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A WOULD-BE TIGER: ASSESSING VIETNAM'S PROSPECTS FOR GAINING MOST FAVORED NATION STATUS FROM THE UNITED STATES

The United States did not remove its trade embargo against the Socialist Republic of Vietnam¹ until February 1994;² nevertheless, foreign investors have labeled Vietnam as "the next Asian Tiger."³ Optimism among Vietnamese and foreign investors has increased since the lifting of the embargo, particularly in light of the 8.2% annual growth in Vietnam's Gross Domestic Product (GDP) that has occurred over the past five years.⁴ In

1. Vietnam is located in Southeastern Asia on the South China Sea, between China and Cambodia. See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 1995, at 453 (1995). The area of Vietnam is 331,000 square kilometers. See *Vietnam at a Glance—Key Facts and Figures*, Reuters North American Wire, June 27, 1996, available in LEXIS, Asiapc Library, Vietnam File. The population was estimated at 74 million people as of June 1996, making Vietnam the world's 13th most populous country. See *id.*; *Vietnam: UN Chief Calls for More VN Exposure in International Press*, *VIETNAM INVESTMENT REV.*, Oct. 31, 1994, available in LEXIS, Asiapc Library, Vietnam File.

2. See Merrill Goozner, *Clinton Opens Door to Vietnam: Firms Get Access to 'Asian Tiger'; Some Vets Protest*, *CHI. TRIB.*, Feb. 4, 1994, at 1; Ruth Marcus & Thomas W. Lippman, *Clinton Lifts Vietnam Trade Embargo: President Calls It 'the Best Way' To Ensure Progress on MIA Issue*, *WASH. POST*, Feb. 4, 1994, at A1; Paul Richter & Michael Ross, *Clinton Lifts Vietnam Embargo To 'Resolve the Fate' of MIAs*, *L.A. TIMES*, Feb. 4, 1994, at A1; Bellanne M. Toren, *The Curtain Is Raised on Vietnam: An Update on the Lifting of the U.S. Embargo*, *ACCA DOCKET*, Spring 1994, at 94; see also Foreign Assets Control Regulations, 31 C.F.R. § 500.578 (1996) (authorizing transactions involving property in which Vietnam or its nationals have an interest, including, but not limited to, importations from and exportations to Vietnam, new investment, travel-related transactions and brokering transactions); Exports to Vietnam; Country Group Y, 59 Fed. Reg. 6524 (1994) (codified at 15 C.F.R. pts. 770, 771 & 785 (1996)) (removing Vietnam from the list of countries to which U.S. exports are prohibited and adding Vietnam to the list of countries to which U.S. commodities and technical data may be exported on a case-by-case basis).

3. Paul Cleary, *Vietnam: 1995 To Be Watershed on Future of Economy*, *AUSTR. FIN. REV.*, May 10, 1995, available in LEXIS, Asiapc Library, Vietnam File.

4. See Reginald Chua, *Vietnam May Stick with Status Quo: Communist Leaders Aren't Expected To Step Up Economic Reforms*, *ASIAN WALL ST. J.*, June 25, 1996, at 1, available in 1996 WL-WSJA 10216667. In 1997, Vietnam's GDP is projected to grow at a rate of 8.5%, compared to a world growth rate of 2.9%. See Daniel Green, *Fast Growth Forecast Targets Asia and Africa*, *FIN. TIMES*, Jan. 13, 1997, available in 1997 WL 3765994.

addition, exports jumped 200% between 1990 and 1995, from \$1.73 billion to \$5.3 billion,⁵ and, during the first half of 1995, foreign investment more than doubled compared to the same period in 1994, reaching \$3.6 billion.⁶

Despite this good news, it would be premature for investors to put all of their capital in Vietnam; many problems plaguing the country since the imposition of the trade embargo continue. Vietnam remains among the poorest nations in the world, with a per capita GDP of approximately \$290 per year.⁷ In addition, Vietnam's trade deficit soared to \$3.6 billion over the first ten and a half months of 1996, up from a deficit of \$2.3 billion for all of 1995.⁸ Finally, Vietnam's legal system continues to befuddle potential investors because its opaqueness and lack of consistency make it difficult for investors to assess properly the potential costs and risks of doing business in Vietnam.⁹ In an effort to correct these problems, the Vietnamese government has embarked on an ambitious program to transform its former state-run economy into a market-based system.¹⁰

Critical to Vietnam's attempts to reform its economy will be its ability to integrate itself into the international trading system. Both Vietnam's newly acquired membership in the Association of Southeast Asian Nations (ASEAN)¹¹ and its recent sign-

5. See *Vietnam: Sustaining the Reform Momentum*, UNION BANK SWITZ. COUNTRY REP., May 1, 1996, available in 1996 WL 10088585 [hereinafter *Reform Momentum*].

6. See *Vietnam: Country Update*, EIU ViewsWire, Oct. 5, 1995, available in LEXIS, Asiapc Library, Alleiu File. The Export-Import Bank has rated Vietnam as the fifth most promising country for foreign direct investments in the medium-term (three years) and the third most promising in the long-term (10 years). See Anne Swardson & Sandra Sugawara, *Asian Workers Become Customers; Foreign Companies Create New Markets Then Move On*, WASH. POST, Dec. 30, 1996, at A1.

7. See *Vietnam: December 1995*, HILFE COUNTRY REP., Dec. 1, 1996, available in 1996 WL 11753473.

8. See *Vietnam Update*, EIU Country Risk Service, Dec. 10, 1996, available in LEXIS, Asiapc Library, Alleiu File.

9. See *License Cancellations Puzzle Hanoi*, BUS. VIETNAM, Dec. 1996, available in LEXIS, Asiapc Library, Vietnam File.

10. See Thomas R. Stauch, Comment, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 INT'L LAW. 995, 1008-20 (1994).

11. See Raphael Pura, *Regional Powerhouse: ASEAN Role Expands As Line Grows To Join Dialogue*, ASIAN WALL ST. J., July 28, 1995, at 1, available in 1995 WL-WSJA 8779444. In addition to Vietnam, ASEAN includes the countries of Thailand, the Philippines, Malaysia, Singapore, Brunei, and Indonesia. See Sherry M.

ing of a trade cooperation agreement with the European Union in July 1995¹² are viewed by Vietnam's Communist-controlled government as stepping stones to its ultimate objective: the granting of Most Favored Nation (MFN) status by the United States.¹³ Obtaining MFN trading access to the U.S. market is critical to establishing successful trade relations between the United States and Vietnam.¹⁴ MFN status would allow Vietnam to export its products into the United States at the lowest available tariff rates and compete with similar products from other countries on an even playing field.¹⁵

The purpose of this Note is to assess Vietnam's prospects of gaining MFN status from the United States. This Note begins by looking at Vietnam's history since the end of the Vietnam War to familiarize the reader with the events leading to Vietnam's current situation. Next, this Note describes the primary barriers to Vietnam's realization of MFN status. In particular, this Note examines the procedural and political steps involved in attaining MFN status, which culminate in a bilateral trade agreement.¹⁶ Finally, this Note reviews the potential obstacles, in particular Communist ideology and poor infrastructure, which may threaten Vietnam's reform program and, by extension, future MFN status. Ultimately, this Note concludes that although the attainment of MFN status certainly is within Vietnam's grasp in the near future, Vietnamese leaders cannot afford to slow Vietnam's current rate of reform, even if such reform comes at the expense of state control.

Stephenson, *ASEAN and the Multilateral Trading System*, 25 LAW & POL'Y INT'L BUS. 439, 439 (1994). ASEAN was created in 1967 to facilitate cooperation on social, cultural, and economic matters and to promote peace in Indochina. *See id.*

12. *See Vietnam Enters Economic Pact with the EU*, ASIAN WALL ST. J., July 18, 1995, at 5, available in 1995 WL-WSJA 8778474.

13. *See Barry Wain, Asian Economic Survey 1995: Vietnam*, ASIAN WALL ST. J., Oct. 9, 1995, available in 1995 WL-WSJA 10225174.

14. *See Sesto E. Vecchi & Lisa Levaggi Borter, U.S. MFN Status for Vietnam*, E. ASIAN EXECUTIVE REP., May 15, 1995, at 6, available in LEXIS, Asiapc Library, Easian File.

15. *See id.*

16. *See id.*

BACKGROUND

Immediate Postwar Period

After the fall of Saigon to the Communist forces of North Vietnam on April 30, 1975,¹⁷ the United States imposed a comprehensive trade embargo against Vietnam under the authority of the Trading with the Enemy Act of 1917 (TWEA).¹⁸ The period immediately following the imposition of the trade embargo resulted in tense relations between the two nations, particularly after President Gerald Ford denied Vietnam's request for aid from the United States pursuant to the Paris Peace Agreements of 1973.¹⁹ President Ford cited Vietnam's untruthfulness and unfair wartime practices as the basis for his denial²⁰ and declared that the two countries would have no trade relationship until Vietnam fully accounted for the fates of the thousands of American soldiers lost either as prisoners of war (POWs) or missing in action (MIAs) during the war.²¹

17. See Peter G. Furniss, *The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARV. INT'L L.J. 238, 238 (1994).

18. 50 U.S.C. app. §§ 1-44 (1994). TWEA authorizes the President, during a time of war, to "investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments," or "importation or exportation of . . . any property in which any foreign country or a national thereof has any interest." *Id.* § 5(b)(1)(A)-(B). TWEA originally was intended to apply only during wartime, but it was extended to nonwartime situations by the International Emergency Economic Powers Act (IEEPA), see Stauch, *supra* note 10, at 1006, which authorizes the President to exercise any powers given to him by 50 U.S.C. § 1702 in order to deal with any "unusual and extraordinary [external threat] to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." International Emergency Economic Powers Act of 1977 § 202, 50 U.S.C. § 1701 (1994); see also Stauch, *supra* note 10, at 1006-08 (discussing how the President's statutory emergency and wartime powers under TWEA and IEEPA may be exercised).

19. See Beth Castelli, Comment, *The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Cooperation?*, 13 DICK. J. INT'L L. 297, 304-05 (1995). Under the Paris Accords, the United States was to have paid North Vietnam \$3.2 billion to repair the damage caused by U.S. bombing. See D.R. SARDESAI, *VIETNAM: TRIALS AND TRIBULATIONS OF A NATION* 128 (1988).

20. See Castelli, *supra* note 19, at 304-05.

21. See *id.* at 305. In addition to extending the embargo, the United States vetoed Vietnam's application to join the United Nations three times between 1975 and 1976. See *id.*

Relations between the United States and Vietnam grew even cooler in 1978 when Vietnam announced that it would become an ally of the Soviet Union²² and followed that announcement by invading Cambodia and establishing its own government there.²³ The Carter Administration responded to the Cambodian invasion by severing all contacts with Vietnam, effectively halting any progress toward the normalization of relations between the United States and Vietnam for the next decade.²⁴

Cut off from the United States and non-Communist nations, who feared jeopardizing their own trading relationships with the United States,²⁵ Vietnam had little choice but to rely almost completely on the Soviet Union and the Communist satellite nations of Eastern Europe as trading partners.²⁶ The Vietnamese government subsequently structured its newly unified economy based on the principles of communism and central planning.²⁷ The transition was not successful, however, and Vietnam began to experience economic problems almost immediately.²⁸ Once-prosperous industries began to fail under centralized state planning, and Vietnam's average per capita income fell to less than \$200 per annum, making Vietnam one of the poorest countries worldwide.²⁹ By the mid-1980s, the Vietnamese government realized that its socialist economy was failing.³⁰ When

22. See WILLIAM J. DUIKER, *VIETNAM: REVOLUTION IN TRANSITION* 211 (2d ed. 1995).

23. See *id.* at 211-12.

24. See *id.* at 211.

25. See Stauch, *supra* note 10, at 1008-09.

26. See *id.* at 1009. Following the war, the Soviet Union provided Vietnam with about \$3 billion in economic and military aid annually, including essential manufacturing materials such as cotton, fuel, fertilizer, and steel. See *id.*

27. See *id.* Under the Soviet system, the government controlled the economy. See Luke Aloysius McGrath, Note, *Vietnam's Struggle To Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 *FORDHAM INT'L L.J.* 2095, 2101 (1995). "[State-owned] enterprises followed a centrally administered system in which the state orchestrated the supply of raw materials, labor relations, production levels, and budgets." *Id.* at 2102.

28. See Stauch, *supra* note 10, at 1009. The only year in which Vietnam's economy operated at a surplus was 1976. See *id.* Throughout the 1980s, Vietnam's economy could not support itself. See *id.* For a discussion of Vietnam's efforts to orient its economy towards a socialist bent, see generally DUIKER, *supra* note 22, at 139-49.

