stating employers pushed for recognition of employer's association similar to trade union); see Interview with Nguyen Thi Khanh Tam, Chief of Staff of Vietnamese Women's Union, in Ho Chi Minh City, Vietnam (August 4, 1994); see also Quoc Vinh, *Women's Union Fights for Expanded Role of Female Worker*, VIETNAM INV. REV., May 30, 1994, at 1 (reporting that Women's Union proposed idea to lawmakers and continued to push when the National Assembly met). Drafts of the code have provoked mixed responses from workers and employers alike. Nguyen Van Phu, *Draft Labour Law Provokes Strong Public Response*, VIETNAM INV. REV., May 2, 1994, at 1.

14. VIETNAM CONST. (as amended 1992); BURKE & HOWELL, *supra* note 18, at 162. The Vietnamese Constitution was substantially amended in April 1992. *Id.* "While similar to the previous constitution of 12/18/80, the new constitution contains subtle changes reflecting Vietnam's commitment to economic revitalization-'Doi Moi.'" Michael J. Scown, *As the Embargo Crumbles, Vietnam Prepares for U.S. Investors*, 4 J. INT'L TAX'N 12, 12 (1993). "The 20 new articles of the constitution are concentrated on Vietnam's economic system, with some changes to the role of the Communist Party in the government hierarchy." *Id.* "The new Vietnamese Constitution nominally reduces

Labor Code that preserve socialist conventions combine with Vietnam's decentralized legal system¹⁶ to exacerbate the tension between local institutions¹⁷ threatened by change and the national government¹⁸ focused on liberal reform.¹⁹ At the national level, the VCP proposes laws to encourage foreign investment in Vietnam.²⁰ Regional government bodies, however, implement those laws to accommodate local needs and attitudes.²¹ By tolerating interpretation of the Labor Code²² and other national legislation at the local level inconsistent with the national agenda, the VCP may impede Vietnam's ability to assume its place in the

the power of the Vietnamese Communist Party (VCP) by enhancing the power of chief government officials and the National Assembly." Ngo, *supra* note 8, at 81.

15. LABOR CODE, *supra* note 12, pmb., at IV-101. "[T]his Code institutionalizes the 'renovation' policy of the Communist Party of Vietnam and provides for detailed implementation of the provisions of the 1992 Constitution of the Socialist Republic of Vietnam on labour, and its utilization and management." *Id.*

16. DAVID G. MARR, *THE ASIA SOCIETY, VIETNAM STRIVES TO CATCH UP* 17 (1995).

Foreign business representatives often discover to their dismay that what they are told in Hanoi does not correspond to briefings provided by local officials, and vice versa. Often it is necessary to negotiate agreements at both levels, then hope that all does not come unstuck in the implementation. Of course, Vietnam is hardly unique in being unable to find the optimum relationship between capital, region, and province.

Id.; compare Taylor, *supra* note 8, at 469 (stating agenda of *doi moi*) with Prime Minister's Address to Closing of the National Assembly, BBC Monitoring Service, June 28, 1994, available in Westlaw, INT-NEWS Database [hereinafter *P.M. Address*] (describing widespread corruption at local levels at times part of collective policies).

17. See UNDP REPORT, *supra* note 2, at 2. "[T]iers of People's Committees (local government) have responsibilities for daily administration at the provincial, city, district, and village level." *Id.*

18. See FREDERICK R. BURKE & DAVID HOWELL, *VIETNAM: A LEGAL BRIEF* 162 (Baker & McKenzie and The State Political Publishing House, Hanoi 1993). "The Vietnamese Communist Party is the prime political force in the country and initiated the recent major economic and legal reforms." *Id.*

19. See MARR *supra* note 16, at 17 (describing less than optimum relationship between capitol, region, and province in Vietnam). "Foreign business representatives often discover to their dismay that what they are told in Hanoi does not correspond to briefings provided by local officials." *Id.*

20. Ngo, *supra* note 8, at 68. "Vietnam's recognition of the importance of foreign investment to the country's economic survival is demonstrated by the enactment of its current liberal foreign investment law." *Id.*

21. UNDP REPORT, *supra* note 2, at 11. "[S]uch decentralization provides advantages in flexible responses to local needs." *Id.*

22. LABOR CODE, *supra* note 12, art. 12, at IV-105. "Trade unions shall, in conjunction with State bodies and economic and social organizations, look after and protect the rights of employees; and inspect and supervise the implementation of the provisions of the Labour Code." *Id.*

international marketplace through *doi moi*.²³

This Note examines whether Vietnam's decentralized legal structure, which allows entrenched local institutions to perpetuate socialist principles and practices when implementing reform legislation such as the Labor Code, will frustrate Vietnam's transformation to a market economy. Part I introduces the economic and social forces whose interaction will determine the success of Vietnam's transition to capitalism. Part II analyzes conflicting political agendas of the local and national legal institutions of Vietnam, using the Labor Code as an example of their effect on the implementation of *doi moi* legislation. Part III argues that the national government should amend existing reform measures to ensure that the Labor Code and other economic legislation are implemented consistently with the tenets of *doi moi*. This Note concludes that unless the national government enforces a uniform interpretation of legislation under *doi moi* consistent with its liberal spirit at all levels of the government, local self-interest will frustrate Vietnam's opportunity to realize its potential to become an economic center of Asia and a productive member of the world community.

I. THE POLITICS OF TRANSFORMATION

The VCP has initiated economic reform under *doi moi* that encourages investment from foreign capital markets.²⁴ The United States is becoming a major source of foreign investment in Vietnam, exerting pressure for social and political as well as economic reform.²⁵ Reform legislation employs existing communist institutions, maintaining the existing communist political

23. UNDP REPORT, *supra* note 2, at 11. "Local authorities presently have a considerable degree of autonomy. They have considerable fiscal power and control over state enterprises [A] lack of clarity in decision making has led to frequent confusion concerning implementation of economic policies." *Id.* "[S]ome government leaders have already flagged their intention to retain a great deal of administrative discretion, either in interpreting the laws or by continuing to issue decrees and regulations designed to update or redefine them according to circumstance." MARR, *supra* note 16, at 13.

24. See *supra* notes 9-11 and accompanying text (describing strategy of increased foreign investment).

25. Connor *supra* note 6, at 489. Although U.S. business was restrained by the U.S. embargo, the United States will enjoy a "certain advantage in the Vietnamese market" and a "promising trade-based future." *Id.* The U.S. involvement in Vietnam's reintegration into the world community entailing "political and economic reforms" has finally come and "is long overdue." *Id.*

and social apparatus.²⁶ The legislation contains broadly worded provisions that allow local institutions the flexibility necessary to implement economic reform, while retaining social and political control.²⁷

A. *Transformation to Capitalism Under Doi Moi*

Vietnam has been in a state of siege for most of the period since the end of the Second World War.²⁸ After years of French colonial occupation and Japanese aggression, Vietnam's revolutionary icon, Ho Chi Minh,²⁹ effectively organized scattered revolutionary groups in a nationalist movement under the League for the Independence of Vietnam, or the Viet Minh.³⁰ Ho Chi Minh declared Vietnam's independence on September 2, 1945 after Viet Minh forces captured Hanoi, the French colonial capital.³¹ Vietnam was not to be unified, however, until 1976, after three decades of civil war and war against France and

26. See Thomas R. Stauch, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 INT'L LAW. 995, 1032 (1994) (describing initial approval process mandated by the 1987 FIL, required before commencement of any foreign investment activity as prime example of how maintaining communism through new law and communist institutions in Vietnam may take precedence over economic development). "Th[e] initial approval process 'affords the government the opportunity to carefully scrutinize each application, approving only those investments which it decides will improve the economy without undermining the control of the Communist Party.'" *Id.*

27. Sidel, *supra* note 7, at 222. "[T]he legal system is being required to serve simultaneously as a means of market liberalization and as a continuing tool to maintain the political authority of the [VCP] and the state apparatus it has created and reinforced." *Id.* "A number of laws passed in recent years fail to resolve underlying issues, simply reserving them for subsequent action when the behavior of individuals, companies, or groups seems to require it." MARR, *supra* note 16, at 13.

28. See WILLIAMS, *supra* note 3, at 1. The nation of Vietnam was formed through a period of incessant wars. *Id.* at 5. China, Japan, France, and Russia as well as the United States have all attempted to exert influence over Vietnam, with varying degrees of failure. *Id.* "The country's former foreign minister, Nguyen Co Thach, when asked once to comment on Vietnam's close relationship with the Soviet Union, quipped that it was the only one of the five permanent members of the UN Security Council that his country had not engaged on the battlefield." *Id.*

29. See STANLEY KARNOW, *VIETNAM: A HISTORY* 688 (1983). Born Nguyen Tat Thanh in 1890, Ho Chi Minh ("He Who Enlightens") was the leader of the Vietnamese communist nationalist movement, fighting the French for nine years, and the first "President of North Vietnam - the Democratic Republic of Vietnam - from 1945 until his death in September 1969." *Id.*

30. *Le*, *supra* note 1, at 149. The Vietnamese vigorously resisted French control, but resistance was scattered until the spring of 1941, when Ho Chi Minh "reorganized various revolutionary groups to form the League for the Independence of Vietnam, more commonly known as the 'Viet Minh.'" *Id.*

31. See *supra* note 1 (describing declaration of Vietnam's independence).

the United States.³²

1. The Socialist Republic's Centralized Economy

In 1976, the Vietnam Communist Party adopted its second³³ five-year plan.³⁴ At the outset of Vietnam's unification,³⁵ the VCP applied the Stalinist-derived economic system³⁶ that had operated in North Vietnam ("North")³⁷ to both halves of the country.³⁸ Orthodox Soviet institutions,³⁹ such as local representative and executive state organs, comprised the system established throughout the country.⁴⁰

Under the Stalinist system, the state controlled the Vietnamese economy.⁴¹ State-owned enterprises exploited the

32. See *supra* note 1 (discussing Vietnam's unification).

33. See D.R. SARDESAI, *SOUTHEAST ASIA: PAST AND PRESENT* 293 (3d ed. 1994). "In December 1976, Vietnam adopted an ambitious second five-year plan. It was termed second in relation to the first five-year plan for the DRV [Democratic Republic of Vietnam] during 1961-66." *Id.*

34. See WILLIAMS, *supra* note 3, at 42. "[T]he Second Five Year Plan (1976-1980), [was] adopted at the fourth party congress in 1976." *Id.* "The thrust of the plan, designed to integrate the two halves of the country, was to leave the richer South concentrating on agriculture and the North on Industry." *Id.* "The hope was that the countryside would subsidize the economic development of industries in the towns." *Id.*

35. See *id.* at 40. "With the end of the war in 1975, Vietnam achieved the national unity and independence for which hundreds of thousands of lives had been shed in the preceding three decades." *Id.*

36. UNDP REPORT, *supra* note 2, at 2. "[T]he Government of the Socialist Republic of Vietnam attempted to organize the country's political and economic system along orthodox Soviet lines." *Id.*

37. See WILLIAMS, *supra* note 3, at 10. On September 2, 1945, the North proclaimed its independence as the Democratic Republic of Vietnam. *Id.*

38. See *id.* at 41. "The Stalinist derived economic system that had operated in the North for some twenty years was rigidly applied over the two halves of the country, which had not even had trading relations for three decades." *Id.*

39. See Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Developments*, 23 GA. J. INT'L. & COMP. L. 155, 159 (1993) (describing local representative organs as councils or soviets and local executive organs as administrative agencies' local offices).

40. Stauch, *supra* note 26, at 1009. "[T]he Communist government in Hanoi chose to structure its institutions based on the Soviet model of communism and central planning." *Id.* "Orthodox Soviet institutions were established throughout the country in a manner not dissimilar to that used in Eastern Europe in the late 1940s, or China in the 1950s." WILLIAMS, *supra* note 3, at 42.

41. Stauch, *supra* note 26, at 1005. "Nonetheless, the Communists of the North soon crushed the capitalist hopes of South Vietnam when the state took over the entire economy and put socialist economic institutions into place." *Id.* "Production was organized on the basis of detailed plans produced at the center by the State Planning Commission." WILLIAMS, *supra* note 3, at 44.

means of production.⁴² These enterprises followed a centrally administered system in which the state orchestrated the supply of raw materials, labor relations, production levels, and budgets.⁴³ By the end of the first decade after unification, however, it became clear that state had failed to effectively administer the centrally planned economy.⁴⁴

As the crisis worsened, state institutions did not perform according to the centrally administered guidelines.⁴⁵ The elaborate state-subsidized economic system broke down.⁴⁶ The institutions at the local level exercised inordinate power,⁴⁷ acted independently from the centralized administration,⁴⁸ and became corrupt.⁴⁹ The resulting stagnation of the economy forced the

42. WILLIAMS, *supra* note 3, at 49. "In 1988, state-owned enterprises still accounted for over 70% of the country's industrial output." *Id.*

43. *Id.* at 44. "There was little in the way of financial discipline, with the requirements of enterprises being met out of the state budget." *Id.*

44. *Id.* at 43. "At the end of the 1970's the Vietnamese economy faced a very real crisis. . . . Behind this failure, there was increasing evidence that, notwithstanding the monolithic facade of party rule, there was far from uniform control, especially in the countryside." *Id.* at 43-44.

45. *Id.* at 44.

Indeed some observers have argued that, even before 1975, party control of the economy in the North was far from what was claimed by official propaganda. Although the Soviet-style institutions necessary to create forced economic development were in place, the compulsion associated with those institutions in classic Stalinist policies seems to have been lacking.

Id.

