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LAW REFORM IN VIETNAM: THE UNEVEN LEGACY OF DOI MOI

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INTRODUCTION

In March 1996, the two authors of this article, accompanied by three colleagues,¹ traveled to Vietnam at the invitation of the Vietnamese Ministry of Education. We were requested to give presentations on American business law at the National University in Hanoi and at one or two law schools in Ho Chi Minh City. The expedition unfolded into a marvelous cross-cultural exchange, providing revealing glimpses of the cultural and social milieu in which Vietnam is transforming its legal system.²

As a result of the program of social, political, and economic reforms called "*doi moi*" (meaning renovation) implemented by the Communist Party in 1986, market forces have been allowed to operate in Vietnam subject to state supervision. The centerpiece of *doi moi* has been to attract foreign investment. The results of this reform, as this brief article will show, have been mixed: South Vietnam has had far more success attracting foreign investors than North Vietnam, and

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1. Arthur Pinto of Brooklyn Law School, Andrea Catania of Seton Hall University School of Law, and Joan Schmidt, Esq., completed the entourage.

2. No single author's voice or perspective can convey our alternating sense of wonder and frustration. Where feasible, we have written jointly of our experiences. Each author, however, approached Vietnam from a different perspective. This was Professor Waller's first trip to Vietnam, motivated by a professional interest in the development of the country's nascent competition law and international trade law regimes, as Vietnam struggles with its transition from full state planning and strives for acceptance in the world trading community. Professor Cao, however, had grown up in Saigon and left behind friends and family when she emigrated to the United States in 1975. Her academic interest in Vietnam primarily lay in foreign investment and corporate law.

much of the foreign capital has flowed to the urban areas, leaving the countryside woefully underdeveloped.³

Even where development has progressed, however, the legal and other infrastructure has been inadequate to sustain the needs of a complex market economy. Furthermore, economic liberalization has not been followed by the same degree of political liberalization. Lastly, in pursuit of most-favored-nation [MFN] status, Vietnam has felt compelled to let the United States dictate the terms of trade, especially with regard to the enforcement of intellectual property rights. Vietnam, however, is still a poor country in which a black market for counterfeit goods thrives, partially because foreign brand-name goods are simply not affordable to the average citizen.

We prepared this article with three goals in mind. In Section I, we provide a general sketch of the role which foreign legal experts play in the law reform of transitional legal systems. In Sections II and III, we relate, through a series of vignettes, our experiences lecturing on U.S. law topics to Vietnamese law students and legal academics and conversing with ordinary Vietnamese citizens. Lastly, in Section IV, we reflect on the flourishing black market in consumer products in Vietnam and the futility of the current U.S. policy of making intellectual property rights enforcement the *sine qua non* of its trading relations with Vietnam.

I. THE LAW REFORM BUSINESS

In the West, law reform is booming as both a lucrative legal practice and a "feel-good" pro bono endeavor. Privatization work for governments in Africa, Eastern Europe, and Asia is a desirable aspect of international practice for major corporate law firms both in Europe and the United States. It is also probably the one type of law reform practice directly funded by a client. Other funded types of law reform tend to involve grants by charitable organizations, academic institutions, foreign governmental aid, or international agencies. For example, the World Bank funds a number of private lawyers to pro-

3. Most of the foreign investment projects have been concentrated in Ho Chi Minh City (700 projects), Ha Noi (325 projects), Dong Nai (263 projects), Ba Ria-Vung Tau (65 projects), and Hai Phong (72 projects). *Vietnam Has 2,320 Foreign Investment Projects Under Way*, ASIA PULSE, Feb. 23, 1998, at 1.

vide legal advice as part of its Structural Assistance Program.⁴ Similarly, the United Nations Development Program has funded a multimillion dollar law reform project in Vietnam.⁵ These lawyers typically draft and help implement commercial and business legislation for countries that are restructuring their economies toward greater reliance on market forces.

It is more common, however, for a lawyer engaged in the law reform business to be doing so on his or her own time rather than for a paying client. Not even governments are above soliciting pro bono advice on draft legislation, with at least the implicit inducement that contributing firms will enjoy a preferred position when the time comes to pay for legal advice.