29. See Stauch, *supra* note 10, at 1009. In addition to its internal economic problems, Vietnam accrued a foreign debt in excess of \$13 billion by 1990. See *id.*

30. See *id.* at 1010. Vietnam's economy reached its lowest point in 1986, as food

the Soviet Union, suffering its own economic problems, drastically reduced its aid to Vietnam, the Vietnamese government was forced to begin reforming its economy by implementing measures aimed at bringing market forces into its economic system.³¹

Doi Moi Reform Period

Technically, Vietnam's reform process began before the mid-1980s because the Vietnamese government introduced economic reforms as early as 1979.³² Reforms had no significant effect, however, until the Communist Party's Congresses of 1986 and 1991.³³ The most dramatic reforms began during the Communist Party's Seventh Congress in 1986, when the government instituted the economic policy of *doi moi*, which means "economic renovation" or "change for the new."³⁴ The central principle of *doi moi* is "rapid industrial growth and development through increased foreign investment."³⁵ Under *doi moi*, the Vietnamese government allowed market forces to operate subject to close state supervision.³⁶ By 1989, the government had eliminated the last vestiges of central planning³⁷ by decollectivizing agricultural land and removing price controls on most commodities.³⁸

At the core of *doi moi* is the Law of Foreign Investment of 1987 (FIL), which reflects the Communist Party's recognition that expanding Vietnam's economy will require the support and capital of foreign investors.³⁹ "With a view to expanding economic

supplies dwindled to an all-time low and inflation approached 800%. See *No More Planning's Chains Shall Bind Us*, ECONOMIST, July 8, 1995, at V13.

31. See Stauch, *supra* note 10, at 1010.

32. See *id.* at 1009. In particular, farmers were permitted to sell their produce on the open market. See DUIKER, *supra* note 22, at 148.

33. See Stauch, *supra* note 10, at 1009-10. These reforms included liberalizing economic planning and relaxing controls on domestic and foreign trade. See DUIKER, *supra* note 22, at 152.

34. Clifford J. Shultz II et al., *American Involvement in Vietnam, Part II: Prospects for U.S. Business in a New Era*, BUS. HORIZONS, Mar.-Apr. 1995, at 21.

35. McGrath, *supra* note 27, at 2096.

36. See Stauch, *supra* note 10, at 1010.

37. See McGrath, *supra* note 27, at 2103.

38. See *id.*

39. See Stauch, *supra* note 10, at 1011.

cooperation with foreign countries, developing the national economy, [and] stepping up export on the basis of effective exploitation of natural resources, labour and other potentialities,"⁴⁰ the FIL sets forth general guidelines for foreign investment, allowing various investment vehicles,⁴¹ and guaranteeing the investments against expropriation.⁴² The implementation of the 1987 FIL evidenced "a firm commitment by the Vietnamese [g]overnment to build a strong and stable Vietnamese economy."⁴³ Other nations were quick to invest their capital in Vietnam with the hope to profit from Vietnam's enormous economic potential.⁴⁴ The Vietnamese government approved \$7.8 billion in foreign investment projects between 1988 and 1994.⁴⁵ Despite Vietnam's success in attracting new investors, however, the U.S. embargo still loomed large over the developing country, diminishing the luster of the government's achievements.⁴⁶ Without the support of the United States, it appeared unlikely that Viet-

40. Preamble, Law on Foreign Investment in Vietnam of 1987 (1987 FIL), amended by Act of June 30, 1990, reprinted in 30 I.L.M. 930 (1991). The FIL consists of 42 articles divided into six chapters. See *id.* Chapter I (articles 1-3) sets forth general provisions and a policy statement on foreign investment. See *id.* arts. 1-3. Chapter II (articles 4-19) lists the various forms of investment permitted in Vietnam. See *id.* arts. 4-19. Chapter III (articles 20-25) contains the terms for profit repatriation and a guarantee against expropriation or nationalization, as well as a section on dispute settlement. See *id.* arts. 20-25. Chapter IV (articles 26-35) lists rights and obligations of foreign organizations and investors and addresses taxation, rents and royalties, and customs duties. See *id.* arts. 26-35. Chapter V (articles 36-38) sets forth the responsibilities of the State Organ for Management of Foreign Investment. See *id.* arts. 36-38. Finally, Chapter VI (articles 39-42) contains various measures regarding the implementation of the FIL. See *id.* arts. 39-42.

41. See *id.* art. 4. The investment vehicles permitted by the FIL are joint ventures, contractual business cooperations, and wholly foreign-owned enterprises. See *infra* notes 178-80 and accompanying text.

42. See *id.* arts. 20-21. Article 21 states that "the invested capital and assets of a foreign organisation and private person shall not be requisitioned and expropriated by administrative measures; [t]he enterprise with foreign invested capital shall not be nationalized." *Id.* art. 21.

43. Stauch, *supra* note 10, at 1019.

44. See *id.* Hong Kong, Singapore, and Taiwan have been among the largest investors. See Jeremy Grant, *Survey of Vietnam (2): Dissent in the Ranks—Overseas Ventures Are Dismayed by the Scant Evidence of a Reduction in Bureaucracy*, FIN. TIMES, Nov. 13, 1995, available in 1995 WL 11159031.

45. See Stauch, *supra* note 10, at 1019.

46. See *id.*

nam could attain its goal of becoming the next "Asian tiger."⁴⁷

U.S.-Vietnam Relations

Under the terms of the trade embargo, U.S. citizens and businesses were prohibited from conducting most financial and business-related activities with Vietnam or its nationals.⁴⁸ Included in the prohibition were the import and export of goods, all financial and commercial dealings, and any transaction incident to transportation or shipping entered into by persons subject to U.S. jurisdiction.⁴⁹ The Office of Foreign Assets Control froze Vietnamese assets by prohibiting all transactions involving those assets within U.S. jurisdiction.⁵⁰ The embargo originally was intended to isolate Vietnam from "Western economic trade, aid, and investment,"⁵¹ but, in later years, the embargo became a means to maintain bargaining power over the Vietnamese in an effort to resolve the issue of American MIAs.⁵²

Initially the embargo effectively cut Vietnam off from the West and forced the Communist government to turn to the Soviet Union and its Eastern European allies.⁵³ In addition to enforcing the embargo, the United States discouraged other countries from providing international aid to Vietnam following Vietnam's invasion of Cambodia in 1979, further increasing Vietnam's isolation.⁵⁴

47. See *id.* at 1019-20.

48. See Sesto E. Vecchi & Michael J. Scown, *Vietnam's Opening Door: U.S. Embargo Shuts Out Only American Firms*, E. ASIAN EXECUTIVE REP., Dec. 15, 1989, at 20, available in LEXIS, Asiapc Library, Easian File.

49. See Trading with the Enemy Act of 1917, 50 U.S.C. app. §5(b)(1)(A)-(B) (1994). The embargo continued to allow American companies, however, to gather information and assess the business climate. See Vecchi & Scown, *supra* note 48, at 20. It also permitted remittances to close relatives in Vietnam. See *id.*

50. See Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1996); Stauch, *supra* note 10, at 1006. But see 31 C.F.R. § 500.578 (1996) (permitting transactions involving property in which a designated national of Vietnam has an interest).

51. Vecchi & Scown, *supra* note 48, at 20.

52. See Stauch, *supra* note 10, at 1020 n.177. Without the embargo, veterans' groups feared that the United States would lose the economic leverage necessary to force the Vietnamese government to turn over information about American MIAs. See *id.*; see also *infra* note 74 and accompanying text.

53. See *supra* notes 22-31 and accompanying text.

54. See Stauch, *supra* note 10, at 1007-08. The U.S. embargo prohibited the

After Vietnam began to implement its reform program in the mid-1980s,⁵⁵ however, foreign corporations and private investors began to take advantage of the economic opportunities offered by Vietnam.⁵⁶ As they watched foreign investors seize prime investment opportunities, American businessmen became increasingly frustrated with their inability to participate.⁵⁷ The American business community thus began to pressure the U.S. government to lift the embargo.⁵⁸ In response to this mounting pressure, President George Bush proposed in April 1991 that the United States commence normalizing relations with Vietnam, including an eventual lifting of the trade embargo.⁵⁹

President Bush's proposal consisted of a four-phase "road map,"⁶⁰ which set forth terms and conditions that the Vietnamese government would have to fulfill in order to complete the normalization process.⁶¹ A key action required during the first phase of the plan was the signing of a Cambodian peace accord by Hanoi on October 23, 1991.⁶² In addition, during the first phase of the normalization process, Vietnam was expected to cooperate fully in resolving all American POW/MIA cases, specifically with regards to the "discrepancy cases" and "live-sighting reports," and to "rapidly repatriate readily recoverable remains" of MIAs.⁶³ In return, the United States would begin talks on normalizing relations and would allow American citizens to travel to Vietnam.⁶⁴

World Bank, the International Monetary Fund (IMF), and the Asian Development Bank from lending to Vietnam. *See id.* at 1008.

55. *See supra* notes 32-43 and accompanying text.

56. *See* Stauch, *supra* note 10, at 1020.

57. *See id.*

58. *See id.*

59. *See* Castelli, *supra* note 19, at 311; Nayan Chanda, 'Road Map' To Renew Ties with Hanoi Could Lead to Some Trade by Year End, WALL ST. J., Apr. 15, 1991, at A10.

60. *See* Chanda, *supra* note 59, at A10 (quoting United States Assistant Secretary of State Richard H. Solomon).

61. *See id.*

62. *See* Castelli, *supra* note 19, at 311.

63. Chanda, *supra* note 59, at A10.

64. *See id.* In order to begin talks with the Vietnamese government, the United States also lifted the 25-mile-ban in New York, which effectively had barred all Vietnamese diplomats from leaving the city. *See id.*

During the second phase of the normalization process, Vietnam continued its efforts to resolve the POW/MIA situation, and the United States responded by restoring telecommunications links with Vietnam and lifting restrictions barring nongovernmental organizations from exporting humanitarian goods to Vietnam.⁶⁵ The United States also sent a high-level delegation to Hanoi to work out the details of the normalization process.⁶⁶

Phase Three began after implementation of the Cambodian peace settlement plan and it continued into the Clinton Administration.⁶⁷ Vietnam has been required to withdraw troops from Cambodia, uphold the Paris Peace Agreement, and continue working on the POW/MIA issue.⁶⁸ Under the terms of the "road map," in July 1993, the United States retracted its opposition to international aid for basic human needs and rebuilding infrastructure in Vietnam.⁶⁹ Accordingly, countries participating in the International Conference on Development Assistance for Vietnam, held in November 1993, pledged \$1.86 billion in loans.⁷⁰ The International Monetary Fund (IMF) and the World Bank followed in October 1994 by approving loans totalling approximately \$700 million and promising additional funds in the

65. See Castelli, *supra* note 19, at 312; Chanda, *supra* note 59, at A10.

66. See Castelli, *supra* note 19, at 313. Commercial transactions that met basic human needs also were approved by the U.S. State Department. See Chanda, *supra* note 59, at A10.

67. See Castelli, *supra* note 19, at 313.

68. See *id.*

69. See *id.* at 313-14; Stauch, *supra* note 10, 1022. In addition, in 1994, Congress repealed section 13 of the Department of State Appropriation Authorization Act of 1973 which had prohibited federal financial assistance to Vietnam without Congress's express authorization. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1995, Pub. L. No. 103-306, § 526(b), 108 Stat. 1608, 1632 (1994); Brenda A. Jacobs et al., *Economic Normalization: Charting the Next Steps; Part I: Diplomatic Relations, Economic Assistance*, E. ASIAN EXECUTIVE REP., Jan. 15, 1996, at 8, available in LEXIS, Asiapc Library, Easian File. Despite the repeal of section 13, however, Congress still may not grant aid to Vietnam because of the Brooke Amendment to the 1995 Foreign Operations Appropriations Act. See § 512, 108 Stat. at 1627. Under this provision, the United States cannot provide aid to any country that has been in default for more than one calendar year on any U.S. foreign assistance loan. See Jacobs et al., *supra*. Vietnam has been in default on loans from the United States since 1976. See *id.*

70. See Thai Phuong, *Foreign Financial Activities in the New Stage of Development*, THOI BAO TAI CHINH, Jan. 5, 1995, at 6, reprinted in *Article Comments on Financial Development*, FBIS-EAST ASIA DAILY REP., Feb. 2, 1995, at 61, 62.

future.⁷¹ Significantly for U.S. businesses, in Phase Three President Clinton permitted American firms to bid on internationally financed projects in Vietnam.⁷² As of July 1996, the United States had become the sixth largest foreign investor in Vietnam, with \$1.2 billion having been invested.⁷³

Despite the promised benefits for U.S. businesses, the decision to continue the normalization process was not easy for the Clinton Administration to make because most veterans' groups urged the President to withhold IMF funds in order to pressure the Vietnamese to be more forthcoming in resolving the POW/MIA issue.⁷⁴ In response to the veterans' groups' concerns, President Clinton required Vietnam to make further progress regarding the POW/MIA situation before the embargo would be lifted and the normalization process could proceed to Phase Four.⁷⁵ Indeed, when President Clinton eventually lifted the embargo on February 4, 1994, he tried to make it clear that economic considerations had played no role in his decision; rather, he cited "significant tangible progress" on the POW/MIA issue by the Vietnamese government as the impetus for the decision to lift the embargo.⁷⁶

The lifting of the embargo signaled the end of Phase Three;

71. *See id.*

72. *See* William Branigin, *Hanoi Hails Embargo End As Step To Better Ties*, WASH. POST, Feb. 4, 1994, at A22.

73. *See* Keith B. Richburg, *Still Seeking Profits in Vietnam*, WASH. POST, July 13, 1996, at A12.

74. *See* Castelli, *supra* note 19, at 314.