46. Stauch, *supra* note 26, at 1010. "By the mid-1980's the Vietnamese Government, although not willing to admit what the Vietnamese people already knew, began to realize that their socialist economic model was failing." *Id.* "The Stalinist command economy, introduced in the North during the 1950s and justified subsequently by the exigencies of anti-American armed struggle, was now coming unstuck from below as well as being questioned from above." MARR, *supra* note 16, at 6.

47. WILLIAMS, *supra* note 3, at 30. "Local cadres exercised extraordinary powers in areas in which they ruled, and resentment against this state of affairs rapidly came to the surface in the more relaxed atmosphere after 1986." *Id.*

48. *See id.* at 43-44.

Behind this failure, there was increasing evidence that, notwithstanding the monolithic facade of party rule, there was far from uniform control, especially in the countryside. Indeed some observers have argued that, even before 1975, party control of the economy in the North was far from what was claimed by official propaganda.

Id. "The de facto independence of many enterprises, not to mention peasants on the cooperatives, was reigned in." *Id.* at 45.

49. *Id.* at 44. "Enterprises and other state agencies sought to exploit the distortions in the pricing system by engaging in the illegal resale of goods and materials bought at artificially fixed prices." *Id.*

VCP into its present stance of reform.⁵⁰

2. The Move Toward a Capitalist Economy

The VCP instituted *doi moi* in 1986 at the sixth party plenum in an attempt to rejuvenate the country's economy.⁵¹ By 1989, the government had removed the remaining mechanisms of central planning.⁵² The government lifted price controls on most commodities⁵³ and decollectivized agricultural land.⁵⁴ Despite the economic difficulties still facing the country, Western investment began to flow into Vietnam.⁵⁵ Private business started to grow in the South of Vietnam and soon expanded to the North.⁵⁶

3. Economic Opportunities for Foreign Investors

Notwithstanding China,⁵⁷ Vietnam represents one of the larger markets in Asia, with a population of seventy-one million people.⁵⁸ The Vietnamese population embodies a well-educated

50. *Id.* at 43. "In view of the stagnation of the northern economy, drastic measures to stimulate production were clearly called for. The implementation of such measures proved to be only the initial steps on a road to reform that is transforming the Vietnamese economy from a centrally planned to a market-oriented system." *Id.*

51. See *supra* note 7 and accompanying text (discussing launching of *doi moi* in response to economic failure of centrally planned economy).

52. MARR, *supra* note 16, at 9. "In 1989 . . . Hanoi took its most decisive steps yet toward a market economy. The central planning apparatus, which had attempted for decades to determine inputs and outputs for state economic units, was dismantled . . ." *Id.* "In 1989 the government effectively removed the last vestiges of central planning. It did so first of all, as a United Nations report noted, by 'openly and unambiguously committing itself to tackling monetary and fiscal problems.'" WILLIAMS, *supra* note 3, at 52 (quoting UNDP, REPORT ON THE ECONOMY OF REFORM IN VIET NAM, STATE PLANNING COMMITTEE, HANOI (1990)).

53. Sidel, *supra* note 7, at 221. "[P]rice controls have been lifted on most commodities . . ." *Id.*

54. *Id.* "[A]gricultural land is being decollectivized and then privatized or turned over to farmers on long-term leases . . ." *Id.*

55. WILLIAMS, *supra* note 3, at 51. "Despite a pre-industrial structure, inadequate institutions, stifling bureaucracy and a shortage of qualified personnel, foreign investment from the West began to trickle into Vietnam in early 1989." *Id.*

56. Sidel, *supra* note 7, at 221. "Whole sectors of the economy have been and are continuing to undergo privatization . . . and private business is booming in southern Vietnam and beginning a rapid expansion in north and central Vietnam." *Id.*

57. Pat K. Chew, *Political Risks and U.S. Investments in China: Chimera of Protection and Predictability*, 34 VA. J. INT'L L. 615, 616 (1994). "After a distinct cooling-off period following the Tiananmen uprisings in the summer of 1989, U.S. businesses are investing again in the potentially enormous Chinese market." *Id.*

58. Taylor, *supra* note 8, at 470. "With a population of 71 million people, Vietnam

and highly productive workforce.⁵⁹ Vietnam possesses an abundant supply of unexploited natural resources⁶⁰ and unlocked agricultural potential.⁶¹ Finally, Vietnam comprises a mysterious and exotic landscape with 3200 kilometers of coastline⁶² making the country ideal for a growing tourist industry.⁶³

Opportunities for investment abound in Vietnam.⁶⁴ Vietnam has received billions of dollars in aid from the IMF and the World Bank.⁶⁵ The Vietnamese government plans to use this aid

is one of the largest markets in the Far East outside of China." *Id.* "Vietnam's population, estimated at 71.9 million in 1993, is growing at an average annual rate of 2.2 per cent." UNDP REPORT, *supra* note 2, at 1.

59. Taylor, *supra* note 8, at 470. "In addition, [Vietnam] has a well educated labor force and the lowest wage rates of any country in the region. Vietnam has a literacy rate of eighty-eight percent compared with seventy-four percent in China and ninety-five percent in the United States." *Id.*

60. *Vietnam's Transition to a Market Economy*, E. ASIAN EXEC. REP., Feb. 15, 1994, at 8, available in LEXIS, Asiapc Library, Vietnam File. "Given Vietnam's endowments, there is no reason why the economy cannot develop a wide range of export products. In agriculture, there is considerable room to diversify exports toward marine products, rubber, nuts, coffee, and tea." *Id.* "Specifically, the nation possesses an abundance of petroleum, coal and natural gas. . . . Vietnam has an abundance of farmland . . . and is currently the world's third largest exporter of rice." Stauch, *supra* note 26, at 1025.

61. See INSTITUTE OF AGRICULTURAL SCIENCE OF SOUTH VIETNAM, RESEARCH AND DEVELOPMENT OF GOATS IN VIETNAM forward (1993). "Until relatively recently, the development of animal production has been hampered by the war years and lack of resources. Pig and poultry production, and dairy development are now getting increasing attention. With goats, despite the wide interest, there has been very limited support for research and development in Vietnam." *Id.*

62. UNDP REPORT, *supra* note 2, at 2. "Vietnam stretches along a 3,200 kilometre section of the South China Sea." *Id.* "Vietnam boasts 3,200 Kilometre of mostly unspoiled coastline." Frederick Balfour, *Surfer Country Now? Vietnam Holds a Surfing Contest in a Bid to Lure Tourists*, FAR E. ECON. REV., Oct. 21, 1993, at 64.

63. Stauch, *supra* note 26, at 1026. "Furthermore, Vietnam's vast coastal properties will create opportunities for hotel and resort chains." *Id.* Ho Chi Minh City Assistant Mayor, Le Quang Chanh, "sees tourists fanning out to resorts . . . [at] one of the several choice spots that will be developed for tourism along Vietnam's breathtaking coastline." Tom Fox, *Come Ye Back to Mandalay*, FW, May 16, 1989, at 38, available in Westlaw, MAGSPPLUS Database.

64. David Forman, *Vietnam Starts to Roar*, BUS. REV. WKLY., July 18, 1994, at 60.

The pace of development in Vietnam makes it difficult to ignore the investment opportunities it offers. Industrial output rose 12.1% in the first four months of this year. GDP growth was 7.5% last year and 8.3% the year before. Foreign investment approvals went from about US\$750 million in 1990 to an estimated US\$4 billion this year, and the Government has announced plans for capital investment of US\$40 billion by the year 2000. But the Government has been careful to keep the economy under control, slashing inflation from almost 500% in the late 1980's to 7% in 1993.

Id.

65. Michael Vatikiotis, *Romance Meets Reality*, FAR E. ECON. REV., Sept. 22, 1994, at

to rebuild its infrastructure which has been destroyed by the passage of time and ravages of war.⁶⁶ Because Vietnam lacks the technology and expertise to rebuild itself, it aggressively provides incentives for foreign investment in infrastructure development.⁶⁷

B. *The Law on Foreign Investment*

The Law on Foreign Investment⁶⁸ ("FIL"), enacted in 1987 and amended in 1990 and 1992, provides general guidelines for foreign investment.⁶⁹ The FIL sets forth permissible investment vehicles for foreign investment,⁷⁰ incorporates protection for Vietnamese workers,⁷¹ and guarantees investors that their capital and assets will not be requisitioned or appropriated.⁷² Still, the FIL requires further regulations at the national⁷³ and local

72. "No longer fettered by the U.S. embargo, the World Bank, IMF and Asian Development Bank (ADB) are disbursing the first tranches of close to US\$1 billion in soft loans they have earmarked for Vietnam." *Id.* William Branigan, *Giving Vietnam the Business*, WASH. POST, Feb. 14, 1994, at A18. "Some U.S. law firms also hope to get involved in the legal aspects of development projects worth billions of dollars that Vietnam plans to implement now that major new loans from the World Bank and other institutions have started to flow." *Id.*

66. Ngo, *supra* note 8, at 82. "The roads and other infrastructure in Vietnam are poor, particularly in the North, where they were bombed by the Americans and rebuilt cheaply, if at all, by the Soviets." *Id.* "Vietnam's ministers are seeking US\$8 billion of foreign capital to build up power, transportation, communications and water supply systems." Richard Korman, *World Projects Hanoi to World: Let's Make a Deal*, Engineering News-Record, Nov. 1, 1993, available in Westlaw, MAGSPPLUS Database.

67. Connor, *supra* note 6, at 482. The Vietnamese government "virtually invited foreign businesses to return to Vietnam." *Id.*

68. Law on Foreign Investment in Vietnam (as amended 1992) (State Political Publishing House, 1993) [hereinafter FIL]. The FIL is hailed as the "most liberal investment law in Asia." Ngo, *supra* note 8, at 67.

69. Sesto E. Vecchi, *Vietnam's Bid for Foreign Investment*, INT'L CORP. L., July/Aug. 1992, at 32. The FIL outlines the forms investment can take and basic structure they require. *Id.*

70. FIL art. 2 (outlining JV, business cooperation contract, and enterprise with 100% foreign owned capital as vehicles for investment).

71. FIL art. 16. "Vietnamese citizens shall be given priority in the recruitment of personnel for an enterprise with foreign owned capital. . . . The rights and obligations of the Vietnamese employees working in an enterprise with foreign owned capital shall be provided for in labour contracts." See Circular No. 04/LDTBXH-TT (March 18, 1993) (Vietnam) (explaining for already existing enterprises, individual labor agreements were required for every employee by Mar. 18, 1994).

72. FIL art. 21. "The capital and assets invested in Vietnam by foreign organizations or individuals shall not be requisitioned or expropriated through administrative measures. An enterprise with foreign owned capital shall not be nationalized." *Id.*

73. See Decree No. 18 CP Regulations in Detail for the Implementation of the Law

levels⁷⁴ to flesh out issues the National Assembly left unresolved.

The Vietnamese government, through the State Committee for Cooperation and Investment ("SCCI"), promotes the JV to foreign investors.⁷⁵ A joint venture ("JV") is a legal entity under Vietnamese law composed of two or more partners entered into a business relationship for a specific purpose.⁷⁶ The JV is the most common mechanism for foreign investment.⁷⁷ Most emerging markets in formerly communist states utilize the JV as the primary investment vehicle.⁷⁸

Under the FIL, the SCCI acts as a guide for the foreign investor throughout the JV process.⁷⁹ The SCCI promotes the value of a Vietnamese partner as a facilitator in navigating the laws and policies at the local level.⁸⁰ The SCCI encourages the

on Foreign Investment in Vietnam, art. 1 [hereinafter 18 CP]. Promulgated by the government, 18 CP "concertizes the Foreign Investment Law and regulates in detail direct investment operations of foreigners in Vietnam; indirect investment operations such as international credit, international assistance, etc. are not within the scope of this Decree." *Id.*

74. *See, e.g.*, Guideline No. 17/LDVL Guidelines of Some Implemented Work at the Foreign Invested Enterprises (July 1, 1993) (Vietnam) (promulgated by Ho Chi Minh People's Committee's Service of Labour, War Invalids, and Social Affairs ("LISA"), guidelines touch upon submissions to SCCI and labor relations).

75. *See id.* arts. 66, 69-70 (granting special tax rates for privileged cases and investment incentives).

76. JOHN P. KARALIS, *INTERNATIONAL JOINT VENTURES: A PRACTICAL GUIDE* § 1.2 (1992). "In a modern joint venture, the parties combine their resources, usually compromising capital, knowledge, skill and services, in the conduct of a business venture, but without necessarily organizing a partnership in the legal sense." *Id.*

77. Connor, *supra* note 6, at 483. "The most commonly utilized method to date has been the joint venture." *Id.*

Depending on the sector of the economy in which the investment is made, the scale of capital contribution, the volume of exports, and the nature and duration of the business, a joint venture enterprise may be exempted by the State body in charge of foreign investment from payment of profits tax for a maximum period of two years commencing from the first profit making year and, further, it may be allowed a fifty (50) per cent reduction of profits tax for a maximum period of the two successive years. Operating losses incurred by a joint venture enterprise in any year may be carried forward to the following year and set off against the profits of that years. Any loss remaining after such set off may be carried forward on the same basis for up to five successive years.

FIL art. 27.