Most governments do not have to solicit pro bono assistance. A tremendous machinery has developed for providing assistance—whether requested or not—in proposing, drafting, or critiquing draft constitutional and legislative provisions. The American Bar Association has an elaborate program called the Central and Eastern European Law Initiative [CEELI], which provides comments on draft legislation, conducts seminars for key legal decision makers in these countries, and sends short-term advisers and long-term consultants to these countries to advise their governments.

Most of the assistance has been offered on the basis of the foreign practitioner's specialty. A few professors and judges have offered a broader perspective on constitutional or judiciary issues, but the majority of law reform consists of private and government lawyers responding to a foreign initiative in specialized areas of practice. Commercial law professors and practitioners have assisted in foreign efforts to develop new commercial codes, asset-based financing, and payment systems; corporate lawyers have helped with privatization efforts and legislation permitting new forms of business organizations; customs lawyers have drafted legislation in their particular field; and so on.

4. See generally Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

5. See Robert Brown, *Legal Reform in Vietnam*, 1994 PRIVATE INVESTORS ABROAD 6-1.

In the field of competition and foreign investment law, law reform efforts have been particularly relentless. For substantive, diplomatic, and symbolic reasons, dozens of countries around the world have recently promulgated or revised their competition laws, with a total of more than fifty nations currently having some form of recognizable antitrust law. An even greater number has adopted new legal regimes that permit direct foreign investment, but with varying degrees of liberalization from the prior regimes.

It is not clear whether the United States and the European Union have created this demand for foreign and comparative law expertise or merely responded to it. Both have specifically required countries to adopt competition provisions as a condition of preferential trading access.⁶ Similarly, international organizations such as the World Bank have conditioned aid on the adoption of new domestic legislation, often including a competition and foreign investment element.⁷ Other international agencies are content to offer Western business law as part of a model for development or participation in the world trading system.⁸

Even the most good-hearted attempts to help with the law reform business bear substantial risks. For example, the American Bar Association, through the CEELI program, has provided opinions on draft legislation throughout the former Soviet Union and Eastern Europe, especially Albania, Kyrgyzia, Moldavia, Croatia, and Slovenia. With scant knowledge of the relevant languages and cultures, law reformers typically operate in a context-free void. Relying on translations of uncertain quality, they frequently offer unhelpful sermons on how U.S. and E.U. models should not be blindly transplanted into a new

6. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997).

7. See, e.g., Mark Dutz, Industry and Development Division, *Competition Law to Support Market-Oriented Reform: The Argentine Context* (The World Bank 1992).

8. See A STUDY OF THE SOVIET ECONOMY (1991) (Joint study by Organization for Economic Cooperation and Development, International Monetary Fund & World Bank offering recommendations for reform of Soviet economy); Organization for Economic Cooperation and Development, *Council Recommendation on Bribery in International Business Transactions*, reprinted in 33 I.L.M. 1389 (1994); David P. Fidler, *Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine*, 19 FORDHAM INT'L L.J. 529 (1995).

legal culture, or how the proposed legislation differs from U.S. or E.U. law.

An additional risk associated with the law reform business is that Western-style business law may be inappropriate for the receiving country, whether substantively, procedurally, or because it may interfere with more critical privatization and democratization efforts.⁹ Both Professor Cao and Professor Waller have written elsewhere about the danger of presuming the existence of universal models and that such models are often exported under the broad rubric of development, economic transformation, or, as in recent years, privatization.¹⁰ Professor William Kovacic has discussed the difficulties of promoting long-term, meaningful legal reform, the likelihood of failure when a foreign law expert “parachutes” into a foreign legal system for a series of brief visits, and the dangers of law reform efforts that serve the needs of the foreign law expert rather than the client.¹¹

China, for example, has pursued a model of economic reform wholly different from the path pursued both by the transitional economies of Eastern Europe and the World Bank's agenda.¹² Given the intersections of various historical, political, and cultural factors in the Chinese economy, it is doubtful

9. See A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUS. J. INT'L L. 311 (1996); A.E. Rodriguez & Mark D. Williams, *A Response to the Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 233 (1994); James Langerfeld & Marsha Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 AM. U. J. INT'L L. & POL'Y 347 (1991).

10. See Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOK. J. INT'L L. 97 (1995), reprinted in 4 FOREIGNERS IN CHINESE LAW, (Tahirih Lee ed., 1996); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557 (1994).