75. *See id.* at 315. President Clinton cited four specific requirements with which Vietnam had to comply before the embargo would be lifted. First, all American remains were to be returned to the United States, and Vietnam was to document its efforts to recover these remains. *See id.* Second, the 92 discrepancy cases and live sightings were to be resolved. *See id.* Third, Vietnam was to investigate further POW/MIA records in Laos. *See id.* Finally, increased efforts to provide all POW/MIA records from Vietnamese archives were required so as to complete U.S. military records. *See id.*

76. *See* Marcus & Lippman, *supra* note 3, at A1. President Clinton's decision to lift the embargo was supported by many members of Congress who had served in Vietnam, including Senator John McCain of Arizona, who remarked: "The United States gave its word that we would lift the embargo if the Vietnamese substantially cooperated with us to determine the fate of our missing. They have done so. It would be unfair, and beneath the dignity of the United States, to go back on our word now." Goozner, *supra* note 2, at 1.

Vietnam and the United States currently are in the middle of Phase Four.⁷⁷ Although business dealings now are permitted between the two countries, full normalization of relations has yet to occur.⁷⁸ In the final phase of the plan, the United Nations will oversee free elections in Cambodia and will remove the remaining restrictions on lending to Vietnam by international financial institutions.⁷⁹ On July 11, 1995, President Clinton announced the opening of diplomatic relations with Vietnam.⁸⁰ Further normalization of relations between the United States and Vietnam will pave the way for the United States to consider Vietnam's eligibility for a broad range of economic programs and benefits, including designating Vietnam as a "beneficiary developing country" for purposes of the Generalized System of Preferences (GSP),⁸¹ giving aid to Vietnam in the form of grants and loans from the Export-Import Bank⁸² and the Overseas Private

77. See Castelli, *supra* note 19, at 316.

78. See *id.* at 317.

79. See Chanda, *supra* note 59, at A10.

80. See *Clinton Normalizes Ties to Vietnam; Acknowledges Economic Interests*, Daily Rep. for Execs. (BNA), July 12, 1995, available in LEXIS, Exec Library, Drexec File [hereinafter *Clinton Normalizes Ties*]; John Rogers, *Vietnam Hails Ties, Targets U.S. Trade, Technology*, Reuters North American Wire, July 12, 1995, available in LEXIS, Asiapc Library, Vietnam File. On May 23, 1996, President Clinton took another step toward normalizing relations between the two countries by nominating Representative Pete Peterson of Florida to serve as the first U.S. ambassador to communist Vietnam. See Thomas W. Lippman, *Former POW Nominated Ambassador to Vietnam*, WASH. POST, May 24, 1996, at A25. In March 1997, the Senate Foreign Relations Committee unanimously voted to approve Peterson's nomination, sending the nomination to the Senate floor. See Richard Sisk, *Fund Woes Snarl Prez' Vietnam Envoy Pick*, DAILY NEWS (New York), Mar. 5, 1997, at 2, available in LEXIS, News Library, Majpap File. However, Senator Robert Smith of New Hampshire has threatened to hold up Peterson's nomination because of unrelated campaign finance concerns. See *id.*

81. 19 U.S.C. §§ 2461-2466 (1994). The GSP allows the United States to grant generalized tariff preferences to certain imports from developing countries. See JOHN H. BARTON & BART S. FISHER, INTERNATIONAL TRADE AND INVESTMENT 518 (1986). Vietnam currently is ineligible for the GSP because it is a Communist country. See 19 U.S.C. § 2462(b)(1). Communist countries specifically are excluded from GSP consideration unless (1) they enjoy MFN status; (2) they are members of the GATT and of the IMF; and (3) they are not "dominated or controlled by international communism." See *id.*; see also Brenda A. Jacobs et al., *Economic Normalization: Charting the Next Steps*, Part II: MFN and GSP Status, Export Controls, Investment and Tax Treaties, WTO, E. ASIAN EXECUTIVE REP., Feb. 1996, at 9, available in LEXIS, Asiapc Library, Easian File.

82. The Export-Import Bank of the United States (Exim), codified at 12 U.S.C.

Investment Corporation (OPIC),⁸³ and granting MFN status to Vietnam.⁸⁴ The next section of this Note focuses on the key benefit for the Vietnamese–MFN status—and discusses the obstacles that Vietnam faces in its attempt to gain this important benefit.

MOST FAVORED NATION STATUS

What Is Most Favored Nation Status?

Title 19, section 1881 of the United States Code describes MFN status as the U.S. government's grant to another country of the same "duty, or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement," unless otherwise provided for by law.⁸⁵ In essence, MFN status implements the concept of nondiscrimination in the U.S. treatment of its trading partners: By extending MFN status, the United States gives that nation's exports the same preferential treatment that it grants to nearly all of its trading partners.⁸⁶

In practice, under the American Harmonized Tariff Schedule

§§ 635-635(t) (1994), was established as an independent government agency in 1945 for the purpose of financing and facilitating exports by U.S. companies. See BARTON & FISHER, *supra* note 81, at 70. Eligibility for the Exim Bank is subject to Jackson-Vanik considerations. See *infra* notes 98-106 and accompanying text; see also U.S. DEPT OF STATE, U.S. NORMALIZES DIPLOMATIC RELATIONS WITH VIETNAM (1995), available in LEXIS, Intlaw Library, Dstate File [hereinafter U.S. DEPT. OF STATE] (describing the requirements for Exim borrowing and applying them to Vietnam).

83. OPIC, codified at 22 U.S.C. §§ 2191-2200(b) (1994), provides insurance for U.S. firms against losses incurred in developing countries caused by currency exchange controls and expropriation. See BARTON & FISHER, *supra* note 81, at 915. OPIC also is subject to Jackson-Vanik eligibility. See *infra* notes 98-106 and accompanying text; see also U.S. DEPT OF STATE, *supra* note 82 (describing the conditions under which OPIC insurance will be issued). OPIC access is especially critical to U.S. businessmen who seek the reassurance that their investment will be protected in the event of political and social upheaval in Vietnam. See *Vietnam Trade: US Politics, Legal Restraints Stall MFN Status*, EIU ViewsWire, July 9, 1996, available in LEXIS, Asaipc Library, Alleiu File.

84. See U.S. DEPT OF STATE, *supra* note 82 (outlining the statutory requirements for MFN status); see also *infra* notes 91-106 and accompanying text.

85. 19 U.S.C. § 1881 (1994).

86. See Jacobs et al., *supra* note 81, at 9. In contrast, under the GSP, which almost exclusively benefits less developed countries, certain products may enter such countries duty-free. See 19 U.S.C. § 2461 (1994). Vietnam is ineligible for the GSP because it is a Communist country. See *supra* note 81 and accompanying text.

(HTS), two duty-rate columns determine the import duties that a country must pay to U.S. Customs.⁸⁷ Column I sets forth the MFN duty rate, which is levied upon all imports from countries that either are members of the General Agreement on Tariffs and Trade (GATT), now the World Trade Organization (WTO), or have executed bilateral trade agreements with the United States.⁸⁸ In contrast, column II comprises the statutory rates that apply to imports from countries that do not enjoy MFN status.⁸⁹ These countries must pay considerably higher duties for all goods, making them less able to compete with other producers in the U.S. market.⁹⁰

How Do Countries Acquire Most Favored Nation Status?

In order for Vietnam to receive MFN status, Vietnam and the United States must negotiate a bilateral commercial agreement in accordance with U.S. trade law.⁹¹ The President's authority to negotiate such an agreement is set forth in the Trade Act of 1974.⁹² Under section 2435 of that Act, the President may authorize bilateral commercial agreements that provide nondiscriminatory MFN treatment to the exports of countries previously denied such treatment if the President determines that such action would be in the national interest.⁹³ Bilateral agreements may last a maximum of three years and are renewable for addi-

87. The Harmonized Tariff Schedule (HTS) was passed under the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 1988 U.S.C.C.A.N. (102 Stat.) 1107, 1147-50.

88. See Jacobs et al., *supra* note 81, at n.47. Vietnam is not currently a member of the WTO. See *infra* note 256.

89. See Jacobs et al., *supra* note 81, at n.47. Currently, the only countries other than Vietnam that do not have U.S. MFN status are Afghanistan, Cuba, Cambodia, Laos, North Korea, Montenegro, and Serbia. See *id.*

90. The MFN tariff for goods entering the United States is typically less than four percent; the average non-MFN duty rate, on the other hand, is over 50%. See *id.* Woven cotton dresses from Vietnam, for example, are assessed at a 90% tariff rate when they enter the United States; with MFN status, however, a tariff of only 12.2% would be assessed. See Brenda A. Jacobs, *For Vietnam, Economic Normalcy Trails Diplomacy and Politics*, BOBBIN, Oct. 1995, at 14, available in 1995 WL 12115260.

91. See Clinton Normalizes Ties, *supra* note 80.

92. 19 U.S.C. §§ 2101-2495 (1994).

93. See Trade Act of 1974 § 405(a), 19 U.S.C. § 2435(a).

tional three-year periods.⁹⁴ Such agreements are subject to joint congressional approval.⁹⁵

In addition to negotiating a bilateral agreement, a country seeking MFN status must follow several procedural steps set forth in Title IV of the Trade Act of 1974.⁹⁶ In particular, two restrictive conditions impact Vietnam's ability to negotiate a bilateral agreement. First, in determining whether to extend MFN status, the President may consider a country's level of cooperation in assisting the United States' efforts to recover Americans missing in action in Southeast Asia.⁹⁷

A more burdensome restriction is the Jackson-Vanik Amendment, which makes MFN status dependent on a country's emigration policies.⁹⁸ Under the Amendment, the United States may withhold MFN status from a nonmarket economy country if the country denies its citizens the right to emigrate, imposes more than a nominal tax on emigration or emigration documents, or levies more than a nominal tax or fee on any citizen as a consequence of a decision to emigrate.⁹⁹ Once a country is designated as being subject to the Jackson-Vanik Amendment, it may only receive MFN status in one of two ways. First, the President can report to Congress that the country is not in violation of any of the emigration conditions.¹⁰⁰ Alternatively, the President has the discretion to waive the emigration requirements if he determines that such waiver will promote the Amendment's objective of promoting fundamental human

94. See *id.* § 2435(b)(1). To renew an agreement, the President must find that "a satisfactory balance of concessions in trade and services has been maintained during the life of [the] agreement" and that "reductions in [U.S.] tariffs and nontariff barriers to trade . . . are satisfactorily reciprocated by the other party." *Id.* In addition, the President may suspend or withdraw nondiscriminatory treatment at any time, thereafter assessing tariffs on all products from that country at the column II rate. See *id.* § 2434(c).

95. See *id.* § 2435(c). A joint resolution of approval by both Houses of Congress is necessary in order for an agreement to go into effect. See *id.* § 2437.

96. See *id.* §§ 2431-2440; Vecchi & Borter, *supra* note 14, at 6.

97. See 19 U.S.C. § 2433. This section also affects a nonmarket economy country's eligibility for the GSP program, Exim Bank lending, and OPIC insurance. See *supra* notes 81-83 and accompanying text.

98. See 19 U.S.C. § 2432; Vecchi & Borter, *supra* note 14, at 6.

99. See 19 U.S.C. § 2432(a).

100. See *id.* § 2432(b).

rights¹⁰¹ and he has been assured that the emigration practices of that country will lead to the achievement of that objective.¹⁰² Such a waiver is issued for a period not to exceed twelve months; however, Congress may vote to deny the waiver.¹⁰³

For all practical purposes, the requirements of the Jackson-Vanik Amendment have been extended in recent years to include an evaluation of a country's history of democracy and human rights, as evidenced by the debates over the annual reviews of China's MFN status¹⁰⁴ and the denial of MFN status to both Poland and Romania on human rights grounds.¹⁰⁵ Although no separate formal waiver exists regarding democracy or human rights, the U.S. government has attempted to make human rights a third criterion by which to evaluate a country's compliance with the statutory requirements.¹⁰⁶

101. See *id.* § 2432(c)(2)(A). Section 2432(a) states that the purpose of the Amendment is "[t]o assure the continued dedication of the United States to fundamental human rights" through scrutinizing a country's emigration practices. *Id.* § 2432(a).

102. See *id.* § 2432(c)(2)(B). Most former column II countries have received MFN status by waiver and not as a result of compliance with emigration policy requirements. See Vecchi & Borter, *supra* note 14, at 6.

103. See 19 U.S.C. § 2432(d). However, Congress "has never rejected a Presidential waiver of compliance with emigration policies." Vecchi & Borter, *supra* note 14, at 6. Moreover, it is unclear whether Congress even has the right to do so, in light of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court held that legislative vetoes of executive decisions are unconstitutional. See Paul Lansing & Eric C. Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L.J. 329, 346-47 (1984).

104. See Jacobs et al., *supra* note 81, at 9. For a general discussion of the U.S. government's history regarding application of the Jackson-Vanik Amendment to China's MFN status, see L. Jay Kuo, Comment, *Farewell to Jackson-Vanik: The Case for Unconditioned MFN Status for the People's Republic of China*, 1 ASIAN L.J. 85 (1994).