78. KARALIS, *supra* note 76, § 7.1. "In Socialist countries, "regulation often encourages or requires joint ventures participation as the means of foreign investment. . . ." *Id.*

79. Ngo *supra* note 8, at 68. "The rights and responsibilities of the [SCCI] include providing assistance and guidance in the negotiation and conclusion of contracts . . ." *Id.*

80. Connor, *supra* note 6, at 483 "In addition to being favored by the State Com-

foreign investor to leave labor relationships and the hiring process to the Vietnamese partner who can more effectively cooperate with the appropriate government agencies and service organizations.⁸¹

The SCCI authorizes the formation of a JV by approving the JV application.⁸² The application must be accompanied by documentation including the signed JV contract and the JV's charter.⁸³ JV contracts must include the procedure for settlement of disputes between the JV partners and responsibilities of the partners in the execution of the JV contract.⁸⁴ The charter of the JV must contain procedures for labor relations between employer and employees in the JV.⁸⁵

C. *The Political and Legal Structures Effecting Doi Moi*

Vietnam faces the challenge of shaping the future of the country's economic development under the influence of local interests and foreign investors.⁸⁶ Investment from U.S. business increases the stakes of reform,⁸⁷ along with the flow of capital.⁸⁸

mittee for Co-operation and Investment, which administers all foreign investments, joint ventures are particularly popular because a local partner can be indispensable for resolving local bureaucratic problems." *Id.*

81. *Guide to Hiring Labour*, *supra* note 12, at 21. "In a JV the Vietnamese partner will often be responsible for overseeing the employee selection process and approving labour contracts." *Id.*; cf. Nina Shea & P.H. Mullen, *You Can't Do Business as Usual in Vietnam*, *ASIAN WALL ST. J.*, March 7, 1995, at 10 (arguing that U.S. firms should not delegate hiring, firing, promoting, rewarding, and discipline of its workers to unsupervised middle-men and local partners, government's labor bureau, or other third parties).

82. BURKE & HOWELL, *supra* note 18, at 170. "[T]he State Committee for Cooperation and Investment (the "SCCI") has the responsibility for the regulation and the management of foreign investment . . ." *Id.*

83. See 18 CP art. 20 (stating application for JV submitted to SCCI must include among other documents; the signed JV contract and the JV's charter).

84. *Id.* art. 21(6). A JV contract shall contain "[t]he procedure for settlement of disputes between the joint venture partners, arbitration body and the applicable law in cases of disputes." *Id.*

85. *Id.* art. 22(9). The charter of the JV shall contain items on "[l]abor relations in the joint venture." *Id.*

86. MARR, *supra* note 16, at 21. "At a deeper level, Vietnam faces a problem of new economic interests at work within an outdated political structure. While these new interests may well remold the structure to their taste, the process will take time and entail not a few dislocations en route." *Id.*

87. Shea & Mullen, *supra* note 81, at 10. "Since trade is emerging as the common language of both governments, it will become the responsibility of the business community to reaffirm for Vietnam - and all of Asia - the high value the American people place on religious and other democratic freedoms." *Id.* "The lifting of that embargo would

The national government has promulgated broadly drafted laws to further *doi moi*, while entrenching local institutions sympathetic to the VCP.⁸⁹ The decentralized nature of Vietnam's political structure empowers local institutions to interpret national law in their communities thereby affecting the efficacy of reform.⁹⁰

1. Foreign Investment: U.S. Investment

Vietnam and the United States are forming a new relationship.⁹¹ At the urging of the U.S. Senate, U.S. President Bill Clinton lifted the U.S. trade embargo⁹² by executive order on February 3, 1994.⁹³ For the last two decades the United States has ex-

not only have an almost immediate effect on Vietnam, but would also lock the country's economic future so tightly into the international economy as to make a retreat into the Stalinist policies of the past virtually impossible." WILLIAMS, *supra* note 3, at 3.

88. *Vietnamese Government Sets Goals for Aggressive Economic Development*, INT'L BUS. & FIN. DAILY (BNA), at D9, Aug. 1, 1994, [hereinafter *Aggressive Development*]. In the first seven months after "the lifting of the embargo, U.S. firms have embarked on 15 projects worth US\$141 million." *Id.*

89. See *supra* note 27 and accompanying text (describing law as tool of VCP for market liberalization and retention of political control).

90. UNDP REPORT, *supra* note 2, at 9 (explaining that local interpretation allows for responses to specific local needs). "Though provincial governments have been given more freedom, they haven't passed it on to entrepreneurs. Foreign investors are welcome, but corruption devours profits." Frank Gibney, Jr., *Back in Business*, TIME, Apr. 24, 1995, at 37, 42.

91. Stauch, *supra* note 26, at 1024. "By lifting the embargo, Clinton put an end to an era that began almost thirty years ago on May 4, 1964, when the United States imposed an embargo on North Vietnam in response to attacks against South Vietnam." *Id.*; see Regional Briefing, FAR E. ECON. REV. 13, Apr. 21, 1994, available in Westlaw, FEER Database. "The U.S. and Vietnam have made progress in their talks on opening liaison offices in each other's capitals and returning frozen assets . . ." *Id.*

92. Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (Supp. V 1993), 31 C.F.R. § 500.201 (1992). "As a parting shot following the defeat of U.S. backed South Vietnam and the fall of Saigon in 1975, the White House extended the embargo to cover all of Vietnam." Stauch, *supra* note 26, at 995; Peter Furniss, *The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARV. INT. L.J. 238, 238 n.1 (1994).

The trade embargo is authorized by the Trading with the Enemy Act . . . which provides the President with sweeping powers to control the trade relationship of the United States with other nations during time of war or national emergency. The trade embargo against Vietnam dates from 1964 when President Johnson called for sanctions against North Vietnam and was extended to South Vietnam when the Thieu government fell in 1975.

Id. (citations omitted).

93. Memorandum on Trade with Vietnam, 30 WKLY. COMP. PRES. DOC. 212 (Feb. 3, 1994). "I hereby direct the Secretary of the Treasury to take all appropriate actions to authorize prospectively all trade and financial dealings with Vietnam, and the Secretary

erted pressure on Vietnam through the politics of isolation.⁹⁴ With the end of the embargo, the United States is taking the first steps toward normal diplomatic and economic relations with its former enemy.⁹⁵ The U.S. government can use Most Favored Nation ("MFN") status as leverage to force concessions by the Vietnamese government regarding political⁹⁶ and social⁹⁷ reform.⁹⁸

of Commerce to exempt Vietnam from existing controls implementing the embargo." *Id.* "The lifting of the embargo was accompanied by an amendment to, rather than repeal of, the Foreign Assets Control Regulations as they apply to Vietnam." Connor, *supra* note 6, at 488.

94. Stauch, *supra* note 26, at 1008-09. "Not only was Vietnam isolated from the U.S. economy but other non-Communist industrialized nations were reluctant to deal with Vietnam for fear of jeopardizing their own economic trade relations with the United States." *Id.*

95. Taylor, *supra* note 8, at 469. "[T]he United States has not yet normalized relations with Vietnam" *Id.*

During the Bush administration, a program known as the 'Road Map' to normalization emerged. This entailed a four-step scenario pursuant to which Vietnam was to sign a Cambodian peace accord, withdraw all military forces from Cambodia, and resolve all issues relating to prisoners of war or soldiers missing in action (POW/MIA). In exchange, the United States would re-establish diplomatic ties, lift the embargo, and at the conclusion of the process, consider granting most-favored nation status to Vietnam.

Connor, *supra* note 6, at 486. "[A]ccording to one U.S. Legislator [Sen. Frank H. Murkowski, R-Ark.], '[w]hen dealing from isolation, we achieve nothing. When dealing directly, we saw progress.'" Stauch, *supra* note 26, at 1035-36.

96. Furniss, *supra* note 92, at 34. "The POW/MIA issue has become a political powderkeg." *Id.*

97. See U.S. DEPT. OF STATE HUMAN RIGHTS REPORT 1993, § 2 (1994) [hereinafter DEP'T. OF STATE REPORT]. The status of workers, free-speech and the right to oppose the government are noted by the State Department as problem issues. *Id.* "[T]he Freedom House human rights organization calls [Vietnam] 'one of the most repressive places on earth.'" Shea & Mullen, *supra* note 81, at 10.

98. Joann Muller, *Returning to Vietnam: State Companies Step Up Plans for Scouting*, *Research*, DETROIT FREE PRESS, Feb. 5, 1994, at 4A. "But Clinton decided Thursday the U.S. would get more leverage by lifting the embargo." *Id.* "Today, our challenge is to shape a policy that promotes these interests most effectively in light of the changes in the world order and in Vietnam itself." Sen. John F. Kerry [D-Mass.], *Trade Can Be Carrot for Vietnam Reform*, VIETNAM BUS. J., Sept./Oct. 1993, at 1, 13. "In trying to influence the policies of a totalitarian government, we must decide which works better, the carrot or the stick?" *Id.* *But see* Shea & Mullen, *supra* note 81, at 10.

At this critical juncture, the fact that Vietnam can imprison prominent pro-democracy voices [specifically two well respected Buddhist leaders] who are the spiritual leaders to millions of Vietnamese Buddhists suggests that the regime believes it has little to fear from U.S. human rights policy. So far, in fact, Hanoi has not even responded to the administration's repeated queries about the status of the two Buddhists, leading observers to surmise that the Clinton Administration has lost all leverage on the human rights issue.

2. The Vietnamese Communist Party

Under the 1992 Constitution, the VCP is the leading force of the state and society.⁹⁹ The VCP nominates candidates for election, influences legislation, and formulates policy for the National Assembly and the government.¹⁰⁰ The VCP influences societal behavior at the local level through its mass organization of peasants, workers, youth, and women in state institutions.¹⁰¹ The VCP does place internal checks on its own use of power, however, through political and legal means,¹⁰² and is required to operate within the framework of the law under the 1992 Constitution.¹⁰³

The VCP has pledged to reform the economy under *doi moi* but is also concerned with remaining in control of that reform.¹⁰⁴ The VCP expects to realize both its goals of economic development and political entrenchment through the renovation of the legal system.¹⁰⁵ After the initial implementation of

Id.

99. VIETNAM CONST. ¶ 1. "The Republic of Vietnam is a socialist country in which the Communist Party is the leading force of state and society." *Id.*

100. Ngo, *supra* note 8, at 81. "Although it appears that the VCP is gradually accepting democratic reform, the present governmental structure still permits the VCP to remain the country's true leader." *Id.* "The government posts which allegedly share power with the VCP are filled by VCP members, and 'nothing prevents the VCP from ensuring the nomination and election of its favored candidates . . . to the posts of Prime Minister or President.'" Harish Mehta, *Vietnam: A New Era of Sharing Power*, BUS. TIMES (Singapore), May 8, 1992, available in LEXIS, Asiapc Library, Vietnam File. The VCP no longer solely directs the government, yet its members recently gained roughly half the seats in the National Assembly. *Id.* "The Vietnamese Communist Party (VCP) guided and directed the government, which therefore was no more than an agency for the implementation of the party's policies." SARDESAI, *supra* note 33, at 289.

101. SARDESAI, *supra* note 33, at 289. "The VCP also led the society through its mass organization of peasants, workers, youth, women, and so on. The party functioned at the four levels: central, provincial, district and village." *Id.*

102. Oskar Weggel, *The Vietnamese Communist Party and its Status Under Law*, in RULING COMMUNIST PARTIES AND THEIR STATUS UNDER LAW 411, 412 (Dietrich Andre Loeber et al. eds., 1986). "Ultimately, the means for checking the Party narrow down to a few constraints that are mainly political in character - i.e. the opposition of Party factions, the patience of the population, foreign policy considerations, etc. To a certain extent, however, there are even legal limitations." *Id.*

103. VIETNAM CONST. ¶ 3.

104. *Party Central Committee Advisor Pham Van Dong Interviewed on Renovation*, BBC Monitoring Service, June 15, 1994, at 1, available in Westlaw, INT-NEWS Database. "It is not our policy to develop just any market economy, but one in accordance with the socialist orientation with approximate management of a state governed by law." *Id.*

105. Sidel, *supra* note 7, at 223. "Because the Communist Party is attempting to manage Vietnam's economic reform effort and intends to retain firm political control,

doi moi, the VCP guarded against the democratic unrest experienced in Europe and in China in 1989 by rejecting moves toward greater pluralism.¹⁰⁶

Notwithstanding the VCP's efforts, the emergence of reform in the economic sphere under *doi moi* led to reform in the social and legal spheres as well.¹⁰⁷ Even VCP officials have acknowledged the need to increase freedom on the personal level in order to promote economic diversification and liberalization.¹⁰⁸ Nonetheless, the VCP still retains command of institutional mechanisms of social control.¹⁰⁹

3. The National Assembly

The National Assembly, the highest legislative body in Vietnam, is composed of deputies elected through direct nationwide elections.¹¹⁰ It is empowered under the 1992 Constitution to make and amend the Constitution and to pass laws.¹¹¹ The

the legal system is being required to serve simultaneously as a means of market liberalization and as a continuing tool to maintain the political authority of the Party and the state apparatus it has created and reinforced." *Id.* at 221-22.

106. WILLIAMS, *supra* note 3, at 32. "Criticism [by the VCP] of the moves in those countries towards greater democracy and political pluralism was among the strongest made by any ruling communist party at the time." *Id.* "The [VCP seventh party] congress reaffirmed its commitment to economic reform, but, shaken by the collapse of communism in Eastern Europe, firmly rejected any idea of political pluralism." *Id.*

107. Sidel, *supra* note 7, at 223. *Doi moi* has engendered pluralism, greater discussion of social issues, and a broader range of increased personal freedoms. *Id.*

108. *Id.* "On the one hand, pluralism, greater discussion of social issues, and a broader range of increased personal freedoms must begin to enter the ordinary lives of Vietnamese citizens." *Id.*

109. *Id.* "The Vietnamese leadership appears united in its commitment to maintaining domestic political stability and has allowed that deep desire for political stability to guide and sometimes limit the pace in which pluralism emerges." *Id.* "Diplomats believe the communist leadership, which regularly warns about the dangers of "peaceful evolution," is fostering a more restrictive political atmosphere to maintain stability as it presses ahead with economic reforms." Vatikiotis, *supra* note 65, at 72. In the early stages of *doi moi*, Vietnam observed the crisis of international communism in China and Eastern Europe which along with domestic factors, "contributed to a rigorous application of the brakes to the whole reform process" in 1989. WILLIAMS, *supra* note 3, at 31.