11. See William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U.J. INT'L L. & POL'Y 436 (1996); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253 (1991).

12. See generally Philip M. Nichols, *Privatization Along the Silk Road: A Comparison of Privatization Techniques in Central Asia*, 29 N.Y.U. J. INT'L L. & POL. 299 (discussing the “Chinese model” of privatization, which allows privately owned enterprises to thrive alongside large state-owned enterprises).

whether the prevailing model of privatization could have been successfully transferred to China.¹³ There is similar futility in transplanting culturally and historically contingent competition law to developing countries.¹⁴ The result is often reminiscent of the 1980 film *The Gods Must Be Crazy*, in which bushmen in the Kalahari Desert find and come to worship a Coke bottle thrown from a passing airplane—only later to rid themselves of the evil object by throwing it off the edge of the world.

II. TRAVEL TO VIETNAM

The purpose of our trip was to contribute to the law reform movement in Vietnam by offering our expertise on U.S. business law to law students and legal scholars who will be positioned to shape the legal infrastructure in the new Vietnam. To determine which subject areas would be most valuable to our audiences, we researched the literature on Vietnam's new openness to Western commerce. Despite its impressive volume, however, the bulk of the literature consisted of bland newspaper articles on "doing business in Vietnam." In fact, to our surprise, we uncovered few scholarly English-language treatments of *doi moi*.¹⁵

Furthermore, our sponsors were disappointingly unforthcoming regarding our precise mission—perhaps because they themselves were operating somewhat in the dark.¹⁶ We were told to prepare to lecture for three or four days at the

13. See Cao, *supra* note 10.

14. See Waller, *supra* note 10.

15. See Pham Van Thuyt, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Vietnam*, 27 LAW & POL'Y INT'L BUS. 541 (1996); Luke Aloysius McGrath, *Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 FORDHAM INT'L L.J. 2095 (1995); Brown, *supra* note 5; Mark Sidel, *The Re-Emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163 (1994); Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221 (1993).

16. Indeed, we are still not entirely certain about the identity of our sponsor. The individual who handled all contacts was a Vietnamese expatriate and co-author of a book on Vietnamese re-education camps. Most of the correspondence came from "The Vietnam Free Market Project," an organization which had sponsored a number of past excursions to Vietnam by U.S. business and law school professors. Our contact's letterhead, however, indicated an affiliation with the "U.S.-Asia Management Institute." Whoever the

National University of Hanoi and perhaps for one day at one of the two law schools in Ho Chi Minh City. Our audiences would consist of law students, professors, government officials, and perhaps judges. Based on this limited guidance, we decided to arrange the curriculum to provide a full-day introduction to the U.S. legal system, followed by half-day segments on business associations, the GATT/WTO system, foreign investment, and dispute resolution.

As the departure date drew near, most of the logistical arrangements remained unconfirmed and our teaching schedules remained unsettled. Accommodations had supposedly been made by the Ministry of Education in Ministry-run hotels, but we had not been provided with addresses. Our visas did not arrive until two days before our departure, after multiple pleas to the Vietnamese embassy in Washington, D.C., and the consulate in New York City, and after the tendering of an additional "facilitating" payment.¹⁷ Our American sponsor sent fifteen hundred dollars to pay our Vietnamese liaison who would be our contact for the twelve days in Vietnam. Thus, we set forth to practice what we had thus far only preached.

A. *Arrival in Saigon*

We landed in Saigon's¹⁸ Tan Son Nhut Airport, which, according to Professor Cao, had undergone a miraculous transformation since her 1991 trip. At that time the runway had been overcome with weeds, and a herd of grazing pigs could be seen from the airplane. Since then, the runway had been resurfaced and the herd of pigs had been replaced by a flock of airport buses sporting an ad that read "Pepsi Cola Welcomes You to Ho Chi Minh City." We were told that the Vietnamese government had decided to create a better first impression for the increasing numbers of foreign visitors.

On the night we arrived, it was 92 degrees and muggy. Casting our eyes around the terminal, we speculated that air-

real sponsor, it received its funding from the United States Agency for International Development.

17. Under the exception provided in the Foreign Corrupt Practices Act of 1977, 15 U.S.C. sec. 78(dd1-2), facilitating or expediting payment to secure the performance of a routine governmental action by a foreign official is exempt from the act's coverage.