105. See Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law?*, 8 B.U. INT'L L.J. 363, 368 (1990).

106. See Vecchi & Borter, *supra* note 14, at 6.

*Why Vietnam Should Receive Most Favored Nation Status**Procedural Requirements**"United States Missing in Action Personnel in Southeast Asia"*¹⁰⁷

Various veterans' groups had argued that Vietnam would be unresponsive to the POW/MIA issue if the U.S. trade embargo were lifted because such action would remove Vietnam's incentive to cooperate in resolving the issue.¹⁰⁸ Now that the embargo has been lifted, the veterans' groups' arguments have shifted. They now advocate using the grant of MFN status as a "carrot" to be used to encourage further resolution of the issue.¹⁰⁹ The Clinton Administration's response has been to focus on increased cooperation between the United States and Vietnam through the process of normalization as the key to getting the necessary resolution of the POW/MIA issue.¹¹⁰

Although it is tragic that the fates of all POW/MIAs have yet to be resolved, it is doubtful whether such a full accounting ever will occur. Indeed, during a trip to Vietnam to examine POW/MIA records in March 1993, a Senate Select Committee concluded that "it [is] time for normalization between the United States and Vietnam, given that a full accounting of all bodies from the war would be impossible."¹¹¹ It seems foolish, therefore, to ignore the economic welfare of U.S. investors while

107. 19 U.S.C. § 2433.

108. See *supra* notes 74-76 and accompanying text.

109. See *Vietnam: Political Risk Outlook*, EIU Country Risk Service, Sept. 20, 1995, available in LEXIS, Asiapc Library, Vietnam File; *infra* notes 227-30 and accompanying text.

110. See U.S. DEPT OF STATE, *supra* note 82. In a statement to the press following the lifting of the embargo, President Clinton said: "Normalization of relations is the next appropriate step. With this new relationship, we will be able to make more progress." *Id.*

111. Castelli, *supra* note 19, at 315-16. After returning from a recent trip to Vietnam, then-Senator Claiborne Pell of Rhode Island reported to Congress that he was "convinced that the government of Vietnam is being fully cooperative with the U.S. on the POW/MIA issue and that, while this cooperation must continue, the issue should not in any way hamper further development of the bilateral relationship." STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 104TH CONG., 2D SESS., DEMOCRACY: AN EMERGING ASIAN VALUE: A REPORT TO THE COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE 8 (Comm. Print 1996).

awaiting the completion of an unattainable goal. Moreover, should evidence come to light that the Vietnamese have not been completely forthright in their dealings on the POW/MIA issue, the President retains the statutory authority to suspend or withdraw the extension of MFN status at any time he deems necessary, regardless of the length of time that the bilateral agreement has been in place.¹¹² In short, the U.S. personnel in Southeast Asia requirement should not be considered to be a serious impediment to the successful negotiation of a bilateral commercial agreement.

*The Jackson-Vanik Amendment*¹¹³

Addressing the Jackson-Vanik Amendment's freedom of emigration requirement, the Department of State's *Report on Human Rights Practices for 1995* outlined a variety of restrictions imposed by the Vietnamese government that limit the movement of its citizens inside and outside of the country.¹¹⁴ Among the restrictions noted in the Report were approval requirements for ethnic minorities seeking to travel outside of certain highland areas, as well as outright denials of exit visas for Vietnamese Muslims desiring to make the *hajj*.¹¹⁵ In addition, the Department of State expressed some concern that members of minority ethnic groups, particularly highland peoples, did not have access to various resettlement programs.¹¹⁶ The Vietnamese government also has continued to monitor Vietnamese emigrés who had returned to visit, fearing them to be potential security

112. Under 19 U.S.C. § 2433, the President may withhold MFN status from a nonmarket economy country if he finds that the country is not cooperating with the U.S. in accounting completely for all United States MIAs in Southeast Asia, repatriating any soldiers who still are alive, or returning the remains of deceased personnel. See 19 U.S.C. § 2433(a). Once having extended MFN status, the President still may withdraw MFN status if he determines that the nonmarket country is not complying with MIA requests. See *id.* § 2434(c).

113. See *id.* § 2432.

114. See U.S. DEP'T OF STATE, 104TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, at 743-44 (Comm. Print 1996) [hereinafter HUMAN RIGHTS PRACTICES].

115. See *id.* at 744.

116. See *id.*

threats.¹¹⁷

Nevertheless, the Jackson-Vanik Amendment should not continue to be an obstacle to Vietnam's attaining MFN status.¹¹⁸ Two compelling reasons militate against the application of the Jackson-Vanik Amendment to Vietnam. First, the Jackson-Vanik Amendment originally was intended to apply only to the Soviet Union's policy on Jewish emigration and, therefore, should be inapplicable in Vietnam's case.¹¹⁹ Second, the Amendment's distinction between market and nonmarket economies fails to account for the transitional nature of Vietnam's economy and threatens to impede Vietnam's progress toward becoming a market economy.¹²⁰

The Jackson-Vanik Amendment emerged from the United States' policy of détente with the Soviet Union¹²¹ and was tailored to deal specifically with the issue of Jewish emigration from the Soviet Union.¹²² In fact, even though the legislative

117. *See id.*

118. For an opposing view arguing that Vietnam's emigration policies should be sufficient alone to deny Vietnam MFN status under the Jackson-Vanik Amendment, see Davis Frye, *Vietnam's Contemporary Battle with the United States: Vying for Most Favored Nation Trading Status*, 29 VAND. J. TRANSNAT'L L. 777, 786-88 (1996).

119. *Cf. Kuo, supra* note 104, at 104 (discussing the applicability of the Jackson-Vanik Amendment to China).

120. *Cf. id.* (discussing the Jackson-Vanik Amendment's nonmarket distinction and its effects on China).

121. *See id.* at 101. The Nixon Administration hoped to use better trade relations with the Soviet Union as a "carrot" in order to improve diplomatic relations between the two countries. *See id.* Secretary of State Henry Kissinger stated, "[O]ur justification for increased trade with the Soviet Union has never been based primarily on economic grounds We see it as a tool to bring about or to reinforce a more moderate orientation of foreign policy and to provide incentives for responsible international behavior" *Id.* (alteration in original).

122. The Amendment was a joint effort by Jewish lobbyists and conservative politicians to deter establishing Soviet trade relations by linking the grant of MFN status to the issue of Jewish emigration from the Soviet Union. *See id.* They enlisted the aid of Senator Henry Jackson, who introduced and attached the Amendment to the proposed Trade Act of 1974. *See id.* at 101-02; Trade Act of 1974 § 402, 19 U.S.C. § 2432 (1994). The Soviet Union subsequently accused the United States of pursuing a "policy of extortion," and after President Ford signed the law into effect on January 3, 1975, the Soviets pulled out of their 1972 Trade Agreement with the United States. *See Kuo, supra* note 104, at 102-03. As a result, the Jackson-Vanik Amendment prevented the Soviet Union from gaining MFN status before its collapse in 1991. *See Kevin M. Cowan, Comment, Cold War Trade Statutes: Is Jackson-Vanik Still Relevant?*, 42 U. KAN. L. REV. 737, 742-43 (1994).

history indicates that the Amendment applied to "all Communist countries except Poland and Yugoslavia,"¹²³ even the bill's sponsor, Senator Henry Jackson, was said to have been surprised at the scope of the Amendment's coverage when China's request for MFN status arose during the late 1970s.¹²⁴ Given that the Jackson-Vanik Amendment was intended to apply only to the Soviet Union, it does not seem appropriate to continue to apply the Amendment to Vietnam. By continuing to apply the freedom of emigration requirement to Vietnam but not to other similarly situated countries, the United States is perpetuating an inconsistent policy that lacks any coherent basis.

In addition, the Jackson-Vanik Amendment should not apply in Vietnam's case because Vietnam is in the midst of transforming its economy into a market-based system. The Amendment provides that "products from any *nonmarket* economy country shall not be eligible to receive nondiscriminatory treatment" if that country restricts freedom of emigration.¹²⁵ The official U.S. policy has been that Vietnam must satisfy the terms of the Jackson-Vanik Amendment before it can be eligible to receive MFN status.¹²⁶ In making this determination, the United States has categorized Vietnam as a nonmarket economy without considering how the Jackson-Vanik Amendment applies to countries with transitional economies. The Amendment itself does not address how to treat nonmarket systems in transition to market economies.¹²⁷ Nor does the 1988 Trade Act,¹²⁸ which provided a statutory definition of a nonmarket economy for the first time, make any mention of how to treat transitional

123. Trade Act of 1974, Pub. L. No. 93-618, 1974 U.S.C.C.A.N. (88 Stat. 1978) 7334.

124. "Senator Jackson . . . was said to have been 'startled to find out that people thought Jackson-Vanik applied to China. [It] never crossed his mind.'" Kuo, *supra* note 104, at 104 (quoting Roger W. Sullivan, President, U.S.-China Business Council, at *United States-People's Republic of China (PRC) Trade Relations, Including Most-Favored-Nation Trade Status for the PRC: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong. 124 (1990)) (alteration in original).

125. 19 U.S.C. § 2432(a) (emphasis added).

126. See U.S. DEPT OF STATE, *supra* note 82.

127. See Kuo, *supra* note 104, at 104.

128. Omnibus Trade and Competitiveness Act of 1988 ("1988 Trade Act"), Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C.).

economies.¹²⁹ Section 1316 of the 1988 Trade Act defines a nonmarket economy country as a "foreign country that . . . does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."¹³⁰ Nowhere in the statute does it suggest how to classify a nonmarket economy country that is in the process of reforming itself.¹³¹

The silence of the statute on this point makes it difficult to determine when the nonmarket designation no longer applies to an economy in transition. In Vietnam's case, the reforms that have been accomplished to date have been significant enough to warrant Vietnam's classification as a developing market economy, and not as a nonmarket economy. The Vietnamese government clearly has embarked on a plan that embraces capitalist market principles.¹³² Managers of the state companies have received more autonomy and now are permitted to choose their own products and set production goals, prices, employment levels, and wages, just like their counterparts in capitalist countries.¹³³ In addition, hard subsidies to state enterprises were eliminated in 1989.¹³⁴

Despite these changes, some state enterprises still are supported by preferential government treatment, such as cheap credit, tax breaks, and better access to foreign exchange and bank funds.¹³⁵ This fact alone, however, does not make Vietnam any more involved in its state industries than many other foreign countries to which the United States has granted MFN status.¹³⁶ In denying MFN status to Vietnam, therefore, the

129. See Michael Kabik, *The Dilemma of "Dumping" from Nonmarket Economy Countries*, 6 EMORY INT'L L. REV. 339, 368-70 (1992).

130. § 1316, 102 Stat. at 1186-88 (codified at 19 U.S.C. § 1677(18)(A)).

131. See Kabik, *supra* note 129, at 377.

132. See *supra* notes 34-45 and accompanying text.

133. See Barry Wain, *Vietnam Going Private: Vietnam Cautious on Selling State Assets*, ASIAN WALL ST. J., Aug. 18, 1992, at 1, available in 1992 WL-WSJA 2010035.

134. See *id.*

135. See *id.*

136. The French and Japanese governments play a large role in controlling private industries. See Kabik, *supra* note 129, at 374. Under French *dirigisme*, government agencies often consult major corporations regarding investment plans; the French government owns some large private sector companies, including Air France

United States risks harming the economic viability of the country's burgeoning private enterprises that are the key to Vietnam's transition to a market-based economy. By designating Vietnam as a nonmarket economy, and thereby, subjecting it to Jackson-Vanik restrictions, the United States threatens Vietnam's ability to become a capitalist-oriented society.

Human Rights Considerations

Although Vietnam allows limited criticism of its policies, human rights advocates continue to emphasize that the country remains a one-party state in which challenges to Communist party leadership are not permitted.¹³⁷ In August 1995, the United States rebuked the Vietnamese government for "imprisoning two Americans for 'peacefully' demonstrating,"¹³⁸ and warned that similar actions would adversely affect Vietnam's efforts to gain U.S. trade benefits.¹³⁹ Additionally, although the Vietnamese Constitution does endorse freedom of speech and freedom of the press, in reality the rights to assemble, associate, and speak freely still are severely restricted by the government.¹⁴⁰

The U.S. government, as a result of its great concern about these and similar human rights infractions, has expanded Jack-

and Renault. *See id.* Japan uses administrative guidance rather than legislative or regulatory measures to influence Japanese businesses. *See id.* at 371. Under administrative guidance, the Japanese government can recommend that businesses either pursue or not pursue a particular course of action. *See id.* at 372. If the businesses fail to follow the recommendation, they may be denied certain licenses or restricted in other ways. *See id.*

137. *See* GENERAL ACCOUNTING OFFICE, GAO-MSIAD-95-42, U.S.-VIETNAM RELATIONS—ISSUES AND IMPLICATIONS, (1995) available in LEXIS, Legis Library, Gaorpt File; *see also* HUMAN RIGHTS PRACTICES, *supra* note 114, at 742 (noting that the Vietnamese government continues to restrict speech that questions the Party's role).

138. *U.S. Faults Vietnam on Human Rights Cases*, Reuters North American Wire, Aug. 15, 1995, available in LEXIS, Asiapc Library, Vietnm File.