110. BURKE & HOWELL, *supra* note 18, at 162. "The National Assembly is the highest legislative authority in Vietnam, and is composed of deputies elected for a five-year term through direct nation-wide elections. . . . The National Assembly also elects the Standing Committee of the National Assembly, the Chairman of the State, and the Prime Minister." *Id.*

111. *Id.* "It [the National Assembly] is the only body empowered to make and amend the Constitution and to pass laws." *Id.* "Laws passed by the National Assembly are promulgated by the President." *Id.* at 163.

National Assembly enters session twice a year to pass legislation and to vote on fundamental external and national policies.¹¹²

The National Assembly has recently exerted its independence from the VCP, actively debating crucial issues affecting *doi moi*.¹¹³ VCP leaders have accepted alternative views expressed in debate,¹¹⁴ but stress the need for unity and collective consensus.¹¹⁵ Even while expressing the openness of *doi moi*, the VCP tolerates no right to question the legitimacy of VCP authority.¹¹⁶

4. The Government

The government is the highest executive body in Vietnam.¹¹⁷ Before *doi moi* the country was ruled collectively by a Council of State¹¹⁸ and a Council of Ministers.¹¹⁹ Rule of the Council of State was by consensus.¹²⁰ Under the 1992 Constitution, the government is headed by a cabinet led by a Prime Min-

112. *Id.* at 162. "National Assembly meets approximately twice each year." Tri Dung, *supra* note 13, at 12. The Standing Committee of the National Assembly is the permanent sitting body of the National Assembly. UNDP REPORT, *supra* note 2, at 2. "[The Standing Committee] has the power to present draft laws to the National Assembly and promulgate ordinances." BURKE & HOWELL, *supra* note 18, at 163.

113. *A Law Unto Themselves*, ECONOMIST, Oct. 22, 1994, at 41 [hereinafter *Law Shortage*]. "[D]ebate [in the National Assembly] has become "perky" on occasion." *Id.*

114. *Id.* at 41. Statements are made in the Assembly that could have meant prison sentences a few years ago. *Id.* "At the same time, they also raised many practical ideas to supplement and improve the quality of various documents to be presented at the plenum." *Do Muoi Speech to Closing Session of Seventh Party Plenum*, BBC Monitoring Service, Aug. 19, 1994, available in Westlaw, INT-NEWS Database [hereinafter *Do Muoi Speech*].

115. *Do Muoi Speech*, *supra* note 114. "Unity and unanimity must be based on the party platform, statute, resolutions, and the state law." *Id.* "We must preserve unity and unanimity within the party as if we were preserving the apples of our eyes, as already advised by Uncle Ho." *Id.*

116. *Law Shortage*, *supra* note 113, at 41. "But there is no right to question the legitimacy of Communist Party Rule." *Id.* "Questioning the legitimacy of the Vietnamese Communist Party or its exclusive vanguard role is not tolerated." DEPT. OF STATE REPORT, *supra* note 97, at 9.

117. BURKE & HOWELL, *supra* note 18, at 163.

118. SARDESAI, *supra* note 33, at 289. "[The Constitution of 1980] gave more authority to a new body, the Council of State which had both legislative and executive functions." *Id.*

119. *Id.* "Parallel to [Council of State] but subordinate in powers was the Council of Ministers, mostly an administrative body." *Id.*

120. *Id.* "[The Council of State] constituted a presidium or collective presidency." *Id.* "Ho Chi Minh always abjured any such practice [of personality cults] in the Vietnamese leadership and instead stressed collective leadership. After his death in 1969, no one individual inherited the mantle of authority." WILLIAMS, *supra* note 3, at 24.

ister.¹²¹ The government has the power to promulgate resolutions and decrees which possess the force of law.¹²²

5. The State Committee for Cooperation and Investment

Since 1989, the State Committee for Cooperation and Investment ("SCCI") has been responsible under the authority of the Prime Minister for the regulation and the management of foreign investment in the private and public sectors.¹²³ The SCCI is intended as a one-stop agency for handling all applications for foreign capital investment in Vietnam.¹²⁴ The SCCI has its own chairman and staff, and includes representatives from various state agencies.¹²⁵ The SCCI is empowered to communicate with the relevant Ministries, State Commissions, and local People's Committees in respect to all aspects of an investment project.¹²⁶

The SCCI has jurisdiction over enterprises with foreign invested capital at every stage of the investment process.¹²⁷ At the initial stages of investment, the SCCI may act as a match-maker,

121. BURKE & HOWELL, *supra* note 18, at 163. "Under the revised Constitution, the collective leadership of the Council of Ministers is abolished and replaced by a cabinet type 'Government' led by a Prime Minister." *Id.*

122. *Id.* "The Government [which] has the power to promulgate resolutions and decrees, is accountable to the National Assembly." *Id.*

123. *Id.* at 170. "Since 1989, the State Committee for Cooperation and Investment ("SCCI") has responsibility for the regulation and the management of foreign investment in the private and public sectors, under the authority of the Council of Ministers." *Id.*

124. *See id.* at 170 (portraying SCCI as one stop agency). *But see* Ngo, *supra* note 8, at 94-97 (describing bureaucratic crisis and failings of approval system). At present applications must be submitted to the appropriate ministry overseeing the particular Vietnamese partner as well as the SCCI. BURKE & HOWELL, *supra* note 18, at 178.

125. BURKE & HOWELL, *supra* note 18, at 170. "The SCCI has its own Chairman (of ministerial status) and staff, and includes representatives of the State Planning Commission, the State Commission for Science and Technology, the Ministry of Foreign Relations, the Ministry of Finance, the State Bank, and a number of additional Ministries and State commissions." *Id.*

126. FIL (as amended 1992) (State Political Publishing House, 1993) art. 36. "The State body of the Government of the Socialist Republic of Vietnam in charge of foreign investment is vested with the overall responsibility for matters relating to the investment activities of foreign organizations and individuals in Vietnam." *Id.*

127. *Id.* art. 36.

The State body in charge of foreign investment shall have the following powers and duties.

1. To assist foreign and Vietnamese parties in the negotiation and conclusion of business cooperation and joint venture contracts. . . . [A]ssist foreign organizations and individuals in the establishment in Vietnam of enterprises with

bringing potential partners together in JVs.¹²⁸ The SCCI approves the JV contract, and the formation of the JV.¹²⁹ In all cases, an application for any form of investment under the FIL must be filed with the SCCI in Hanoi.¹³⁰

6. People's Committees

Vietnam is divided into administrative units ranging from neighborhoods to provinces.¹³¹ Administrative units from the village level up are administered by the People's Committees and the People's Councils.¹³² People's Committees are elected by the People's Councils and headed by *Chu tich*, or Chairmen.¹³³ The power of the People's Committees at the local level extends to zoning and foreign investment approval.¹³⁴ Decisions

one hundred (100) per cent foreign owned capital, and assist in the resolution of all other matters at the request of those organizations and individuals.

2. To consider and approve business cooperation and joint venture contracts, authorize the establishment, by foreign organizations and individuals, of enterprises with one hundred (100) per cent foreign owned capital, and approve the charters of those enterprises with foreign owned capital.

3. To determine and grant preferential treatment to enterprises with foreign owned capital and to parties to business cooperation contract[s].

4. To monitor and supervise the performance of business cooperation and joint venture contracts and the operation of enterprises with one hundred (100) per cent foreign owned capital.

5. To analyze the economic activities with foreign owned capital.

Id.

128. BURKE & HOWELL, *supra* note 18, at 176. "Potential Vietnamese partners may be identified directly by foreign investors, although it is advisable to seek the assistance of the SCCI (either directly or through the SCCI's Transaction Centers) or the Vietnamese Chamber of Commerce and Industry." *Id.*

129. FIL art. 36. "The State body in charge of foreign investment shall have the following powers and duties To consider and approve business cooperation and joint venture contracts . . ." *Id.* "The joint venture contract shall become effective and the joint venture shall have the status of a juridical person from the date of issuance of the investment license and certification of registration of the charter of the joint venture." 18 CP art. 24.

130. BURKE & HOWELL, *supra* note 18, at 177. "In all cases, an application for any form of investment under the Law on Foreign Investment must be filed with the SCCI in Hanoi." *Id.*

131. *Id.* at 163. "Vietnam is divided into administrative units ranging from neighborhoods to provinces." *Id.*

132. *Id.* at 163. "Administrative units from the village level up are administered by the People's Committees and the People's Councils . . ." *Id.*

133. *Id.* at 163. "People's Committees are elected by the people's Councils and headed by *Chu Tich* (Chairman)." *Id.*

134. Wunker, *supra* note 8, at 369. "Moreover, the parties [of a JV] must receive approval by the appropriate People's Committee of the relevant province, city, or special zone . . ." *Id.*

of People's Committees, especially in metropolitan centers such as Hanoi and Ho Chi Minh City, affect the success of investments and the resolution of disputes by withholding approval and through contrary interpretation of law.¹³⁵

7. The National Trade Union

The national government has invigorated trade unions¹³⁶ as a tool for regulation of enterprises, implementation of policy, and protection of workers.¹³⁷ Labor advocates complain that due to high unemployment, employers are free to exploit employees.¹³⁸ The role of trade unions, the right to strike, and the collective labor agreement in individual enterprises balance the bargaining power of the two sides.¹³⁹ Under the new law, workers have the right to organize and be represented by the employee's representatives or representatives of the enterprise's trade union in every business that employs more than ten workers.¹⁴⁰ The national trade union, the General Federation of La-

135. Vatikiotis, *supra* note 65, at 72. The People's Committee in Ho Chi Minh City forced an investor to remove the top five stories of new luxury high rise office complex, after zoning changed, even though the investor received approval by the Ministry of Construction in Hanoi for the later problematic height before beginning construction. *Id.*

136. BURKE & HOWELL, *supra* note 18, at 213. "Vietnamese employees have the right to form or join a trade union (which is a state organization)." *Id.*

137. *Striking a Balance: Interview with Trade Union President Nguyen Van Tu*, VIETNAM ECON. TIMES, May 1994, at 24 [hereinafter *Striking a Balance*]. "Trade Unions will be strengthened so as to protect employees rights and benefits." *Id.*

138. See Vu Oanh Says Unemployment "Beyond Limit for Public Security", BBC Monitoring Service, May 23, 1994, available in Westlaw, INT-NEWS Database (excerpting article written by VCP politburo member Vu Oanh reporting unemployment is serious concern of government in Vietnam).

139. See Minh Anh, *Statute to Create More Roles for Labour Unions*, VIETNAM INV. REV., June 6-13, 1994, at 1. "With regard to the tasks, powers and functions of the trade union, the Statute stipulates that the organization has the duty to defend the lawful rights and interests of workers, and represent them in the settlement of questions bearing on the relationship between labourer and employer." *Id.*; see also LABOR CODE, *supra* note 12, arts. 153-55, 157-79, at VI-156-66. But see DEPT. OF STATE REPORT, *supra* note 97, § 6(a) (characterizing trade unions as extensions of the VCP and representative of workers).

140. LABOR CODE, *supra* note 12, art. 45(1)(a), at IV-119. "The representative of the labour collective shall be the executive committee of the trade union of the enterprise or a temporary trade union organization." *Id.* "The new law will require that every joint venture or 100-per-cent foreign owned company with 11 or more workers establish a trade union." Dana Sachs, *Labour Laws: Part 8 of Our Ongoing Investment Series*, VIETNAM INV. REV., Nov. 22, 1993, at 14.

bour,¹⁴¹ plans to further its goals of reform through organization and representation of workers at the local level.¹⁴²

II. *CONFLICT OF SOVEREIGNTY AND THE LABOR CODE IN TRANSITION*

Local institutions have been autonomous since their inception.¹⁴³ Lack of a formalized legal structure has created a tradition of improvised dispute resolution and ad hoc problem solving.¹⁴⁴ National exercise of power, emerging pluralism, and the popular support for continued reform threaten the autonomy of local institutions.¹⁴⁵ During Vietnam's transition local institutions have interpreted broadly drafted laws¹⁴⁶ to strengthen their power base and to further regional goals.¹⁴⁷ This exercise of arbitrary power at the local level exacerbates existing discrepancies between national law and local practice.¹⁴⁸

141. Interview with Hoang Thi Khanh, Vice President General Confederation of Labour, President of Ho Chi Minh City Confederation of Labour, in Ho Chi Minh City, Vietnam (Aug. 6, 1994) [hereinafter Hoang Interview]. The General Confederation of Labour is the national trade union and represents all workers throughout the country. *Id.*

142. *Striking a Balance*, *supra* note 137, at 24. "[O]ur plan is that we shall set up trade unions in every enterprise with foreign invested capital." *Id.*

143. *See supra* note 48 and accompanying text (describing failure of centrally administered system to effectively administrate and the resulting autonomy of local institutions).

144. Weggel, *supra* note 102, at 412. "[I]t is evident that there is a lack of formal law which is compensated for by improvisations and ad hoc judgements." *Id.*

145. *Courts of Public Opinion*, *ECONOMIST*, Dec. 24, 1995, at 39. The Police are a good example of an institution in such crisis, as public opinion, after years of perceiving an abuse of power by police authorities, demands reform. *Id.* For example, at the trial of a police officer accused of robbing and slaying a young man, stone-throwers showed "their disapproval not only of Mr. Tung Duong and the police in general but of the wider misuse of authority." *Id.*

What stirs public anger is the manner in which many party and government officials use their privileged political positions to gain the inside track in new economic deals, quickly accumulating fortunes (by Vietnamese standards), flaunting their wealth before less fortunate compatriots, and constructing a web of connections as defense against competitors.