18. Everyone, including government officials we met, still calls the city by its former name.

ports often mirror the local and national character, recalling the heavily garrisoned Seoul Kimpo Airport, the unconscious multiculturalism of Heathrow, and the bedlam of Kennedy International. Tan Son Nhut smacked of a Stalinist dictatorship. It was unearthly quiet. Immigration officers sat beneath signs warning travelers not to leave their money folded inside their passports or travel papers. Clearing immigration required the production of exactly one more photo than anyone had told us to bring. Conveniently, there was a woman with an old Polaroid who took pictures for \$2 in U.S. currency. We watched with curiosity as customs officers carefully inspected passengers' books and audio tapes and viewed video tapes on a miniature VCR. Vietnamese returning from overseas were targeted more regularly than foreign tourists. Despite the subversive implications of the U.S. Constitution for a Stalinist state, our law books ended up attracting no special attention.

It was ten o'clock p.m. when we left the customs area into a swarm of people yelling to friends and of livery drivers trying to attract customers. We were greeted by our hosts, two men and a woman, and loaded our things into their van. Even at this hour, utter chaos ruled Saigon's streets. There were no traffic lanes, no visible demarcations, and no double lanes that divided one side of the street from oncoming traffic. Horns reigned over brakes. Our driver artfully snaked through traffic, oblivious to the swarms of bicycles and motorbikes that engulfed us at every traffic stop. Young couples riding double on motorbikes shouted to friends at each intersection.

Our hotel turned out to be a no-frills affair. The bedroom was sparse and clean, but completely lacking in the usual amenities most non-backpackers over thirty would prefer. We later moved to a more centrally located hotel, the Rex, known before the fall of Saigon as a charming, colonial-era hotel frequented by Americans for its roof-top pool and bar. The hotel was attractively appointed in a style combining traditional regional Vietnamese decors and provided a level of service matching if not surpassing the best luxury hotels of the West.

B. *Trip to the Mekong Delta*

One of our two male hosts picked us up at five o'clock the next morning to take us on a tour of Long Xuyen, a province in the Mekong Delta, where Professor Cao's uncle happened

to live. Our host had brought along his high-school-age daughter, who was eager to practice her conversational English with us. The father immediately invited us for lunch at his house. In fact, his wife, he informed us, was already in the process of preparing a traditional Vietnamese meal. Along the way, we managed to snap a few photographs of the beautiful countryside. We were particularly taken by scenes of children tending rice fields on the backs of water buffaloes. Our host, however, evidently considered lunch to be the day's main event, and continually hurried us along.

During the ride, our host unexpectedly asked us if we would aid him in his attempt to leave Vietnam. Specifically, he asked us to write letters in support of his application via the Orderly Departure Program—a program intended to lessen the flow of refugees out of the country. We listened with interest to his personal history, including his decision not to accept a helicopter ride out of Vietnam on the day of Saigon's fall, his time spent in a Communist re-education camp, and the discrimination suffered by his family.

After we arrived at his house in Long Xuyen, our host telephoned Professor Cao's uncle, who lived nearby, and invited him to lunch. The uncle had been a member of the National Liberation Front (Vietcong), and had remained in Vietnam after the fall of Saigon. Having dedicated his life to the revolutionary cause, he had been rewarded with a high-level government post at the province level. The uncle, now retired, arrived for lunch on a Honda motorcycle, sporting a Reebok cap.

Lunch turned out to be a sumptuous feast of caramelized pork, tamarind-laced fish soup, and an assortment of sautéed vegetables. The uncle inquired about his family in the United States, particularly about his three children. His son had once been a member of the elite South Vietnamese airborne troops. From his questions, however, it was clear that he was far more interested in learning how to attract foreign investment to the province of Long Xuyen.

Our journey into the heartland of the country revealed that Vietnam is indeed a very poor country. Viewing only the relatively wealthy Saigon, a visitor could easily forget that the average annual per capita income is only a few hundred dollars, and often much less in the countryside. We also wit-

nessed firsthand the need for modernization projects that focus on rural development. In Vietnam, where the majority of the population inhabits the countryside, the rural provinces strongly resist the influence of the central authorities—a phenomenon summed up by the adage “Even the emperor’s law stops at the village gate.” The central government’s historical, albeit reluctant, acknowledgment that the formal law of the central government must defer to the informal law of the village has led to an over-concentration of political and economic power in metropolitan areas and to the underdevelopment of the countryside. This skewed development and dichotomy of power forms the operational code of Vietnam, a reality frequently overlooked by Western law reformers and foreign investors.