139. *See id.* In addition, the United States expressed concern about the fate of a dissident Buddhist monk who was sentenced to five years in jail for offenses connected with his attempts to provide humanitarian relief to flood victims. *See id.*

140. *See* HUMAN RIGHTS PRACTICES, *supra* note 114, at 742-43. The Vietnamese government also continues to control the media. *See id.* at 742. In December 1995, the Vietnamese government shut down an official newspaper for printing a story on the alleged corruption of a government official. *See Vietnam Shuts Newspaper Over Corruption Report*, Reuters World Service, Dec. 26, 1995, available in LEXIS, Asiapc Library, Vietnm File; *see also* Frye, *supra* note 118, at 810.

son-Vanik's purview to include human rights as a de facto consideration in granting MFN status.¹⁴¹ For its part, the Vietnamese government has steadfastly rejected any linkage between human rights performance and trade benefits, stating: "We are willing to continue a dialogue with the United States on human rights, considering it as a global issue but not accepting it as a condition for the trade and economic relations between the two countries."¹⁴²

Although Vietnam's human rights policy continues to raise concerns, the U.S. policy of including human rights in Jackson-Vanik considerations nevertheless should be abandoned. Nowhere in Jackson-Vanik is MFN status made contingent on human rights policy.¹⁴³ The Amendment's wording and legislative history make it clear that the restriction only applies to a country's emigration policy.¹⁴⁴ President Clinton implicitly recognized this fact in May 1994 when he decided to "delink" U.S. trade regulations from human rights issues" and granted China MFN trading status.¹⁴⁵ Further, in contrast to the situations in China and Vietnam, "[t]he revocation of MFN status was not seriously considered for non-Communist nations such as Syria, Iraq, Iran, or Libya, even during periods of gross human rights

141. For all practical purposes, Congress has extended Jackson-Vanik's purview to include the issue of human rights since the Tiananmen Square incident in 1989. See Jacobs et al., *supra* note 81, at 9; see also Frye, *supra* note 118, at 809.

142. *Vietnam Slams Rights Condition on Trade with U.S.*, Reuters North American Wire, Aug. 17, 1995, available in LEXIS, Asiapc Library, Vietnam File (quoting Foreign Ministry Spokeswoman Ho The Lan).

143. See Jacobs et al., *supra* note 81, at 9.

144. See 19 U.S.C. § 2432 (1994). Undersecretary of State Joan Spero acknowledged as much during a speech at the National Press Club when she stated that "legally the link with Jackson-Vanik really has to do with immigration policy." Joan Spero, Speech on U.S.-Vietnam Relations at the National Press Club (Oct. 3, 1995) (transcript available from Federal Document Clearing House), available in 1995 WL 581074.

145. Lena H. Sun, *China Applauds Trade Move; Dissidents Wary*, WASH. POST, May 27, 1994, at A28 (referring to the Chinese government's official statement welcoming President Clinton's grant of MFN status to China); see also Michael Dobbs, *Intervention Gave Boost to Clinton*, WASH. POST, Oct. 14, 1996, at A1 (noting President Clinton's acknowledgement that linking trade policy and human rights issues was a mistake in China's case); Mary McGrory, *The Price Is Rights*, WASH. POST, May 31, 1994, at A2 (lamenting President Clinton's decision to grant China MFN status).

violations in those countries."¹⁴⁶

For its part, Vietnam should be less intransigent on the issue of linking human rights to U.S. trade benefits. In its recent economic cooperation accord with the European Union,¹⁴⁷ the Vietnamese government agreed to a human rights clause that included a commitment to respect human rights and democratic principles.¹⁴⁸ Because Vietnam has shown a clear willingness to recognize some link between human rights issues and trade status with the European Union, it is inconsistent for the Vietnamese government to continue rebuff the United States' similar request.

Bilateral Commercial Agreement

Even if the procedural requirements mentioned above are met, Vietnam and the United States still must negotiate a bilateral commercial agreement. Before a bilateral agreement can be reached, Congress must be convinced that any agreement made will be mutually beneficial. To date, the U.S. government has highlighted five areas of concern, including "import quotas, licensing, investment restrictions, [and] foreign exchange controls[,] as well as [the] lack of effective dispute settlement mechanism[s]."¹⁴⁹

146. Kuo, *supra* note 104, at 105.

147. The agreement set up a framework for increased EU-Vietnamese economic and trade cooperation, including MFN status for Vietnamese trade with EU member countries. See *Cooperation Agreement Between the European Community and the Socialist Republic of Vietnam*, RAPID, July 17, 1995, available in LEXIS, Intlaw Library, ECnews File (Council of Ministers press release containing text of agreement).

148. See John Rogers, *EU and Vietnam Make Human Rights Breakthrough*, Reuters North American Wire, July 23, 1994, available in LEXIS, Asiapc Library, Vietnm File; see also Gillian Handyside, *Euro-MEPs Agree Vietnam Deal, Stress Human Rights*, Reuters North American Wire, Feb. 1, 1996, available in LEXIS, Asiapc Library, Vietnm File (noting the European Parliament's insistence when approving the agreement that Vietnam improve its human rights record).

149. *Vietnam May Use U.S. Trade Talks as Base for WTO*, Reuters Financial Service, Oct. 5, 1995, available in LEXIS, Asiapc Library, Vietnm File. Title 19, section 2435(b) of the Code lists two other areas that must be included in any bilateral commercial agreement involving the United States: the protection of national security and the protection of intellectual property rights, see 19 U.S.C. § 2435(b) (1994), neither of which will be discussed in this Note. Comments on the barriers that Vietnam faces in these areas have been made elsewhere. See, e.g., Frye, *supra* note 118, at 793-94, 795-800.

Import Quotas and Tariffs

Although critics of Vietnam's trade regime often contend that a major obstacle to trade in Vietnam is its use of import quotas,¹⁵⁰ this concern is overstated because Vietnam has made significant progress toward eliminating quotas.¹⁵¹ Instead, the quotas have been replaced largely by import tariffs as part of the first phase of the country's trade liberalization process.¹⁵²

Although tariffs have increasingly replaced quotas, problems remain. Vietnam's tariffs are set at an artificially high level because conservative government officials are afraid to expose the thousands of remaining state enterprises to the rigors of free trade.¹⁵³ As a result, Vietnamese tariff rates can be as high as eighty percent.¹⁵⁴ Under Vietnam's law on export and import duties in effect since March 1992, all imports and exports are subject to duties once they cross the border.¹⁵⁵

150. See Paul Cleary, *Vietnam Hits Imports After Deficit—Trade and Exporting*, AUSTRL. FIN. REV., Apr. 5, 1995, available in LEXIS, Asiapc Library, Vietnm File. Import quotas are less desirable than tariffs for two reasons. First, the implementation of a quota system encourages the risk of government corruption in licensing, and shields from public view the protection granted to domestic producers. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 366 (2d ed. 1986). Secondly, a quantitative restriction on a good generates additional income for the importer, as opposed to a tariff, which yields customs revenue for the government. See *id.* at 33.

151. See *Vietnam's Transition to a Market Economy: III: Reform Priorities—Foreign Trade*, E. ASIAN EXECUTIVE REP., Feb. 15, 1994, at 8, available in LEXIS, Asiapc Library, Easian File [hereinafter *Reform Priorities—Foreign Trade*]. Today, only rice and garments and knitwear exported to the European Union, Canada, and Norway continue to be regulated by quotas. See *Vietnam: Decision No. 864-TTg of December 30, 1995 of the Policy on Commodities and the Regulation of Import-Export in 1996*, Vietnam Official Gazette, Apr. 30, 1996, available in 1996 WL 11778615 (art. 2).

152. See *Reform Priorities—Foreign Trade*, *supra* note 151, at 8. Tariffs are preferable to quotas because they do not limit the amount of goods that a foreign exporter may bring into Vietnam. Cf. JACKSON & DAVEY, *supra* note 150, at 366 (distinguishing the quota as a trade barrier that *does* restrict the amount of goods imported).

153. See Cleary, *supra* note 150.

154. See Reginald Chua, *Philippine Model? Vietnam May Be Taking Wrong Path to Tigerdom*, ASIAN WALL ST. J., Oct. 23, 1996, at 1, available in 1996 WL-WSJA 12478160.

155. National Assembly, Socialist Republic of Vietnam, *Law on Export and Import Duties*, ch. I, art. 1 (visited Oct. 28, 1996) <<http://www.serve.net/vietnam/pages/viet1445.html>>.

Vietnam's tariff structure, grounded in the Brussels Harmonized System (BHS), is considered to be both "too simple and too complicated."¹⁵⁶ The structure is overly simple because the classification nomenclature consists of a single column with a single rate applicable to a group of individual commodities that are not identified with sufficient detail.¹⁵⁷ As a consequence, it is difficult to ascertain the tariff rate for commodities that are not specifically listed in the customs code.¹⁵⁸ The tariff structure is complicated further by the fact that, in April 1995, the Ministry of Finance announced that it would adjust import and export duties on a quarterly basis, making it extremely difficult for businesses to ascertain the correct tariff rate at any given time.¹⁵⁹ The complexity of the system and the high tariff duties deter foreign exports to Vietnam because they create uncertainty as to the amount of customs duties owed and make imported products prohibitively expensive in the Vietnamese market.¹⁶⁰

Vietnam has attempted to address these problems by consolidating the tariff classifications into five detailed lists of exports and imports, each subject to different trade policies.¹⁶¹ This reform should bring more certainty and predictability to the deter-

156. *Reform Priorities—Foreign Trade*, *supra* note 151, at 8.

157. *See id.*

158. *See id.*

159. *See Tariffs and Import Taxes*, EIU Investing Licensing & Trading, Apr. 1, 1996 available in LEXIS, Asiapc Library, Alleiu File.

160. High tariffs also harm Vietnam's economy because they encourage smuggling. *See Reform Priorities—Foreign Trade*, *supra* note 151, at 8. During the first nine months of 1995, smuggling accounted for almost \$1.4 billion of Vietnamese imports. *See Smuggling Accounts for \$1.4 Bln [sic] of Vietnam Imports*, Reuters World Service, Oct. 16, 1995, available in LEXIS, Asiapc Library, Vietnm File [hereinafter *Smuggling*]. In addition, high tariffs push resources into inefficient sectors of the economy because domestic producers try to take advantage of the high financial returns that result from higher levels of protection. *See Reform Priorities—Foreign Trade*, *supra* note 151, at 8.

161. *See Vietnam: Trade Regulations*, EIU ViewsWire, Oct. 5, 1995, available in LEXIS, Asiapc Library, Alleiu File. The lists include:

(1) banned exports and imports; (2) quota-restricted exports—including garments, textiles and tapioca . . . ; (3) imports subject to 'orientation plans'—petrol and oil, fertiliser, cement, steel and explosives; (4) exports and imports subject to guidelines of concerned government departments—chemical, pharmaceutical and construction materials; and (5) other goods . . . which can be freely exported and imported.

Id.

mination of tariff duties owed by exporters and importers. In addition, Vietnam's recently acquired membership in ASEAN requires Vietnam to adhere to the ASEAN Free Trade Agreement (AFTA), which calls for members to reduce tariffs on most of the products traded in the region to a maximum rate of five percent by the year 2003.¹⁶² As of January 1996, Vietnam had lowered tariffs for approximately 1,600 items imported from other ASEAN countries to between zero and five percent.¹⁶³

Despite these encouraging signs, however, questions remain regarding Vietnam's commitment to reducing tariffs. First, the ASEAN partners granted Vietnam an extension until 2006 to make the phased tariff reductions required of it under AFTA.¹⁶⁴ Moreover, the practical effect of the tariff reductions instituted by Vietnam has been minimal because the reductions largely have been replaced by additional import taxes, such as a consumption tax, in an attempt to make up lost tariff revenue.¹⁶⁵

Instead of resorting to such measures, the Vietnamese government should consider restructuring its tariff collection system and reinforcing its borders against smugglers if it wishes to prove to its trading partners that it is committed to lowering

162. See Ted Bardacke, *Asean Makes Way for Vietnam: Partners Give Hanoi Extra Time To Bring in Tariff Cuts*, FIN. TIMES, Apr. 28, 1995, at 6, available in LEXIS, Asiapc Library, Allnws File. Under ASEAN's Common Effective Preferential Tariff (CEPT) agreement, which covers over 40,000 types of products, Vietnam will be required "to make its carefully controlled economy more transparent and clarify trade and tariff policies." Philip McClellan, *Vietnam Takes Cautious Steps Towards Free Trade Area*, Agence France Presse, Dec. 17, 1995, available in LEXIS, Asiapc Library, Allnws File. Vietnam must lower its duties on over 2,200 items in order to qualify for CEPT. See Johnson et al., *Vietnam: New Tax Changes in Vietnam Likely To Impact on Foreign Investors*, BUS. MONITOR, Feb. 29, 1996, available in LEXIS, Asiapc Library, Allnws File.

163. See *Tariffs and Import Taxes*, supra note 159.

164. See Lara Parpan, *ASEAN Business Groups Give Tentative Welcome to AFTA by 2000*, Agence France Presse, Aug. 2, 1995, available in LEXIS, Asiapc Library, Allnws File.