MARR, *supra* note 16, at 13.

146. *See supra* note 27 and accompanying text (describing VCP's use of law to promote economic development while entrenching its political control).

147. MARR, *supra* note 16, at 19. "Provincial, city, and district administrations constantly look for ways to retain and perhaps expand their political space." *Id.*

148. *Id.* at 18.

If a locality disagrees with a major policy, it usually does not voice this opinion openly or directly, for fear of having its patriotism called into question. The preferred response is to agree with the policy formally and then proceed to

A. *Conflict in the Legal System and Doi Moi*

The legal system in Vietnam is currently in crisis.¹⁴⁹ Over the last eight years, the government of Vietnam has actively reformed its legal system and the organization of Vietnam's legal institutions.¹⁵⁰ With the new constitution, over 100 sets of laws and thousands of legal documents at the governmental and ministerial level.¹⁵¹ While this activity is praised by commentators,¹⁵² these general laws are unsupported by specific guidelines¹⁵³ and redress of grievances is limited for aggrieved parties.¹⁵⁴ Corruption and disregard of law and regulations is common at the local level of government.¹⁵⁵ Bribery is considered the only legitimate

apply it selectively, evade it, or quietly obstruct it, preferably with some ally at the capital advising on what is feasible at any given moment and warning of any counteraction.

Id.

149. See Hoai Anh, *UNDP Aids Legal Reform*, VIETNAM INV. REV., May 2, 1994, at 18. "The Vietnamese government has acknowledged the need for more major reforms in the legal system." *Id.*

150. *Id.*

"Over the last eight years the legal system and the organization of Vietnam's legal institutions have made a stride forward. A constitution, over 100 sets of laws and thousands of legal documents at the governmental and ministerial level have been adopted. But these are only modest results of a major task that we have to fulfil," said Minister [of Justice] Loc who considered it "inappropriate for Vietnam to imitate the legal models of any foreign country."

Id.

151. *Id.*

152. See UNDP REPORT, *supra* note 2, at 11 (praising steps taken toward reform).

153. *Law Shortage*, *supra* note 113, at 41. Le Dang Doanh, of Hanoi's Central Institute of Economic Management "says that many laws 'are words not laws.' . . . [T]he bankruptcy law has no regulations to support it. The environmental law says that polluters must pay into clean-up fund, but no one seems to know what the payment should be." *Id.*

154. *Id.* "In Paris last year, Lu Van Dat, the architect of the 1987 foreign investment law, told the International Bar Association that, for investors tangled in a legal dispute, the only realistic remedy was political intervention." *Id.*

155. Gibney, *supra* note 90, at 38. "On a recent visit, Singapore's Senior Minister Lee Kuan Yew, a Hanoi favorite, complained that investment projects are 'being held to ransom.'" *Id.*; see P. M. Address, *supra* note 16, at 1.

Regrettably, there are indications of lack of serious order and discipline in state management and of deliberate attempts to act at variance with the law. [For example, a] number of provincial people's committees have legalized hundreds of smuggled cars of reduced tax rates at their convenience. Other provincial people's committees have claimed that their cars should be duty free because they are gifts. Actually, this is nothing but an attempt to buy cars and resell them for a profit. In some provinces, customs officials have fixed motorcycle import fees at their convenience and have collected hundreds of

and trustworthy alternative in conducting business.¹⁵⁶

Extrajudicial relief is heavily relied upon because the judicial system is in the process of being restructured.¹⁵⁷ Legal adjudication lacks a system of enforcement for contractual or economic disputes.¹⁵⁸ Recognizing the inadequacies of the judicial system, the state encourages dispute resolution through arbitration and negotiation.¹⁵⁹ No case law or precedent found in common law jurisdictions exists to influence resolution of disputes because of the preference for arbitration and negotiation to resolve disputes.¹⁶⁰ Government agencies, such as the SCCI, may intercede to mediate arbitration.¹⁶¹ Arbitration committees and the People's Courts serve to resolve disputes when arbitration and negotiation fail.¹⁶²

millions of dong for their agencies. Some provinces have granted import licenses for explosives at their convenience

Id.; see also *Law Shortage*, *supra* note 113, at 41; Harish Mehta, *Foreign Lawyers Cope With Uncertainties in Vietnam*, SINGAPORE BUS. TIMES, May 19, 1994, at 1; Alex McKinnon, *Investment Worries*, VIETNAM INV. REV., May 9, 1994, at 1.

156. Ngo, *supra* note 8, at 83. "Many consider bribery the only way to make business predictable." *Id.*

157. Sidel, *supra* note 7, at 254. "In early 1992 the Supreme People's Court and the Ministry of Justice struggled for control of management and staffing of provincial and lower courts in the drafting of a law on the on the organization of the courts." *Id.*

158. Mehta, *supra* note 155, at 1. "One problem with the Vietnamese legal system is that judgments are not always enforced. In theory, a foreign firm can take a Vietnamese firm to court to resolve a dispute, and may even win its case. But what happens then is uncertain." *Id.*

159. LABOR CODE, *supra* note 12, art. 9, at VI-104. "The State encourages the resolution of labour disputes by way of conciliation and arbitration." *Id.*

160. Mehta, *supra* note 155, at 1. "Another problem is precedents. 'They are lacking' says Mr. [Sesto] Vecchi [Partner, Russin & Vecchi, with offices in Hanoi and Ho Chi Minh City]." *Id.*

161. 18 CP art. 33. "However, article 33 of the 1993 Regulations specifically empowers the SCCI to arbitrate when disputes among members of a joint venture's board of management arise on issues of business objectives, business planning, and key personnel that require unanimity of the board of management." Wunker, *supra* note 8, at 382.

162. LABOR CODE, *supra* note 12, art. 170, at IV-163.

The resolution procedure for a collective labour dispute shall be as follows:

1. The labour conciliatory council of an enterprise or the labour conciliator shall commence the resolution procedure within seven (7) days from the date of receipt of the request for resolution. Both parties to the dispute or their duly appointed representatives must be present at the conciliation hearing.
2. The labour conciliatory council of the enterprise or the labour conciliator shall put forward a resolution proposal to the parties for consideration. If both parties accept the resolution proposal, a settlement agreement shall be prepared and signed by the parties, and the chairman and secretary of the

1. The Sovereignty Question

Existing local institutions' autonomy is threatened by the move towards liberalization, pluralism, and market reform.¹⁶³ Reform extends the powers of the national government,¹⁶⁴ at the expense of communist state apparatus.¹⁶⁵ Laws, ordinances, and decrees, issued by the National Assembly and the government, systemize law on the national level.¹⁶⁶ This pluralism subjects autonomous ministries and agencies to national authority and popular will.¹⁶⁷

2. Countervailing Agendas of National and Local Levels of Government

The national and the local power structures in Vietnam view foreign investment as an opportunity.¹⁶⁸ The national government is attempting to stabilize and systematize the Vietnamese law in order to attract foreign investment.¹⁶⁹ The local level in-

labour conciliatory council of the enterprise. Both parties shall have the obligation to carry out the provisions of the settlement agreement.

3. In the event that the conciliation fails, a non-settlement statement outlining the view of the parties and the council shall be prepared by the labour conciliatory council or labour conciliator, and be signed by the parties, and the chairman and secretary of the council. Either party to the dispute shall have the right to request the provincial labour arbitration council to resolve the dispute.

Id.

163. See *supra* note 145 and accompanying text (describing pluralism as threat to local institutions arbitrary exercise of power for self-interest).

164. Ngo, *supra* note 8, at 81. "The Constitution strengthen[ed] the power of the Prime Minister, who can now appoint and dismiss his cabinet; the power of the President, who can . . . appoint the Chief Justice; and the power of the National Assembly, which is empowered to enact laws and decrees that must pass on the house floor." *Id.*

165. See *id.* (explaining extension powers of National Assembly and government nominally detracts from power of VCP).

166. See *supra* note 12 and accompanying text (stating Labor Code is codification of existing law).

167. *Courts of Public Opinion, supra* note 145, at 39. "This is a warning to people in authority not to abuse their power . . . I think this makes people in government very nervous. . . . Monitoring justice has become a way of protest in Vietnam." *Id.* (quoting witness of demonstration).

168. See MARR, *supra* note 16, at 5 (discussing opportunity of VCP to retain power by striking bargain with populace by allowing population opportunity to "find new economic space" at local level through foreign investment).

169. Valerie Senghor, *France Lends a Hand for Legal Overhaul*, VIETNAM INV. REV., Oct. 10, 1994, at 1. Serge Tchwaruk, president of Total, a French oil company, insists, "We need stability in regulation of business, so there is no change in the game rules between the beginning and the end of a project." *Id.*

stitutions interpret the law so as to realize the benefits of foreign investment.¹⁷⁰

a. *Doi Moi* at the National Level

The national government, led by the VCP, advocates a strategy of economic development through increased foreign investment.¹⁷¹ The VCP is pursuing a strategy of market reform designed to improve the Gross Domestic Product,¹⁷² increase the standard of living for its people,¹⁷³ improve the nation's infrastructure,¹⁷⁴ and enable Vietnam to enter Asian and global markets.¹⁷⁵ This vision of reform requires a large amount of foreign investment due to a lack of domestic savings.¹⁷⁶

The nature and size of the foreign investment required for development requires reform in Vietnam's legal system.¹⁷⁷ A sys-

170. BURKE & HOWELL, *supra* note 18, at 163. Lower level ministers and agencies "are empowered to issue circulars and regulations which define the day-to-day application of laws and ordinances." *Id.*

171. See *supra* notes 6-8 and accompanying text (describing increased foreign investment as one of key objectives of *doi moi*).

172. *Vietnam's Transition to a Market Economy; II: Growth Prospects, Financing Requirements and a Reform Agenda*, E. ASIAN EXEC. REP., Jan. 15, 1994, at 8, available in LEXIS Library, Vietnam File [hereinafter *Transition II*]. "Reforms in 1989 brought an initial surge in output, especially in agriculture and services, and GDP increased 8.0 percent." *Id.*

173. WILLIAMS, *supra* note 3, at 40. "The move away from centrally planned economy has led to a modest improvement in the quality of life of most Vietnamese: rationing has virtually disappeared, comparatively cheap consumer goods are abundant, and for those with money, access to foreign exchange is relatively easy." *Id.*

174. See *supra* notes 65-66 and accompanying text (discussing Vietnam's need for infrastructure development).

175. Forman, *supra* note 64, at 60. "Most attention has focused on Vietnam since the late 1980's, when its government launched [*doi moi*], a program of economic restructuring designed to link it with the international economy." *Id.*; see *supra* note 8 and accompanying text (discussing national government's implementation of *doi moi*, specifically FIL and other economic legislation, to improve foreign relations and achieve stable domestic economic development).

176. *Transition II*, *supra* note 172, at 8. "The foreign aid financing requirement for this scenario [of fast paced growth] is US\$400-US\$600 million a year in 1994-1995, rising to US\$1 billion by 1997." *Id.*

177. *Vietnam's Transition to a Market Economy; I: Reform Priorities — Foreign Direct Investment*, E. ASIAN EXEC. REP., December 15, 1994, at 1, available in LEXIS, Vietnam File [hereinafter *Transition I*].

There are, however, additional reforms that will be required to sustain Vietnam's transition to an outward-oriented, market economy.

Direct foreign investment (DFI) is important to trade expansion, as the government [of Vietnam] well knows. DFI is also crucial to the countries industrial modernization, in addition to being an inflow of capital to supple-

tematized and stable legal system attracts foreign investors.¹⁷⁸ A comprehensive and consistent set of laws is an initial step in providing a predictable investment climate conducive to foreign investment.¹⁷⁹

b. *Doi Moi* at the Local Level

The legislation of *doi moi* maintains local communist structures, linking them to continued reform.¹⁸⁰ The local level People's Committees, agencies, individual ministries,¹⁸¹ and trade unions concern themselves with immediate regional interests.¹⁸² Local institutions react to national encroachment on their autonomy,¹⁸³ anomalies in the labor market,¹⁸⁴ regional poverty,

ment the current low level of domestic saving. The main guideline for reform is decontrol and deregulation. Scope of reform exists at both the approval level and during the implementation stage.

Id.

178. See *supra* note 169 and accompanying text (discussing stable legal environment necessary for foreign investment).

179. John G. Scriven, *Joint Venture legislation in Eastern Europe: A Practical Guide*, 21 HARV. INT'L L. J. 633, 662 (1980). Countries can create a climate that is more conducive to foreign investment by "provid[ing] the foreign investor with a stable and predictable economic environment in which to operate a joint venture." *Id.*; see Ngo, *supra* note 8, at 95 (stating bureaucracy is frustrating "Vietnam's [otherwise successful] efforts to promote simplicity and accessibility in its foreign investment policy).

180. See Ngo, *supra* note 8, at 94-97 (describing requirement of review of all foreign investment by VCP as example of legislation contrary to *doi moi* in which communist agenda takes precedence over economic development). "This approval process affords the Vietnamese government the opportunity to selectively approve only those foreign-proposed projects which it deems appropriate to the health of the economy and the maintenance of the communist regime." *Id.* at 81.

181. LABOR CODE, *supra* note 12, art. 181, at IV-167. "The Ministry of Labour, War Invalids, and Social Affairs shall carry out State management of labour in branches and localities within the country." *Id.*

182. Vatikiotis, *supra* note 65, at 72. "'Regulations have become regionalized, which means added frustration,' says John Dick, a lawyer with the Australian firm Freehill, Hollingdale and Page." *Id.*

183. *Id.* "But efforts to dismantle administrative fiefdoms meet zealous resistance, especially at the local level." *Id.*

184. *Post-Embargo Employment*, SAIGON TIMES, June 16-22, 1994, at 13. With increased foreign investment, there is a growing demand for skilled and unskilled workers. *Id.* Many Vietnamese, however, are still unemployed. *Id.* "Each Year H[o] C[hi] M[inh] City has over 300,000 people in need of a job." *Id.* This imbalance has resulted from the shift from a centralized market to a free market economy. *Id.* "[T]he labour market is experiencing a great demand for commercial accountants, marketing officers, interpreters and executive assistants, etc., but these skills are still not offered in many training programs." *Id.* While it has been argued that the market is self-correcting, the State has taken steps to rectify the situation. LABOR CODE, *supra* note 12, art. 180(1), (3), at IV-166-67.

and an influx of incoming capital.¹⁸⁵ As a result, local institutional action assumes a competitive, short-term edge regarding foreign investment.¹⁸⁶

Incidents of graft, corruption, and unfair practices, commonplace in the centralized economy, are multiplying with the transition to a market economy.¹⁸⁷ Local institutions enjoy unique positions to further their own agendas because local interpretation plays a large role in the implementation of national laws.¹⁸⁸ Further, individual bureaucrats can take advantage of

State management of labour encompasses the following:

1. Maintaining the balance of labour supply and demand, and making appropriate adjustments where necessary to formulate national policies, plans, or schemes on labour sources, distribution, and utilization for society as a whole;

3. Establishing and organizing the implementation of national programmes, relating to employment, migration, establishment of new economic zones, and overseas Vietnamese workers;

Id.; *Vietnamese Working for Foreigners*, SAIGON TIMES, June 16-22, 1994, at 14. Discordant wages between foreign companies and local firms have created a rift in the market. *Id.*

185. Ngo, *supra* note 8, at 96. "Finally, allowing regional economic entities to independently administer foreign investment will undoubtedly foster corruption." *Id.*

186. See BURKE & HOWELL, *supra* note 18, at 180. At the outset of investment, the JV is favored as the primary investment vehicle, while wholly-owned foreign companies are not so favored. *Id.* The JV enterprise is the most common type of business organization utilizing foreign investment found in Vietnam. *Id.* Wholly owned foreign investment enterprises were restricted at early stages of *doi moi*. *Id.* Foreign workers are similarly disfavored in that local labor receives preferential status under the law. FIL art. 16 (as amended 1992) (State Political Publishing House, 1993). "Vietnamese citizens shall be given priority in the recruitment of personnel for an enterprise with foreign owned capital." *Id.*

Where a Vietnamese cannot be recruited for works which require highly technical or management skills, enterprises, organizations, or individuals shall be permitted to employ foreign employees provided that the period of employment is fixed and appropriate training plans and programmes are established for Vietnamese workers in order to enable early replacement of foreign employees.

LABOR CODE, *supra* note 12, art. 132(1), at IV-148.

187. See *supra* note 16 and accompanying text (citing examples of corruptive practices by local institutions and demanding reform); *supra* note 19 and accompanying text (discussing discrepancies between law and practice at local level).

188. Ngo, *supra* note 8, at 96. "With the new economic freedom introduced as Vietnam moves from a centrally planned to a market economy, these lower level bureaucrats will have greater discretion to recommend a proposal to the State Organ for approval." *Id.* "Though the SCCI pledges to rule on investment licen[se] applications within 30 days, investors are often hamstrung by other ministries . . . either before or after they go through the SCCI. As a result, getting approvals can take anything from one to three years. And with corruption commonplace, the process can be a costly one." Vatikiotis, *supra*, note 65, at 72. SCCI must approve all amendments to JV contracts, as well as the initial investment license. FIL art. 2; 18 CP art. 22.

positions of authority by demanding tribute, bribes, or otherwise exercising their powers for personal gain.¹⁸⁹

B. *The Implementation of the Labor Code at the Local Level*

The foreign investor, encouraged by tax incentives, and the benefits of having a Vietnamese partner, often chooses the JV as the vehicle for investment.¹⁹⁰ When a foreign party forms a JV with an already existing Vietnamese entity, the Vietnamese partner's workers demand contract termination allowances.¹⁹¹ The new Labor Code leaves regulation and adjudication to resolution at the local level.¹⁹² Faced with the failure of the JV, an unresponsive or biased dispute resolution mechanism, and the threat of strikes from workers, the foreign investor may ultimately assume the responsibility for payment of contract termination allowances.¹⁹³

1. The Labor Code

The Labor Code ("Labor Code"), newly legislated by the National Assembly on June 23, 1994,¹⁹⁴ may not resolve key practical issues that may adversely affect future investment.¹⁹⁵ The National Assembly drafts legislation, such as the Labor Code, broadly.¹⁹⁶ The National Assembly codified existing labor law,

189. *Id.* at 96. "Corruption is more likely to attract lower level bureaucrats because these officials earn meager incomes compared to the amounts they may gain from accepting bribes. . . . Should an investor refuse to comply with a bribery demand, the official may effectively extinguish the project early in the approval process." *Id.*

190. See *supra* notes 75-85 and accompanying text (outlining process encouraging investment in JV in Vietnam).

191. Hoang Interview, *supra* note 141. State enterprises contribute assets to the JV, during transition workers demand payment of retrenchment or retirement. *Id.*

192. Tri Dung, *supra* note 13, at 12. "Facing such a broad range of views, and anticipating the cantankerous character of National Assembly debate, the [Standing] Committee has elected to submit the labour code for discussion and general approval at the Assembly but leave details to be ironed out afterwards and promulgated at a later date." *Id.*

193. Hoang Interview, *supra* note 141. If responsibility for these allowances is not covered under JV contract, it is open to negotiation between the two parties. *Id.*

194. Tina Diaz, *Labour Law Passed But Does Not Replace Decree 233!*, 3 VIETNAM TODAY, No. 3, 1994, at 15. "The new Labour Code . . . will take effect from January 1, 1995 . . ." *Id.*

195. See Tri Dung, *supra* note 13, at 12 (reporting controversial issues have been left to be "ironed out at a later date").

196. LABOR CODE, *supra* note 12, art. 179, at IV-166. Under the Labor Code, power over strike resolution is granted to the national, reform-minded, legislative body. *Id.* "The Standing Committee of the National Assembly shall determine the resolution of

with additional provisions, in the Labor Code.¹⁹⁷

The Labor Code attempts to protect the interests of workers as well as the reasonable interests of employers.¹⁹⁸ Although it creates an attractive climate for investors, the Labor Code still incorporates protections for labor.¹⁹⁹ Proponents of the Labor Code herald its regulations as striking the balance between employee rights and employer expectations while reflecting the realities of the Vietnamese labor market.²⁰⁰

2. Hiring in the New Regime

As a reiteration of the existing law, the Labor Code does not change the existing hiring practices.²⁰¹ The Labor Code allows an employer to recruit labor directly or through an employment service organization.²⁰² Enterprises must comply with procedures of notification and authorization still in effect even when hiring directly.²⁰³ An employer must still utilize employee servicing agencies in administration of employees within enterprises.²⁰⁴

strikes and other labour matters." *Id.* Power is also granted to the local, conservative, communist body. *Id.* art. 177, at IV-166. "The people's court shall have the power to make the final decision in relation to strikes and collective labour disputes." *Id.*

197. See *supra* notes 12 and accompanying text (discussing Labor Code as codification of existing labor law).

198. *Right to Strike in New Vietnam Labour Code*, Reuters Newswire - Far East, May 24, 1994, at 1, available in LEXIS, Intlaw Library, Vietnam File. The Vietnamese government has attempted to provide an equal distribution of rights and duties to both the employer and the employee in the employment relationship created by the Labor Code. *Id.*

199. LABOR CODE, *supra* note 12, pmb1., at IV-101. "The Labour Code protects the right to work, benefits, and other rights of workers . . ." *Id.*; see *New Labour Contracts, VIETNAM INV. REV.*, July 12-18 1993, at 1 (quoting Ministry of Labour officials stating protection of workers is top priority).

200. See, e.g., LABOR CODE, *supra* note 12, art. 6, at IV-103. The Labor Code sets the minimum employee age at 15 years of age. *Id.* "It is believed that Vietnam has to officially consider working age as low as 15 years because in reality, many private companies are employing workers that young. The Vietnamese Labour Federation wants to protect working children." Nguyen Van Phu, *supra* note 13, at 1.

201. See *supra* note 12 (describing Labor Code as reiteration of existing law).

202. LABOR CODE, *supra* note 12, art. 16(2), at IV-107. "An employer shall have the right to recruit labor directly or through employment service agencies, and to increase or reduce the number of employees in accordance with production and business requirements and in compliance with the provisions of the law." *Id.*

203. Diaz, *supra* note 194, at 15. "Foreign investors, however, will have to follow both the new Law and still be required to operate under Decree 233 which in its original form is now considered inappropriate." *Id.*

204. LABOR CODE, *supra* note 12, art. 132, at IV-148; see Interview with Ta Thanh,

3. The Retirement Allowance

Retirement allowance is a social insurance benefit accruing at the termination of a labor contract.²⁰⁵ The Labor Code requires an employer to pay an employee social insurance allowances.²⁰⁶ Employees are entitled to the payment of this allowance upon the termination of their labor contract after reaching a specific age or after contributing to a social insurance fund for over twenty years.²⁰⁷ If these requirements are not met, one lump sum payment is paid at the termination of a contract.²⁰⁸

Vice Director of FOSCO, in Ho Chi Minh City, Vietnam [hereinafter FOSCO Interview] (Aug. 4, 1994).

Direct employment, where an employee is not only recruited but also supervised and paid solely by the foreign enterprise without participation by a service agency, is contemplated under the new law. In the future it may be allowed with approval and notification of local authorities.

Id.; see Interview with Collin White, United Nations Development Project, in Hanoi, Vietnam (July 2, 1994). In Hanoi, the United Nations Development Project ("UNDP") has implemented direct employment. *Id.*

205. LABOR CODE, *supra* note 12, art. 140, at IV-151.

The State shall stipulate policies on social insurance in order to expand and improve the material security of an employee, and to stabilize the life of an employee and his family when the employee falls ill, becomes pregnant, retires, dies, becomes injured in an accident, becomes unemployed, suffers some unexpected crisis, or suffers from other problems.

Id.

206. *Id.* art. 141, at IV-151-52.

Compulsory forms of social insurance shall apply to business enterprises which employ ten (10) or more employees. In these enterprises, the employer and the employees must make contributions in social insurance funds in accordance with [A]rticle 149 of this Code and the employees shall be entitled to social insurance benefits and allowances in the event of illness, work-related accidents and occupational disease, pregnancy retirement and death.

Id.

207. *Id.* art. 145(1), at IV-153.

1. An employee who satisfies the following criteria in respect of age and period of participation in social insurance shall be entitled to pension benefits as follows:

(a) The retirement age of an employee who has worked in heavy, dangerous, or toxic jobs, or in regions with harsh conditions, near the border, or on islands, and in a number of special cases determined by the Government shall be sixty (60) years for a male and fifty five (55) years for a female;

(b) An employee who has paid social insurance contributions for a period of twenty (20) years or more.

Id.; see Decree No. 43-CP of the Government, Stipulating Temporarily the Social Insurance Regimes (June 22, 1993).

208. LABOR CODE *supra* note 12, art. 145(3), at IV-153. "An employee who does not satisfy the requirements stipulated in clauses 1 and 2 of this article for monthly payment of a pension shall be entitled to a lump sum retirement payment." *Id.*

Upon termination, an employee receives the retirement allowance only if the employee received no other allowance, such as retrenchment allowance, or lump sum payment.²⁰⁹

4. Retrenchment Allowance

Retrenchment allowance²¹⁰ is a payment to an employee, who has been employed for over one year, for the loss of work at the time a contract is terminated.²¹¹ In the case of restructuring or technological advancement leading to retrenchment, the employer is responsible to retrain and assign an employee to new duties instead of terminating that employee.²¹² The enterprise must pay the allowance in one lump sum at the termination of a contract.²¹³

209. *Id.* art. 147(1), at IV-155. "Provided that no retrenchment allowance or lump sum payment has been paid to the employee from a social insurance fund, the period of employment of an employee in State enterprises prior to this Code becoming effective shall be deemed as a period of contribution to social insurance." *Id.*

210. *See id.* arts. 17, 42, at IV-107, IV-118 (mandating payment of retirement allowance). *Compare id.* art. 145, at IV-154 *with id.* arts. 17, 42, at IV-107, IV-118. Retrenchment allowance differs from retirement allowance in that it is a lump sum payment. *Id.* It is paid regardless of age, but only after the employee has worked one year. *Id.* Monthly retirement is conditional upon fulfilling the age requirement or years contributing requirement. *Id.* art. 145, at IV-154.

211. *Id.* art. 42(1), at IV-118. "Where the labour contract of an employee who has been employed in an organization, or with an individual, for at least one year is terminated, the employer must pay such employee a retrenchment allowance equal to the aggregate amount of half a month's salary for each year of employment plus salary allowances (if any)." *Id.* *But see id.* art. 17(1), at IV-107 (providing retrenchment after restructuring, if reassignment is not possible).

212. *Id.* art. 17(1), at IV-107.

Where, as a result of organizational restructuring or technological changes, an employee who has been employed in the business for a period of one or more years becomes unemployed, the employer shall have the responsibility to retrain and assign the employee to another job within the enterprise; if a new job cannot be created, the employer must pay an allowance for loss of work equivalent to the aggregate amount of one month's salary for each year of employment but no less than two months salary.