165. See *Vietnam: Decree No. 97-CP of December 27, 1995 of the Government Detailing the Implementation of the Law on Special Consumption Tax and the Laws on Amendments and Supplements to a Number of Articles of the Law on Special Consumption Tax*, Vietnam Official Gazette, April 15, 1996, available in 1996 WL 11778604; *VN Cheats on Tariffs*, BUS. VIETNAM, July 1996, available in LEXIS, Asiapc Library, Vietnam File. In addition, bureaucratic red-tape and corruption add hidden costs. See Chua, supra note 154.

tariffs and maintaining its level of revenue. As of May 1996, the General Customs Department had collected only about twenty-eight percent of its projected import/export tariffs for the year, continuing a long history of revenue collection problems.¹⁶⁶ In addition, it has been estimated that illegal trade constitutes nearly twenty percent of Vietnam's total recorded trade.¹⁶⁷ A more efficient tariff collection system and increased border vigilance would make up for the revenue shortfall from the lower tariffs while still reflecting Vietnam's commitment to the goal of tariff reduction.

Import Licensing Requirements

A second barrier to MFN status posed by Vietnam's tariff-management system is its import permit and licensing requirements. Generally, a foreign company may not conduct trading activities in Vietnam unless it receives a license to do so from the State Committee for Cooperation and Investment (SCCI).¹⁶⁸ Moreover, the foreign company must conduct trade through licensed local trading companies.¹⁶⁹ Permits are good only for the categories of products listed in a company's original application; if the company wants to export or import additional products not included in the original permit list, it must apply

166. See *Vietnam Tariff Collection Shortfall*, ASIAN WALL ST. J., June 12, 1996, at 4, available in 1996 WL-WSJA 10215656.

167. See *Reform Momentum*, supra note 5; see also *Smuggling*, supra note 160 (reporting \$1.4 billion in smuggled imports into Vietnam in the first nine months of 1995 and noting that "the true figure . . . could be much higher").

168. See *Vietnam: Decree No. 89-CP of Dec. 15, 1995 of the Gov't on Revoking the Procedures for Granting Export or Import Permit For Each Consignment*, Vietnam Official Gazette, Mar. 15, 1996, available in 1996 WL 11778508; *Vietnam—Import License Procedures*, MARKET REP., Mar. 22, 1995, available in LEXIS, Asiapc Library, Vietnam File. To apply for an import license, importers must present to the Ministry of Trade, which oversees the SCCI, copies of the investment license, the bill of lading, and a commercial invoice from the supplier. See Mai Dung, *Licensing Liabilities*, VIETNAM ECON. TIMES, July 1994, at 19. The SCCI recently has merged with the State Planning Committee (SPC) to form the new Ministry of Planning and Investment. See *Vietnam*, IBC INT'L COUNTRY RISK GUIDE, Dec. 1995, available in LEXIS, Asiapc Library, Ibccrg File.

169. See *Vietnam: Trade Regulations*, supra note 161. About 70% of the licensed local trading companies are state owned. See *id.*

for a new permit.¹⁷⁰ Such a requirement can harm the economy because it constrains trade expansion and diversification.¹⁷¹

The SCCI's reluctance to issue investment permits for pure trade purposes is another potential problem.¹⁷² The government typically prefers investments that offer some form of value-added service, such as goods targeted at the manufacturing and industrial sectors.¹⁷³ Such reluctance restricts the types of goods which may be exported to Vietnam.

Vietnam has attempted to revise its licensing and permitting procedures by allowing privately owned firms to hold permits to import and export.¹⁷⁴ In addition to providing an alternative to the state-run trading companies for foreign investors, the revised procedures are important because private firms are contributing an increasing share of exports to the economy.¹⁷⁵ A second improvement is that licenses no longer are required to accompany each shipment.¹⁷⁶ As customs procedures and statistical collection become more efficient, the need for licensing should disappear altogether.¹⁷⁷

Foreign Investment Restrictions

Under FIL, three types of investment are permitted: the contractual business cooperation,¹⁷⁸ the joint venture,¹⁷⁹ and the

170. See *Reform Priorities—Foreign Trade*, *supra* note 151, at 8.

171. See *id.*

172. See *Vietnam—Import License Procedures*, *supra* note 168. A pure trading activity is an enterprise whose primary aim "is to import items wholesale from abroad for sale." *Id.*

173. See *id.*

174. See *Reform Priorities—Foreign Trade*, *supra* note 151, at 8.

175. See *id.* Nevertheless, many private exporters still have to trade through an authorized trading company, which increases their costs of doing business. See *id.*

176. See *Vietnam Regulations: Import, Export Procedures Simplified*, EIU ViewsWire, Apr. 3, 1996, available in LEXIS, Asiapac Library, Alleiu. Previously, a license was required for each shipment in addition to the Foreign Trade permit necessary to import or export goods. See *id.*

177. See *Reform Priorities—Foreign Trade*, *supra* note 151, at 8.

178. Article 5 of the 1987 FIL establishes that "[a] foreign partner and a Vietnamese partner may enter into contractual business cooperation." Law on Foreign Investment in Vietnam of 1987 (1987 FIL), art. 5, amended by Act of June 30, 1990, reprinted in 30 I.L.M. 930 (1991). The rights and obligations of each partner are determined through mutual agreement and should be expressly stated in the business cooperation contract. See *id.* Contractual business cooperation enables the investor to

wholly foreign-owned enterprise.¹⁸⁰ The licensing process for any of the investment vehicles is time-consuming and costly to the foreign investor. Beyond choosing an appropriate location for a venture and the right partner, the investor must deal with a lengthy administrative process that requires multiple approvals at both the national and local levels.¹⁸¹ The many layers of ap-

conduct business in Vietnam without creating a new legal entity. See James Taylor Jr., *Vietnam: The Current Legal Environment for U.S. Investors*, 25 LAW & POL'Y INT'L BUS. 469, 473 (1994).

179. See 1987 FIL, art. 6. A joint venture is "an enterprise jointly set up in Vietnam by the foreign and Vietnamese partners, based on a joint venture contract or an agreement concluded between the Government of the Socialist Republic of Vietnam and a foreign government." *Id.* art. 2. Vietnamese authorities favor joint ventures because they involve local partners in national development more effectively than do other investment structures. See AN INVESTOR'S GUIDE TO VIETNAM 10 (Christopher Zach ed., 1995). Foreign investors also may prefer the joint venture because without the benefit of a local partner, the enterprise may encounter serious problems in negotiating bureaucratic obstacles. See F. Gale Connor, *Vietnam: Trading with the Enemy or Investing in the Future?*, 25 LAW & POL'Y INT'L BUS. 481, 483 (1994).

180. 1987 FIL, art. 14. The wholly foreign-owned enterprise offers foreign investors "limited liability and full control." Stauch, *supra* note 10, at 1016. Although the wholly foreign-owned enterprise brings with it the influence of foreign expertise in management and production, the requirements for setting up a wholly foreign-owned enterprise are fairly strict. See AN INVESTOR'S GUIDE TO VIETNAM, *supra* note 179, at 10. The bias toward the joint venture means that, in order to be approved, a wholly foreign-owned enterprise's investment must be either in a high-priority investment area or substantial enough to warrant preferential treatment. See *id.* Roughly 80% of all foreign direct investment (FDI) in Vietnam is allotted to joint ventures. In contrast, wholly foreign-owned enterprises comprise less than 5% of all FDI, while only 15% of the projects are contractual business cooperations. See Pham Van Thuyet, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Viet-Nam*, 27 LAW & POL'Y INT'L BUS. 541, 569-70 (1996).

181. See *Vietnam's Transition to a Market Economy; I: Reform Priorities—Foreign Direct Investment*, E. ASIAN EXECUTIVE REP., Dec. 15, 1993, at 9, available in LEXIS, Asiapc Library, Easian File. The process involved in gaining approval for a joint venture license could take anywhere from six months to two years. See Jonathan L. Golin, *Tiger by the Tail*, A.B.A. J., Feb. 1995, at 62, 64. At the national level, the SCCI is responsible for approving the joint venture application. See McGrath, *supra* note 27, at 2113. The application must be accompanied by the venture's charter and a feasibility study, see 1987 FIL, art. 37, that sets forth the "proposed business scope of the . . . venture, the investment to be made by both parties, the benefits it will bring to the country and region, the estimated profitability of the enterprise and the environmental impact of the venture." AN INVESTOR'S GUIDE TO VIETNAM, *supra* note 179, at 11. In addition, the investor must prepare a letter of intent to be approved by the local People's Committee, which is made up of local bureaucrats in the area where the project will be located. See *id.* Once the ap-

proval required to get a project off the ground can negatively influence a company's decision to invest in Vietnam and may undermine governmental efforts to promote simplicity and accessibility in its foreign investment laws.¹⁸²

For joint ventures, a distinct disadvantage to foreign investors is that all major decisions must be made unanimously by the Board of Management, including the decisions whether to adopt the annual budget and appoint managerial personnel.¹⁸³ The FIL requires that each Board of Management include at least two representatives for each partner in the venture.¹⁸⁴ This requirement can be unfair to foreign investors, particularly because, in the majority of projects, the Vietnamese investor's sole contribution to the venture is the land or building where the project is located, while the foreign investor has provided all of the financial capital.¹⁸⁵ Because in many cases the Vietnamese

plication has been filed with the SCCI, the SCCI has 50 days to submit its opinion on large-scale and sensitive investments to the Prime Minister. See Mathilde L. Genovese, *Succeeding in Vietnam's Emerging Market Economy; Part II—Feasibility Studies, Approval, Guarantees, Strategies*, E. ASIAN EXECUTIVE REP., June 15, 1995, at 6, available in LEXIS, Asiapc Library, Easian File. Such projects commonly are known as Group A projects. See *id.* Group A projects include those with:

investment capital of \$40 million or more in airports, cement, chemicals, cultural and tourist centers, electricity, electronics, metallurgy, mining, oil and gas, real estate, seaports, telecommunications and trade centers; projects involving infrastructure . . . ; projects involving culture, the press and publishing, national defense and security; and projects using five or more hectares of urban land or 50 or more hectares of other land.

Id. The Prime Minister has the final decision on the project; however, before the project even is presented to the Prime Minister, more than 65 other signatures are required. See *id.* For other projects, which are considered Group B projects, the SCCI has 45 days to notify investors of its decision. See *id.* At the local level, if the People's Committee of the province fails to submit its opinion on the project to the SCCI within 45 days, it is deemed to have granted approval. See *id.* For a full description of Vietnam's elaborate foreign investment approval process, see Van Thuyet, *supra* note 180, at 597-98.

182. See Camellia Ngo, Note, *Foreign Investment Promotion: Thailand As a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 81 (1992). Moreover, at each level of approval, investors in Vietnam may have to bribe officials responsible for processing their applications. See *id.* at 96. As the process continues and the stakes increase, the likelihood increases that an official, knowing what is at risk, may hold out for higher benefits. See *id.*

183. See 1987 FIL, art. 13; see also Frederick Burke, *Legal Aspects of Business in Vietnam*, BUS. VIETNAM, Feb. 1996, available in LEXIS, Asiapc Library, Vietnam File.

184. See 1987 FIL, art. 12.

185. See Mathilde L. Genovese, *Succeeding in Vietnam's Emerging Market*

representatives may not fully comprehend international business practices, management techniques, or marketing tactics, they may not foresee the long-term necessity of a particular business decision and may create a voting bloc to oppose the action in order to serve short-term goals.¹⁸⁶ As a result of the unanimity requirement, the Board of Management may deadlock on important issues, putting the success of the project at risk.¹⁸⁷

A third limitation on foreign investment is the period of time during which a government license is valid. Article 15 of the FIL states that "[t]he duration of an enterprise with foreign invested capital shall not exceed twenty (20) years."¹⁸⁸ In limited circumstances, the duration of the license may be extended; however, the extension depends upon "the amount of the investment, the length of time required to obtain a return on the investment, whether the investment is a priority investment, and whether the project is located in a difficult environment."¹⁸⁹ In many investment projects, therefore, a foreign investor will be reluctant even to begin the project if he cannot be certain that he will receive an adequate return on the investment within the term of the license. Additionally, in many joint ventures, the foreign investor at some point may be required to surrender ownership of all or part of the equity of the enterprise to the local partner or the government.¹⁹⁰ Thus, there is no incentive to replace, repair or renovate worn-out machinery and equipment during the

Economy; Part I—Representative Offices, Types of Foreign Investment, E. ASIAN EXECUTIVE REP., May 15, 1995, at 7, available in LEXIS, Asiapc Library, Easian File.

186. *See id.*

187. *See id.*

188. 1987 FIL, art. 15.

189. Genovese, *supra* note 185, at 7. Projects falling within the Group A designation are considered to be priority projects. *Cf.* Genovese, *supra* note 181, at 6. Licenses for some projects may be extended for up to 50 years if the projects involve natural resources or large, long-term investments. *See* Decree Regulating in Detail the Implementation of the Law on Foreign Investment, 30 I.L.M. 942, 953-54 art. 44 (1991); *see also* Hoang Van Huan, *Vietnam Continues To Assess Changes to the Foreign Investment Law*, VIETNAM INVESTMENT REV., Mar. 11, 1996, at 12, available in 1996 WL 8391122 (noting that 1992 amendments to the FIL extended the duration of a joint venture project to 50 or even 70 years under certain circumstances).