Id. The amount paid is more than retrenchment under normal conditions. *Compare id.* art. 17(1) (aggregate amount of one month's salary per year) *with id.* art. 42 (aggregate amount of half month's salary per year).

213. *Id.* art. 42(1), at IV-118.

Where the labour contract of an employee who has been employed in an organization, or with an individual, for at least one year is terminated, the employer must pay such employee a retrenchment allowance equal to the aggregate amount of half a month's salary for each year of employment plus salary allowances (if any).

Id.; *see id.* art. 17(1), at IV-107 (providing for retrenchment after restructuring, if reas-

5. Accounting Procedures for Insurance Funds

Under the new law retirement allowance is paid out of the fund set up through the stipulated accounting procedure for every enterprise.²¹⁴ Enterprises must establish a reserve for re-trenchment allowances in accordance with regular accounting procedures.²¹⁵ The state will contribute to both funds to ensure adequate coverage for employees.²¹⁶

6. Legal Grounds of Responsibility for Contract Termination Allowances in a Newly-Formed Joint Venture

Responsibility for the payment of termination allowances in a new JV may be assigned to the foreign partner.²¹⁷ Under Article 66 of the Labor Code, the JV is responsible for payment of allowances, as the new owner.²¹⁸ In determining the responsibil-

segment is not possible); Interview with Nguyen Van Son, Chief of Labour and Employment Department, Department of Labour-War Invalids and Social Affairs of Ho Chi Minh City, in Ho Chi Minh City, Vietnam (Aug. 5, 1994) [hereinafter LISA Interview] (explaining procedure for retrenchment).

214. LABOR CODE, *supra* note 12, art. 149, at IV-155.

1. Social insurance funds shall be established from the following sources:

- (a) The employer shall contribute a sum equivalent to fifteen (15) percent of the total balance of the salary fund;
- (b) Each employee shall contribute five (5) percent of his wage;
- (c) The State shall contribute and assist with additional funds to ensure the implementation of social insurance for workers.
- (d) Other sources.

2. Social insurance funds shall be uniformly managed in accordance with State financial policies and on the basis of accounting records, and be protected by the State. The retention and growth of social insurance funds shall be carried out in accordance with the Provisions of the Government. *Id.*

Decree 43-CP, § VII, art. 21 (June 22, 1993) (Vietnam).

215. LABOR CODE, *supra* note 12, art. 17(2), at IV-107. "Business enterprises must establish a reserve for retrenchment payouts in accordance with the provisions of the Government in order to ensure that retrenched employees are paid in a timely manner." *Id.*

216. *Id.* art. 149(1), at IV-155. "The State shall contribute and assist with additional funds to ensure the implementation of social insurance for workers." *Id.*

217. *See id.* art. 66, at IV-127 (providing that in event of mergers or transfers of rights of ownership, new employer is responsible for payment of wages and other rights and interests to employees).

218. *Id.* art. 66, at IV-127.

In the event that an enterprise merges, divides, or transfers its rights of ownership and management, or right to use its assets, the new employer must be responsible for payment of wages and other rights and interests to the employees. In the event that the enterprise becomes bankrupt, all salaries, retrenchment allowances, social insurance, and other rights and interests of the em-

ity of the two partners of the JV, the JV contract and the JV charter cover responsibility of contributions and assumptions of responsibilities.²¹⁹ Under Article 31 of the Labor Code, when an organization changes its structure or its ownership, a new employer is bound by the employee's labor contract.²²⁰ The JV will be bound by the old contracts of the state employees until new contracts are negotiated and the old contracts are terminated.²²¹

6. Dispute Resolution in Vietnam

In the case of a JV, the JV contract and JV charter are controlling when a labor dispute arises.²²² Amendments to the JV charter require the approval of the JV's board.²²³ Amendments to the JV contract reached through negotiation by the partners, require approval of the SCCI.²²⁴ Issues not covered by the charter or contract, such as financial matters, are open for negotiation between the partners.²²⁵ Article 17 of the Labor Code re-

employees shall be first and foremost liability of the enterprise in order of priority of payment.

Id. If JV is found to be a new owner, employees are found to be employees of JV, and termination allowances are found to be rights and interests under Article 66, the JV would be responsible for payment. *Id.*

219. 18 CP art. 21. "A joint venture contract shall contain the following main items . . . [t]he procedure for the settlement of disputes between the joint venture partners, arbitration body and applicable law in cases of disputes." *Id.* "The charter of the joint venture shall contain the following main items . . . [l]abor relations in the joint venture." *Id.* art. 22.

220. LABOR CODE, *supra* note 12, art. 31, at IV-112.

In cases where an enterprise merges, divides, or transfers the ownership, management, or right to use the assets of the enterprise, the new employer shall continue to be bound by the labour contract of the employee until such time as both parties can agree on the amendment or termination of the contract, or can enter into a new labour contract.

Id.

221. *See id.* art. 31 IV-112. If employee contracts are not terminated before an enterprise enters a JV, the new owner may be forced to honor labour contracts under Article 31. *Id.*

222. *See supra* note 219 and accompanying text (stating in relevant parts that JV contract must include "[t]he procedure for settlement of disputes" and "[r]esponsibilities of the partners in the execution of the joint venture contract" and charter must include provisions governing "[l]abour relations").

223. 18 CP art. 33. "A decision on any of the matters set out below shall be made by the members of the Board of Management on the principle of unanimity [including] [a]mendments and supplements to the charter of the joint venture." *Id.*

224. *Id.* art. 25. "Any amendments to the joint venture contract as may be agreed upon by the joint venture partners shall not become valid until it is approved by the State Committee for Cooperation and Investment." *Id.*

225. Hoang Interview, *supra* note 141. Resolution of disputes depend upon the

quires that before retrenching any employees, employers must consult with the trade union of the enterprise.²²⁶ If there is disagreement between the employer and the trade union, the matter must be submitted to the local labor office.²²⁷

In a dispute between the employer and the employee, the parties must resolve disputes on social insurance issues in accordance with the Labor Code dispute resolution provisions.²²⁸ Under Chapter XIV of the Labor Code, a labor dispute is resolved through negotiation and arbitration.²²⁹ The matter may

agreement between the parties, if the JV contract, or charter does not make clear who is responsible it is open for negotiation. *Id.*

226. See LABOR CODE, *supra* note 12, art. 17(2), at IV-107-08.

In cases where the retrenchment referred to in clause 1 of this article applies to a number of employees, the employer must publish a list of the employees, the employer must publish a list of the employees to be retrenched, and on the basis of business requirements, seniority, skill, family conditions, and other factors of each employee, the employer shall gradually retrench the employees provided that the employer shall gradually retrench the employees provided that the executive committee of the trade union of the enterprise is consulted in accordance with the procedure stipulated in clause 2 of article 38 of this Code. An employer shall only be permitted to retrench employees after notifying the labour office.

Id.

227. *Id.* art. 38(2), at IV-115.

Prior to the termination of a labour contract in accordance with subclauses (a), (b), and (c) of clause 1 of this article, the employer must discuss and reach an agreement with the executive committee of the trade union. Where there is disagreement, both parties must submit a report to the competent body or organization. After a period of thirty (30) days as from the date the labour office is notified, the employer shall have the right to make a decision and be responsible for such a decision. Where the executive committee of the trade union of the enterprise or the employee disagrees with the decision of the employer, either party shall have the right to request the resolution of a labour dispute in accordance with a procedure stipulated by law.

Id.

228. *Id.* art. 151, at IV-156. "Where a dispute arises between an employee and an employer on social insurance issues, the parties must resolve the dispute in accordance with the provisions of Chapter XIV of this Code." *Id.*

229. *Id.* art. 158, at IV-158.

A labour dispute shall be resolved on the basis of the following principals:

1. Direct negotiation and conciliation between the disputing parties at the place where the dispute arises.
2. Conciliation and arbitration on the basis of mutual respect of rights and benefits, respect of general social benefits, and compliance with the law.
3. A labour dispute must be resolved publicly, objectively, in a timely manner, using a quick and simple resolution process, and in compliance with the law.
4. The trade union organization of the enterprise and the representative of the employee must participate in the resolution process of the labour dispute.

Id.

be resolved by a labor dispute resolution body²³⁰ only if either party refuses to negotiate, the parties fail to resolve the dispute, or upon the request of a party.²³¹ After a dispute goes through the labor conciliatory committee and the provincial arbitration committee, the people's court can be requested to resolve the matter by either party, or the workers may opt to strike.²³²

The foreign partner must negotiate with the employees or the Vietnamese partner.²³³ The foreign partner views the debt for termination allowances as incurred before the JV is formed.²³⁴ The trade union, the labor office, the SCCI, and em-

230. *Id.* art. 168, at IV-162.

The following bodies and organizations shall be vested with the power to resolve a collective labour dispute:

1. The labour conciliatory council of an enterprise, or the labour conciliator of the district labour office in the case of enterprises which do not have a labour conciliatory council;
2. The provincial labour arbitration council;
3. The peoples court.

Id. "A labour conciliatory council of an enterprise shall be established in enterprises which employ ten (10) or more employees and shall consist of an equal number of representatives of the employees and the employer." *Id.* art. 163, at IV-160. "The standing members of the provincial labour arbitration council shall consist of representatives of the labour office, the trade union, the employer, and a number of other respected lawyers, administrators, and social workers of the locality." *Id.* art. 169(2), at IV-163.

231. *Id.* art. 159, at IV-159.

A labour dispute shall only be resolved by a labour dispute resolution body or organization if either party refuses to negotiate; if both parties fail to resolve the dispute by way of negotiation; or if one or both of the parties lodge a request for resolution of the labour dispute.

Id.

232. *Id.* art. 172, at IV-172.

1. Where the labour collective is not satisfied with the decision of the labour arbitration council, it shall have the right to request the people's court to resolve the matter, or to strike.
2. Where the employer is not satisfied with the decision of the labour arbitration council, the employer shall have the right to request the people's court to review the decision of the arbitration council. The decision of the employer to request the people's court to review the decision of the arbitration council does not affect the right to strike of the labour collective.

Id.

233. *See supra* notes 222-27 and accompanying text (discussing negotiation between parties regarding issues not covered in allocation of responsibilities of JV contract or labor relations in JV charter).

234. *See id.* art. 17, at IV-107. The allowance becomes due at the termination of the labor contract. *Id.* No legal entity other than the Vietnamese partner enjoys a labor relationship with the employees at the termination of the contract. *See id.* art. 26, at IV-110 (explaining labor relationship as established through voluntary commitment). The allowance is providing for past performance from which the Vietnamese partner

ployees constitute the arbitration bodies that influence the final outcome of dispute resolution.²³⁵ From the position of the Vietnamese laborer, businessman, trade union representative, or government agency, the allowance is a rightful debt of the JV.²³⁶

III. THE VIETNAMESE COMMUNIST PARTY MUST PLACE DOI MOI ABOVE THE MAINTENANCE OF LOCAL INSTITUTIONS

The leaders of the VCP are aware of the conflict within the legal system.²³⁷ The conflict is a result of the VCP's efforts to maintain the communist state apparatus and existing distribution of social control.²³⁸ The local institutions augmenting the tenets of *doi moi* are the same institutions empowered under the new legislation.²³⁹ The VCP mistakenly trusts local institutions to entrench the Party's interests, however, these institutions take advantage of broad grants of power to pursue material gain.²⁴⁰

has benefitted. *See id.* arts. 17, 42, at IV-107, IV-118 (providing that retrenchment is due after one year of working for enterprise and amount is based on years worked for an enterprise); *id.* art. 145, at IV-153 (providing that retirement is due after twenty years contribution to insurance fund or if employee is past retirement age and that amount due is based on years worked). The JV has not received any benefit because the JV is not a legal entity in existence during the employment under the old contract. *Id.*; *see* 18 CP art. 19 (explaining that JV is formally established upon issuance of investment license and registration of its charter by SCCI).

235. *See supra* notes 222-27 and accompanying text (outlining procedure for resolving disputes through arbitration between Vietnamese Partner, foreign partner, and workers mediated by SCCI, trade union, and labor office).

236. *See LABOR CODE, supra* note 12, art. 163, at IV-160. The JV, and in particular the foreign partner, is benefiting from the workers' experience within the industry and is considered better prepared to bear the burden of the debt. *See* FIL art. 7 (as amended 1992) (State Political Publishing House, 1993) (allowing Vietnamese partner to contribute technical knowledge and services as asset to JV). The negotiating team for the JV may be unsympathetic to the foreign partner. *See id.* (defining conciliatory council made up of equal amount of representatives of employees and employer). In a JV there are at least two parties embodying the employers. FIL art. 6 (stating two parties or more parties may establish joint venture enterprise). The foreign investor can be represented unevenly. *Guide to Hiring Labour, supra* note 12, at 21 (noting that in JV Vietnamese partner will often be responsible for overseeing employee selection process and approving labor contracts).

237. Vatikiotis, *supra* note 65, at 72. "The country's top leadership is aware of this, as it is of most problems facing foreign investors in Vietnam." *Id.*

238. *See supra* note 27 and accompanying text (discussing entrenchment of local institutions through new legislation).

239. *See supra* notes 23, 155-56, 188-89 and accompanying text (describing local institution resistance to reform and existence of corruption and self-dealing).

240. *See supra* notes 143-56 and accompanying text (describing crisis of legal system and corruption at local levels of government).