190. *See* Irwin Jay Robinson, *Current Problems and Opportunities in Vietnam and American Shortsightedness: A Commentary*, BUS. VIETNAM, July 1995, available in LEXIS, Asiapc Library, Vietnam File.

latter years of a project because little chance of recouping the investment exists.¹⁹¹

The Vietnamese government has responded to concerns regarding investment restrictions by streamlining the application process.¹⁹² In legislation issued at the end of 1994, the Vietnamese government proposed expediting the processing time for projects at the national level, thereby reducing the evaluation time on most projects to two months rather than three.¹⁹³ In addition, the government has sought to limit the role of local authorities by prohibiting the formation of the local committees that evaluate business projects.¹⁹⁴

Despite the positive actions taken by the Vietnamese government, however, not every proposed change promises to improve investment opportunities. In a bill submitted to the Prime Minister in September 1995, the SCCI proposed cutting the length of investment licenses for foreign hotel and office blocks by fifteen to twenty percent, in the hopes that Vietnamese parties could gain control of the properties earlier.¹⁹⁵ The shorter length of time could dissuade foreign investors from beginning hotel and office projects in Vietnam altogether.¹⁹⁶

Foreign Exchange Controls

Foreign exchange controls are another area of great concern to the United States government.¹⁹⁷ Most troubling to U.S. trade representatives has been the requirement that foreign compa-

191. *See id.*

192. *See Vietnam Is Planning Legislation To Encourage Foreign Investment*, ASIAN WALL ST. J., July 11, 1994, at 4, available in 1994 WL-WSJA 2005172 [hereinafter *Legislation To Encourage Foreign Investment*].

193. *See id.*; Van Thuyet, *supra* note 180, at 571.

194. *See Legislation To Encourage Foreign Investment*, *supra* note 192.

195. *See* Jeremy Grant, *Temporary Stop on Investment Licences in Vietnam*, FIN. TIMES, Sept. 20, 1995, at 3, available in LEXIS, Asiapc Library, Fintme File; VN Laws Frustrate Investors, BUS. VIETNAM, Dec. 1995, available in LEXIS, Asiapc Library, Vietnam File.

196. *See supra* notes 188-91 and accompanying text. The Vietnamese government also seeks to increase its stake in the joint ventures, not by adding capital to projects, but by revaluing its land contributions. *See VN Laws Frustrate Investors*, *supra* note 195.

197. *See supra* note 149 and accompanying text.

nies keep a foreign currency account within Vietnam and maintain a balance sufficient to satisfy all of their foreign currency expenditures, including any repatriation of profits.¹⁹⁸ Such repatriations are allowed only at the end of each financial year.¹⁹⁹ Moreover, if the amount of the transfer exceeds the investor's initial capital contribution and reinvested profits, the investor must apply to the SCCI for special permission to transfer the funds.²⁰⁰

In addition, all currency exchanges must be made at the State Bank of Vietnam's official exchange rate.²⁰¹ This requirement fails to address the potential discrepancies that may arise in the exchange rate between the time of investment and the time of transfer;²⁰² consequently, investors stand to lose money if the dong should depreciate during the period of investment. This would pose a particular problem if the Vietnamese government should decide to devalue the dong in order to improve its trade deficit.²⁰³ While such a decision would close the trade gap over

198. See *The Straight Dope on Foreign Exchange Controls*, VIETNAM INVESTMENT REV., June 26, 1995, at 14, available in 1995 WL 14180615.

199. See *id.* Furthermore, repatriation of profits will not be permitted until taxes are paid on the amount and all financial obligations to the State Bank of Vietnam are satisfied. See *id.*

200. See *id.*

201. See 1987 FIL, art. 24, amended by Act of June 30, 1990, reprinted in 30 I.L.M. 930 (1991); *Vietnam: Forex Regulations*, EIU ViewsWire, Jan. 30, 1997, available in LEXIS, Asiapc Library, Alleiu File. In August 1994, the Vietnamese government made it even more difficult to obtain foreign currency in Vietnam by issuing an order requiring virtually all transactions to be conducted in *dong*, the national currency. See *Vietnam: Forex Regulations*, *supra*. The new policy is onerous because the dong is considered to be a "soft" currency and not easily convertible to "hard" currencies regularly traded on the foreign exchange markets, such as the dollar, yen or Deutsche Mark. See Van Thuyet, *supra* note 180, at 573. Purposes for which approval is granted to use foreign currency in Vietnam include: "[i]mporting materials and services for the enterprise; [p]aying wages to foreign employees; [p]aying the interest on borrowings; [r]epaying foreign currency loans; [p]aying Vietnamese organisations that have the right to receive foreign exchange; [c]ontributing capital to the foreign investment project; [and] [b]uying government bonds." *Vietnam: Forex Regulations*, *supra*.

202. See *id.*

203. See John Chalmers, *Bankers Urge Caution As Vietnam Mulls Devaluation*, Reuters North American Wire, Sept. 30, 1996, available in LEXIS, Asiapc Library, Vietnam File. This, in fact, happened in December 1996 when the State Bank of Vietnam moved its official rate to 11,044 dong per dollar from 11,039 in an effort to close Vietnam's trade gap. See *Vietnam Dong Easier After State Bank Eases Floor*,

the short-term, it would also undermine public confidence in the local currency and raise the cost of importing capital goods, thus stunting long-term domestic and foreign investment growth.²⁰⁴

To allay investor fears, therefore, the Vietnamese government should be prepared to ease remittance requirements to facilitate the return of capital to foreign investors. First, it should lift restrictions on an investor's ability to send money back to his home country,²⁰⁵ thereby allowing the investor to preserve the value of his investment. Second, the government should eliminate the lengthy approval process required by the SCCI for repatriation of capital in cases where the amount exceeds the basis of the investment. In the long run, tight foreign exchange conditions should be alleviated as Vietnam becomes increasingly successful at stabilizing its currency, generating trade surpluses, and limiting inflation.²⁰⁶

Dispute Resolution

Finally, the U.S. government has noted the lack of effective dispute resolution mechanisms as a cause for concern.²⁰⁷ Three main methods of enforcement currently exist in Vietnam: the court system, arbitration, and administrative orders.²⁰⁸ In general, however, socialist countries prefer arbitration over litigation as a method of dispute resolution.²⁰⁹

The FIL provides that arbitration should be used to resolve disputes among foreign and Vietnamese parties to a joint venture;²¹⁰ however, it does not designate a method of dispute resolution for conflicts between foreign investors and the Vietnam-

Reuters Financial Service, Dec. 22, 1996, available in LEXIS, Asiapc Library, Vietnam File.

204. See Chalmers, *supra* note 203.

205. Currently, profits cannot be repatriated until profit tax is paid on it at the end of the fiscal year. See *Vietnam: Forex Regulations*, *supra* note 201.

206. See Robert L. Wunker, *The Laws of Vietnam Affecting Foreign Investment*, 28 INT'L LAW. 363, 375 (1994).

207. See *supra* note 149 and accompanying text.

208. See NATALIE G. LICHTENSTEIN, A SURVEY OF VIET NAM'S LEGAL FRAMEWORK IN TRANSITION 58 (World Bank Working Paper No. 1291, 1994).

209. See *id.*

210. See 1987 FIL, art. 25, amended by Act of June 30, 1990, reprinted in 30 I.L.M. 930 (1991).

ese government.²¹¹ Foreign investors prefer that matters be settled by international arbitration rather than by Vietnamese courts, but because of the government's refusal to relinquish jurisdiction, investors must prepare to deal with the Vietnamese courts in any potential disputes.²¹² Even if the investor wisely puts a clause in the contract agreeing to settle disputes by international arbitration, it still is questionable whether the investor will be able to enforce the decision in Vietnamese courts, because Vietnam is not currently a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²¹³ Thus, the combination of potential bias toward the government in Vietnamese courts and the uncertainties involved in the enforcement of arbitral awards increases the risks for foreign investors and, in many cases, may dissuade foreign investors from pursuing projects in Vietnam.²¹⁴

There are encouraging signs, however, that Vietnamese legislators have recognized the perceived deficiencies in the country's court system.²¹⁵ In 1993, the National Assembly created a new arbitral structure to resolve commercial disputes between foreign investors and Vietnamese commercial partners by establishing the Economic Court and the Vietnam International Arbitration Centre.²¹⁶ It may take some time, however, for these fora to develop expertise in settling commercial disputes; in the near future, international arbitration will remain the preferred method of dispute resolution for foreign investors doing business in Vietnam.²¹⁷ To that end, Vietnam passed a Law on the Enforcement of Foreign Civil Judgements that went into effect on

211. See Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 2007 (1994) [hereinafter *Protection of FDI*]. Decree No. 18-CP, which implements the FIL, merely directs that such disputes "shall be brought before a Government competent authority." *Id.* (quoting Decree No. 18-CP art. 102) (emphasis added).

212. See *id.*

213. See *Vietnam: How Legal Is Arbitration?*, VIETNAM INVESTMENT REV., Jan. 2, 1995, available in LEXIS, Asiapc Library, Vietnam File.

214. See *Protection of FDI*, *supra* note 211, at 2007.

215. See *Economic Courts: Resolving Disputes*, VIETNAM ECON. TIMES, Sept. 1994, at 30.

216. See *id.* The International Arbitration Centre is designed to be a neutral forum for the resolution of international commercial disputes. See Van Thuyet, *supra* note 180, at 573.

217. See *Economic Courts: Resolving Disputes*, *supra* note 215, at 30.

January 1, 1996. Under the new law, foreign arbitral awards may be enforced in Vietnam if the awards were made in a country with which Vietnam has executed an international arbitral agreement.²¹⁸ Vietnam's efforts to develop a court system that is more sensitive to the rights of foreigners will encourage more investment in Vietnam as companies gain assurance that, in the event of a dispute, their interests will be protected.

Underdevelopment of Legal Framework

Underlying all of these barriers to a successfully negotiated bilateral commercial agreement is the simple reality that much of the legal framework required for a market economy in Vietnam still is in development. The current legal structure is a "hodgepodge of remnants of the French civil law system, pre—doi moi socialist decrees, and the recent proliferation of commercially oriented regulations lifted wholesale from market economies."²¹⁹ The Vietnamese government "has become a virtual legislation factory with new laws, decrees, circulars, directives and regulations, often in draft form, coming out almost weekly."²²⁰ Because Vietnam lacks a central publishing service, people find out about new regulations months after their enactment.²²¹ It is exceedingly difficult, therefore, for investors to be certain that their investments comply with the law, because what may be legal today might not be legal tomorrow. Even so, the problem "is not so much the absence of law but a lack of experience in dealing with commercial business concepts."²²² For many Vietnamese officials, the change from communism means that they are having to rethink their methods of attracting foreign investments.²²³ Unfortunately, instead of creating an environment that encourages more foreign investment and

218. See *Regulatory Watch in Vietnam*, EIU Business Asia, Mar. 25, 1996, available in LEXIS, Asiapc Library, Alleiu File. To date, Vietnam has negotiated only a few international agreements, primarily with Eastern European countries. See *Vietnam: How Legal Is Arbitration?*, *supra* note 213.

219. Golin, *supra* note 181, at 63.

220. *Id.* at 64.

221. See *id.*

222. *Id.*

223. See Robinson, *supra* note 190.

creates employment for its people, the Vietnamese government has tried to take the profits for itself through high taxation and onerous licensing requirements.²²⁴ Another problem is that many Vietnamese do not appreciate that when their word is given, whether written or oral, foreign investors have the right to rely on it and to expect them not to change materially the rules and conditions governing the agreement.²²⁵

Many of these concerns, however, will be addressed as Vietnam's legal framework continues to develop and as the Vietnamese become better acquainted with how other countries conduct their business activities. As time passes, attorneys will be able to give more knowledgeable advice to clients making foreign investments, and Vietnamese lawyers will be better able to understand the needs and objectives of foreign investors and ensure that foreign investments receive adequate protection.

POTENTIAL PROBLEMS ALONG THE WAY

Despite Vietnam's promising reforms, some troubling obstacles still stand in the way of any potential grant of MFN status by the United States. First, there remains great opposition within the U.S. Congress to the idea of granting MFN status to the Vietnamese in the near future.²²⁶ In an effort to resolve fully the POW/MIA issue, a group of Republicans has vowed to attempt to block further progress in normalizing relations, including blocking the passage of the bilateral trade agreement necessary for MFN status.²²⁷ President Clinton's decision to es-

224. *Cf. id.* (stating that "if the taxation and other conditions . . . are not stabilized so as to permit the investor to make a fair profit, investment in Vietnam will decline").

225. *See id.* A related problem is the issue of language. The law requires that foreign contracts also be translated into Vietnamese, and that the two versions be "equally binding." Burke, *supra* note 183. The discrepancies between the two versions of a contract are often so egregious that it is virtually impossible to reach a "meeting of the minds." *See id.*

226. *See Jacobs, supra* note 90, at 16; Frye, *supra* note 118, at 804-06.

227. *See Jacobs, supra* note 90, at 16. At the time the President announced the reestablishment of diplomatic ties with Vietnam, several new bills were introduced criticizing the decision and denying funding for a U.S. embassy in Vietnam. *See id.* House Republicans particularly have criticized the Clinton Administration's stance toward Vietnam and have accused the Administration of letting the Vietnamese government dictate when and how it discloses information on POW/MIA remains. *See*

tablish diplomatic relations in July 1995 reflected his recognition of the politics surrounding Vietnam; he timed the decision carefully in an effort to keep it from becoming an issue during the 1996 presidential campaign.²²⁸ Given the controversy during the 1992 election over President Clinton's student deferment during the Vietnam War,²²⁹ it was not surprising that Clinton postponed any talk about a trade agreement with Vietnam until after the 1996 election. Indeed, during a visit to Vietnam in July 1996, National Security Advisor Anthony Lake emphasized that the POW/MIA issue remained President Clinton's highest priority in U.S.-Vietnam relations, much to the Vietnamese government's chagrin.²³⁰ With President Clinton's re-election,²³¹ however, political opposition in the United States should pose less of a threat to Vietnam's MFN hopes. Not surprisingly, news of the election results was greeted warmly by the Vietnamese government.²³²

A second cause for concern is that even if Vietnam can reform its legal system sufficiently, those efforts may be futile if Vietnam's infrastructure cannot support the increased level of foreign investment. U.S. opposition to international lending to Vietnam during the late 1970s and 1980s meant that Vietnam could not get financial aid to rebuild the infrastructure, particularly in the north, that had been damaged extensively during

Jim Wolf, *House Republicans Fault Clinton on Vietnam MIAs*, Reuters North American Wire, June 19, 1996, available in LEXIS, Asiapc Library, Vietnam File. Senator Robert Smith of New Hampshire has been among the most vocal opponents to normalizing relations with Vietnam, complaining that not enough has been done to account fully for the more than 2000 Americans listed as MIA in Southeast Asia and threatening to hold up Pete Peterson's nomination as ambassador to Vietnam. See Sisk, *supra* note 80, at 2.

228. Former Republican Senator Robert Dole, recently defeated in his bid for the Presidency, opposed President Clinton's decision to normalize relations with Vietnam and threatened to fight any grant of MFN status to the Vietnamese. See Keith B. Richburg, *U.S.-Vietnam Ties Turn Out Knotty*, WASH. POST, Jan. 30, 1996, at A10.

229. See Jacobs, *supra* note 90, at 16.

230. See John Chalmers, *U.S. Seeks To Bolster Year-Old Ties with Vietnam*, Reuters North American Wire, July 12, 1996, available in LEXIS, Asiapc Library, Vietnam File.

231. See Dan Balz, *Clinton Wins by Wide Margin*, WASH. POST, Nov. 6, 1996, at A1.

232. *Former Enemy Vietnam Welcomes Clinton Victory*, Reuters World Service, Nov. 6, 1996, available in LEXIS, Asiapc Library, Vietnam File.

the Vietnam War.²³³ The roads in Vietnam are poor, the mass transportation system is substandard, and the administration of ports is inefficient.²³⁴ Power shortages are widespread, and the telecommunications system is antiquated.²³⁵ The total cost for modernizing Vietnam's infrastructure has been estimated as ranging from \$44 billion to \$45 billion.²³⁶ All of these problems impede the development and growth of a favorable investment climate as bottlenecks caused by the aging infrastructure severely restrict the free flow of goods.²³⁷ The financing now available to Vietnam will greatly assist it in rebuilding its infrastructure.²³⁸ For the time being, however, the lack of adequate infrastructure will continue to frustrate American investors, the key constituency that the Vietnamese government must win over in order to maintain pressure on the U.S. government.

Finally, the Vietnamese government must face the reality that the market economy concept is inconsistent with the theory of communism. The Vietnamese Constitution states: "The state develops the multisectoral commodity economy in accordance with the market mechanism based on state management and socialist orientations,"²³⁹ a premise fundamentally at odds with Adam Smith's notion of the "invisible hand."²⁴⁰ The Communist

233. See Shultz et al., *supra* note 34, at 21-22; Stauch, *supra* note 10, at 1027.

234. See Stauch, *supra* note 10, at 1027-28. Less than 15% of Vietnam's 100,000 roads are paved, and many of the nation's bridges and roads are still damaged from the Vietnam War. See *id.* Moreover, Vietnam's ports are so congested and inadequate that without improvement, shipping companies soon may refuse to stop there. See *VN Ports Face Problems*, BUS. VIETNAM, July 1996, available in LEXIS, Asiapc Library, Vietnam File.

235. See Stauch, *supra* note 10, at 1033.

236. See *Infrastructure Financing*, EIU Business Reports, Sept. 20, 1996, available in LEXIS, Asiapc Library, Alleiu File.

237. Cf. Reginald Chua, *Asian Economic Survey 1996-97—Vietnam: Economic Growth Remains Robust, but the Current Account Deficit Is Worrisome; Foreign Investors Are Becoming Fed Up with Bureaucracy and the Gradual Pace of Reforms*, ASIAN WALL ST. J., Oct. 22, 1996, at 51, available in 1996 WL-WSJA 12476452 (noting that the poor infrastructure is "already causing bottlenecks").

238. See Wain, *supra* note 4.

239. VIETNAM CONST. ch. I, art. 15 (1992), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz, eds., Supp. 1992).

240. Adam Smith refers to the market forces governed by the notions of supply and demand as "an invisible hand." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell & A.S. Skinner eds., Liber-

Vietnamese government appears convinced that it successfully can implement economic reform while maintaining firm political control,²⁴¹ yet no socialist country has heretofore been able to balance these contrary principles.²⁴² If it appears that the government is losing its grasp on power, the Vietnamese government possibly could abandon *doi moi* and roll back the level of reforms.²⁴³ Indeed, after a promising start, many investors have become increasingly skeptical of Vietnam's ability to realize its full potential, citing the government's unwillingness to "make the hard decisions."²⁴⁴ Although Vietnam's Gross Domestic Product has grown an average of 8.2% annually over the past five years, much of that growth was in reaction to the institution of *doi moi* reforms after years of stagnation under the Stalinist economy.²⁴⁵ Now, however, Vietnam's economy appears to be at a crossroads. While investors wait to see what direction the Vietnamese government intends to take regarding economic reform, foreign investment has declined by approximately forty-two percent.²⁴⁶ Early indications of the government's intentions

ty Classics 1981) (1775).

241. See Ngo, *supra* note 182, at 82. A prime example of this belief is the requirement that before the government approves an investment project, it must be satisfied that the project will "improve the economy without undermining the control of the Communist Party." Stauch, *supra* note 10, at 1032. In addition, as part of its policy statement, the Vietnamese congress in June 1996 proposed a plan to "establish Communist Party cells at foreign joint ventures." *Foreign Direct Investment: Communism Is Still a Priority*, EIU Business Reports, June 30, 1996, available in LEXIS, Asiapc Library, Alleiu File.

242. See Stauch, *supra* note 10, at 1030.

243. Some old-school communists already have "question[ed] the value of the U.S. relationship and [have] urg[ed] Vietnam to pay more attention to improving ties with China." Richburg, *supra* note 228, at A10. Recent signs of the Vietnamese government's growing unease at the increased foreign influence in Vietnam include the jailing of dissident Buddhist monks, see *supra* note 139 and accompanying text, the closure of a newspaper for reporting on government corruption, see *supra* note 140 and accompanying text, and the announcement of a campaign against social vices and negative foreign influences. See Adrian Edwards, *Vietnam's Rulers Grow Wary of Foreign Influence*, Reuters World Service, Dec. 28, 1995, available in LEXIS, Asiapc Library, Vietnam File.

244. Kristin Huckshorn, *Vietnam's Tide of Negativism Turns Foreign Investors Wary*, PORTLAND OREGONIAN, Sept. 29, 1996, at A9, available in 1996 WL 11388795 (quoting a Western businessman "disillusioned with pervasive corruption and legal ambiguities").

245. See Chua, *supra* note 4, at 2.

246. See John Chalmers, *Vietnam's Economic Reform at Critical Stage*, Reuters

are not good—the Communist Party issued a draft report prior to its Party Congress in June 1996, urging that reforms “be accompanied by the strengthening of the role of state management along the socialist line.”²⁴⁷ If the Vietnamese government wants to sustain Vietnam’s economic growth, then it must be willing to relinquish some of its power and let the “invisible hand” of the market guide the recovery. To that end, Vietnam certainly will benefit from its membership in ASEAN, which commits it to the path of economic liberalization.²⁴⁸ ASEAN membership alone will not be enough, however, and the Vietnamese government will have to continue to take bold measures to convince foreign businesses that Vietnam remains a viable long-term investment. The biggest problem remains the large state sector.²⁴⁹ Despite eliminating direct subsidies to state-run enterprises,²⁵⁰ the Vietnamese government remains biased towards state companies to the detriment of the nascent private sector.²⁵¹ Instead of slowing down reform to consolidate its political position, the Vietnamese government must maintain the pace it has set and take steps to “allow private firms and state companies to compete on equal terms”²⁵² if it hopes to give American businesses a reason to continue to pressure the U.S. government to extend MFN status to Vietnam.²⁵³

CONCLUSION

Vietnam has come a long way from the post-Vietnam War period, when it allied itself with the Soviet Union and adopted socialist planning principles. The overhaul of the system that be-

Business Reports, June 19, 1996, available in LEXIS, Asiapc Library, Vietnam File.

247. Chua, *supra* note 4, at 1 (quoting a draft report issued by the Communist Party for the Vietnamese congress).

248. See *supra* note 162 and accompanying text.

249. See Reginald Chua, *Hanoi Needs New Policies To Buoy Growth*, U.N. Says, ASIAN WALL ST. J., Nov. 27, 1996, at 3, available in 1996 WL-WSJA 12479160.

250. See *supra* note 134 and accompanying text.

251. See Chua, *supra* note 249, at 3; see also *supra* note 135 and accompanying text.

252. Chua, *supra* note 249, at 3.

253. The Vietnamese government would do well to recall the promise the country showed back in the early 1990s when American businesses played such a large role in convincing then-President Bush to begin the normalization process. See *supra* notes 57-59 and accompanying text.

gan in the mid-1980s has produced some impressive economic statistics and bodes well for Vietnam's economic future.²⁵⁴ This future no doubt would be enhanced greatly by a grant of MFN status from the United States, which would allow Vietnamese companies to export their products to the United States at the lowest available tariff rates.²⁵⁵ The grant of MFN status from the United States also would significantly improve Vietnam's chances for gaining membership to the World Trade Organization (WTO), thereby integrating Vietnam more fully into the global community.²⁵⁶ Both MFN status as well as Vietnam's future prosperity, remain heavily dependent upon the political will of the Vietnamese government. Should Vietnamese leaders realize that the key to their country's success is to allow economic liberalization to take its course and decide to help it along with

254. See *supra* notes 4-6 and accompanying text.

255. See *supra* notes 14-15 and accompanying text.

256. The World Trade Organization (WTO) is the legal and institutional foundation of the multilateral trading system, which came into force on January 1, 1995. See Thomas J. Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 357 (1995). The WTO replaces the General Agreement of Tariffs and Trade (GATT), which previously had governed multilateral trade. See *id.* Through membership in the WTO, Vietnam seeks to stimulate its economy, gaining the benefits of lower import tariffs from other member countries as a part of the MFN principle. See Le Minh Quan, *Vietnam Seeks To Join GATT with MFN Status*, VIETNAM INVESTMENT REV., June 28, 1993, available in LEXIS, Asiapac Library, Vietnm File.

In July 1994, Vietnam received WTO observer status, which allowed it to attend WTO Council meetings and participate in discussions upon invitation. See Quoc Vinh, *Vietnam: Vietnam Granted GATT Observer Status*, VIETNAM INVESTMENT REV., July 25, 1995, available in LEXIS, Asiapac Library, Vietnm File. In January 1995, a working party was formed to consider Vietnam's request for accession. See *International Organization Update: WTO, INDOCHINA DIG.*, Feb. 10, 1995, available in WESTLAW, Apbus Database. Despite this progress, however, Vietnam is still considered to be at least a year away from full membership in the WTO. See *WTO Bid*, BUS. VIETNAM, Dec. 1996, available in LEXIS, Asiapac Library, Vietnm File. Even if Vietnam should gain WTO membership prior to negotiating a bilateral trade agreement with the United States, it still will not be entitled to automatic MFN status, however. Under GATT Article XXXV, the agreement will not apply between a new member and any other member if "at the time of accession neither party has entered into tariff negotiations with the other, and the other member does not consent to the application." Gardner Patterson, *The GATT: Categories, Problems and Procedures of Membership*, 1992 COLUM. BUS. L. REV. 7, 8. In other words, the United States may still continue to deny Vietnam MFN status if they are unable to reach agreement on a bilateral trade accord.

the necessary legal reforms, then Vietnam will be successful in sustaining its current level of economic growth and will provide a lucrative opportunity for foreign investors.

For the United States, the time has come to look past its hard feelings towards Vietnam and recognize the potential benefits to U.S. businesses that a formal trading relationship between the countries will bring. As discussed previously in this Note, Vietnam has met all of the procedural requirements under U.S. law, leaving only the bilateral trading agreement to be negotiated. To be sure, the United States should make every attempt to satisfy itself that Vietnam truly intends to meet international standards in its trade and investment regime before deciding to grant Vietnam MFN status, but it would be a mistake to wait too long and potentially miss out on the benefits of a strong trading relationship with the next "Asian tiger."

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