The VCP must address the arbitrary interpretation of national laws to suit regional and personal goals.²⁴¹ Every province and district interprets legislation differently than or contrary to the national agenda.²⁴² Because of its instability, Vietnamese law is systematically ignored by foreign and local businessmen.²⁴³ Continued capricious exercises of authority at the local level will undermine the authority and institutional integrity of new legislation.²⁴⁴

If the legal system is to be utilized as the vehicle of economic reform, it cannot be employed as the means of entrenching the status quo.²⁴⁵ Unless the national government legislates specific reform legislation and enforces its provisions, the paths of law and practice will further diverge.²⁴⁶ Local institutions have proved unreliable as agents of *doi moi*. Regardless of their professed loyalty to the VCP, institutional local interests must be disassociated with the exercise of interpreting the new economic legislation.

A. *Reformulating the Traditional Role of Local Institutions*

Within Vietnamese society there is a traditional role for local level institutions in the legal system.²⁴⁷ After this role's de-

241. See *supra* notes 181-89 and accompanying text (stating that local institutions respond to pressures of transition with self-dealing and short-term goals).

242. See *supra* notes 181-88 and accompanying text (discussing regionalization at local level).

243. See *supra* notes 155-56 and accompanying text (describing disregard of national law by local level government and bribery as only trustworthy alternative in conducting business).

244. Ngo, *supra* note 8, at 96. "A foreign investment law which indirectly fosters corruptive practices undermines legitimate authority and institutional integrity." *Id.* (citing Sesto Vecchi, *Operating In Unstructured Legal Environments: The Vietnam Model*, E. ASIAN EXEC. REP., July 1991, available in LEXIS, Intnew Library, Easian File).

245. See Ngo, *supra* note 8, at 98 (concluding "Vietnam cannot achieve the economic successes accomplished by Thailand until Vietnam surrenders the desire to control economic change which may inadvertently undermine communist political control").

246. See *supra* note 148 and accompanying text (describing crisis in Vietnam in which law and local practice are incongruous).

247. SARDESAI, *supra* note 33, at 173.

Each Vietnamese village was a bamboo-fenced, practically autonomous social entity, governed by a council of village notables, who collected taxes on behalf of the central government, determined the agrarian chores, and distributed the rice product among the peasants. They also dispensed justice. . . . As the folk saying had it, 'The laws of the emperor are less than the customs of the village.'

struction under French rule,²⁴⁸ local institutions were re-established with the imposition of Stalinist institutional mechanisms in the North in 1945 and in the South in 1975.²⁴⁹ Showing their native resilience, these Vietnamese institutions remained Vietnamese under their Soviet trappings.²⁵⁰ Local institutions should be revitalized to fulfill their traditional roles, but only if consistent with the national agenda.²⁵¹

Local institutions provide flexible responses in a country with considerable differences in climate, topography, and settlement patterns, as well as difficulties in communication and transportation.²⁵² The needs of the Mekong Delta differ from those of the northern highlands. Ho Chi Minh City and Hanoi require a higher minimum wage than the rest of the country due to the increased cost of living in those cities. The national government can legislate domestic issues broadly, leaving details to

Id.

248. *Id.* "The French broke the village autonomy and its corporate character, substituted elections for cooperation of council members, instituted regular registration of births and deaths (resulting in more accurate tax polls than hitherto), and exercised tighter control over fiscal matters." *Id.*

249. See *supra* notes 38-43 and accompanying text (discussing imposition of Soviet-style institutions at local level).

250. Weggel, *supra* note 102, at 419.

The VCP formally portrays itself as Leninist, but de facto it behaves for the most part in an entirely traditional [Vietnamese] manner . . . Even if Marxist-Leninist doctrine were reduced some day to mere verbal ritual, the VCP would almost certainly survive as an institution to the extent that behind the Leninist facade a working-style is evolving which is shaped according to traditional — not Leninist — patterns and which, at best, displays a few coincidental similarities to the Marxist-Leninist canon.

This new breed of "Red Mandarins" is apt to resist any form of legal control as vigorously as the generations of their traditional predecessors did for 2000 years.

Id.

251. Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION* 274, 284 (Sanford Levinson ed., 1995). "Good institutional arrangements should certainly be entrenched if they can offer firm protection to democratic liberty and even to the preconditions for economic prosperity." *Id.*

252. See *supra* note 21 and accompanying text (discussing benefits of local level interpretation). "Most notable for Vietnam is the long north-south configuration, the product of eight centuries or more of ethnic Vietnamese migration from the Red River delta down the central coast and thence into the Mekong delta. This produced a state with considerable differences of climate, topography, and settlement patterns, together with obvious problems of transportation and communication." MARR, *supra* note 16, at 18.

be clarified at the local level when problems arise.²⁵³

The national government is equipped to make choices effecting foreign investment and *doi moi*. The national government of Vietnam is politically and economically effective.²⁵⁴ Vietnamese leaders are cognizant of both the benefits and disadvantages of substantial foreign investment.²⁵⁵ The Vietnamese government has made definitive choices regarding the size and structure foreign investment will take in the country.²⁵⁶

The local institutions must cede their sovereignty in the economic sphere to the national government in order to enable Vietnam to achieve its goals at the international level. Vietnam is attempting to establish a position in world markets and in the international political arena.²⁵⁷ Vietnam must respond to the fluctuations of international markets. International perception of Vietnam's reform movement will affect the country's ability to attract needed economic aid and foreign investment. Disregard at the local level for national law beneficial to the international investor undermines the confidence of international lenders and investors in Vietnam's fledgling market.

The VCP must bring local level institutions in line with the national agenda. Popular support for *doi moi* lends legitimacy to the VCP's exercise of power to subjugate maverick local level institutions. Local level abuses destabilize the foundations of Vietnam's new legal system. Corruption and self-dealing defuse the VCP's ability to effectively govern and undermines the people's confidence in the VCP. In order to maintain stability the VCP must subjugate local institutions to the rule of law and the na-

253. See *supra* note 21 and accompanying text (discussing advantages to flexibility on local levels).

254. See, e.g., Wunker, *supra* note 8, at 382. "It is astonishing not only how quickly the Government of Vietnam is transforming itself into a market centered economy, but also how extensively it has created new laws in so many fields to catalyze and facilitate its economic metamorphosis." *Id.*

255. MARR, *supra* note 16, at 11. "More fundamentally, the inflow of foreign capital provokes sweeping socio-economic and cultural changes, some construed [by the Vietnamese government] as healthy, some viewed otherwise, but all destabilizing to households, neighborhoods, provinces, and the nation alike." *Id.*

256. See *supra* notes 78-79 and accompanying text (describing incentives for specific investment and grooming of enterprises for JV partnership).

257. See *supra* note 8 and accompanying text (discussing entrance into world markets as goal prompting Vietnam's renovation).

tional will.²⁵⁸

B. *The National Government Should Resolve Conflict in the Labor Code*

The Labor Code's regulations grant inordinate discretionary power to local level institutions.²⁵⁹ The roles of local institutions as arbiters and mediators should be maintained only if a uniform interpretation of the Labor Code is established, and the local institutions are obligated to enforce that interpretation.²⁶⁰ The National Government must force local institutions to follow strict guidelines in order to provide consistent dispute resolution²⁶¹ and protect foreign investors.²⁶²

1. The National Government Should Amend the Labor Code

Because the Labor Code leaves room for varying interpretations and empowers local institutions to interpret its provisions, further guidelines are necessary. The Labor Code should be amended such that Articles 61, 33, and 17 take into account the specific circumstances of foreign investment and JV formation.²⁶³ The foreign investor should not be forced to renegotiate the JV contract or collective labor agreements from an unfair bargaining position.

The amended law should state that upon contract termination the responsibility of termination allowance does not transfer with ownership of the enterprise.²⁶⁴ Alternatively, the law should provide that a contract is modified and not terminated when an enterprise is restructured or ownership changes hands. This allows negotiation for the benefit of both parties but does

258. See *supra* note 167 and accompanying text (discussing popular criticism of corrupt institutions and need for reform).

259. See *supra* notes 26-27 and accompanying text (discussing entrenchment of local institutions through legislation).

260. See *supra* notes 247-58 and accompanying text (discussing traditional role for local institutions and need for centralization).

261. See *supra* notes 149-62 (discussing crisis in Vietnam's legal system due to corruption at the local level and the reliance on local institutions to mediate negotiation of dispute resolution).

262. See *supra* notes 187-89 and accompanying (describing graft, corruption, and unfair dealings practiced by local officials at expense of foreign investors).

263. See *supra* notes 217-27 and accompanying text (describing legal argument for JV's assumption of termination allowances).

264. See *supra* notes 218, 220 and accompanying texts (discussing Articles 66 and 31 as mandating continuation of responsibilities to workers with transfer of ownership).

not place the foreign party at a disadvantage. The law should indicate if foreign investors are responsible for such payments, so that those payments can be factored into a prospective investors cost analysis.

2. The National Government Should Change the Interpretation of the Labor Code

Because the formation of a JV falls under Article 17, and not 42, retrenchment should not be paid to workers who are still employed.²⁶⁵ The formation of a JV is a restructuring, which triggers Article 17. Article 17, like Articles 31 and 66, deals specifically with the continuity of employment for workers. If after a year of employment, an employee's position is terminated due to technological advancement or organizational restructuring, the employer shall have the responsibility of reassigning and retraining the employee or paying a retrenchment allowance.²⁶⁶

Under Article 17, retrenchment due to restructuring must be paid to workers only if the employee cannot be retrained and reassigned to a new job within the enterprise.²⁶⁷ With the formation of a JV, workers are being assigned to jobs within the new enterprise. Article 17 mandates only that employees are reassigned in case technological advances or organizational restructuring liquidate an employees position.²⁶⁸ Retrenchment should not be paid under Article 17 because workers are not being retrenched but remain employed.

While Articles 31 and 66 of the Labor Code make specific allowances for the results of mergers and transfers of ownership, they require only that a contract be honored by the new owner and that the new owner be responsible for payment of wages and

265. See *supra* notes 210-213 and accompanying text (discussing the retrenchment allowance as allowance paid to employee for loss of work).

266. LABOR CODE, *supra* note 12, art. 17(1), at IV-107.

Where, as a result of organizational restructuring or technological changes, an employee who has been employed in the business for a period of one or more years becomes unemployed, the employer shall have the responsibility to retrain and assign the employee to another job within the enterprise; if a new job cannot be created, the employer must pay an allowance for loss of work equivalent to the aggregate amount of one month's salary for each year of employment but no less than two months salary.

Id.

267. *Id.*

268. *Id.*

other rights and interests.²⁶⁹ Honoring responsibilities and existing relationships does not translate to paying termination allowances to employees who continue to work in the same factory. Article 17 should be followed when a JV is formed with an existing Vietnamese enterprise.

3. Vietnam Must Be Forthright with Investors

Disclosing risks at the beginning of the investment courtship will resolve the difficulties that result from ambiguities within the law. If disclosed, investors can creatively negotiate solutions to any issue. Further, disclosure allows foreign investors to assign responsibility in the JV contract.

The desire to capture investors drives local institutions and the SCCI not to disclose less attractive information. The SCCI may hide negative aspects of an investment package, leading investors down ill-chosen paths.²⁷⁰ This practice results only in mistrust, frustration and the potential failure of JV's.²⁷¹ The im-

269. *Id.* arts. 33, 61; *see supra* notes 217-21 and accompanying text (discussing how responsibility for payment of retrenchment may be assigned to the foreign partner under Articles 17, 33, and 61).

270. Interview with Duncan T. Pham, Partner of Pham & Associates, P.C., in Seoul Airport, Seoul, Korea (Aug. 19, 1994). Investors in the seafood industry may not fully understand, or be told of the "fact that higher-than-projected capital infusion is required to import more modern technology and to place the processing plants closer to the optimum purchasing points, i.e., the docks (if they exist)." *Id.*

[A]ll seafood exporters in Vietnam were or are state-owned entities, formed by local government branches, and located in or close to urban areas and away from coastal areas. Indeed, the better capitalized the enterprise, the more centrally located it is, for example SEAPRODEX is in Ho Chi Minh City. With the current sorry state of Vietnamese transportation and the equally sorry state of Vietnamese refrigeration technology, it is not unusual for fish or seafood to be less than fresh when it reaches the processing plant of the exporting agency. . . . Consequently, Vietnamese exports are faced with higher rejection rates by importers than comparable products from its neighbors.

Id.

271. *Id.*

Certainly, there has been a small number of foreign JV partners who have opted to freeze spending in an effort to (i) pressure their Vietnamese partner to contribute more resources, or (ii) wait for the SCCI to yank their licenses. This halt of capital can occur at different points in time during the life of a JV: (i) immediately after receiving the license, while compiling actual data in Vietnamese, as opposed to working off numbers proffered by the Vietnamese partner (ii) immediately after the central or local government (or both) changes the laws directly or indirectly affecting the JV enterprise (iii) immediately after discovering that a crucial datum relied upon turn out to be a dud, i.e., the number of commercial fishing vessels under contract is 5 instead of

pulse to conceal negative information must be overcome or investors will lose faith in the SCCI as a resource and will try to circumvent its authority.

Most investors are not discouraged by relatively low increases in labor costs, if informed before signing a contract. If higher costs are only disclosed to the investor after commitment, the investor may feel trapped. Disclosure develops mutual trust between JV partners in the formation of a continuing relationship.

CONCLUSION

Vietnam is struggling to balance its need for foreign capital with its strong desire to retain its national sovereignty, protect its people and resources from exploitation, and ensure stable and sustained growth. The Vietnamese government must not allow local interests to upset that balance. Local interests must cede their sovereignty concerning *doi moi*. The national government must exorcise entrenched institutions from the legal system in order to realize Vietnam's potential to become a leading economic and cultural force in Asia.

15, or the building which will be razed to make way for a covered parking garage for the new 3 star hotel actually belongs to some other entity not the Vietnamese partner (iv) immediately after finding out that they have picked the wrong partner (v) immediately after the fifth or sixth time the Vietnamese directors have created/fomented trouble.

Id.