Investors who have relied on the published laws and regulations to obtain licenses from central government agencies for countryside construction projects have tasted firsthand the strong will of the provincial authorities. In many cases, no license, approval, or document from the central authorities will have the intended legal effect. We learned of one hapless investor who constructed a tall office building pursuant to a building permit issued by a Saigon agency, only to be ordered by the local provincial office to tear down the top floors. The building, claimed the local government officials, cast an unacceptably dark shadow on the provincial office, sowing bad luck for its occupants.

III. STILL TWO COUNTRIES: LAW SCHOOLS IN VIETNAM

In 1954, Vietnam was divided politically into North Vietnam and South Vietnam pursuant to the terms of the Geneva Accords. What many people do not realize is that prior to that time, Vietnam had in fact existed as two independent countries for two centuries.¹⁹ Although Vietnamese nationalists are opposed to thinking of a divided Vietnam, our experiences at the law schools in Saigon and Hanoi clearly reflected a lingering sense of one geography, two countries. In the South, there was an obvious need for legal and other infrastructure to accommodate the flood for foreign investment. By contrast, our impression from discussions with faculty at Hanoi Law School

19. See JOSEPH BUTTINGER, *VIETNAM: A POLITICAL HISTORY* (1968).

indicated that in the North, law reform takes a backseat to the desperate quest for foreign investment.

A. *Saigon Law School*

As it turned out, we would not be lecturing at the law school in Saigon, but only meeting informally with its faculty. We arrived at the school mid-morning and were escorted by our hosts past a seemingly endless row of parked bicycles and motorbikes to a conference room adjacent to the Dean's office. The Dean lead us into her office, which was already occupied by several faculty members. The Dean was a woman in her thirties who had spent nearly a decade studying law in Moscow, only to return home and find those skills no longer in high demand. Her ability to serve effectively as Dean in these changing times, however, suggested that she possessed great flexibility.

By way of introduction, the Dean explained that her law faculty was run by the Ministry of Education and that it was in the process of merging with the other law faculty in Saigon, which was run by the Ministry of Justice. The combined institution would be run by the latter ministry, and the combined deanship would be assumed by the other institutute's present dean, a more senior man with ties to the Ministry of Justice.

As we entered the room with the rest of the faculty, Professor Cao encountered a Saigon law professor she had met six years earlier in New York City. This professor—whose identity we will not divulge for his sake—had earned an LL.M. from an American law school that sufficiently tainted him to warrant a sentence of "indefinite solitary confinement" lasting fifteen years. Ironically, he had willingly returned to Vietnam only a few months before the end of the war on the mistaken belief that his lack of political involvement would pose no danger to him. In the course of our conversation, he told us, "You must understand that in Vietnam, law is the way that the state exercises its power." Professor Waller replied that a majority of American law professors would probably agree with that statement, realizing only later the trivial sense in which such terms are bandied about in the United States, and the true impact of the Saigon professor's words.

We gave an overview of U.S. constitutional principles, the litigation system, and the criminal justice system. The Saigon

faculty, in turn, explained their school's evolving law curriculum, which was attracting an increasing number of Saigon undergraduates. The school had many more required courses than American law schools, some being general studies courses unrelated to the law, others being the standard Marxist-Leninist material that has vanished from the curricula of most socialist countries since the fall of the Soviet Union.

We learned that the organized bar in Vietnam is tiny. An entire generation of adult Vietnamese grew up without any formal legal education. For years, those who practiced law during or before the war were often subjected to forced labor, prison camps, and banishment. In the South, only a few lawyers remain who practiced before the end of the war. Most are now elderly and retired, and in no position to influence the practice of law, let alone its reform. Practicing senior attorneys are even more scarce in the North. While the population of young lawyers who have received their degrees since 1990 is increasing, most lack the experience or stature to lead in their profession.

The growth of the bar was also limited by stringent examination and practice rules, which required internships under the direction of existing bar members. Some members refused or were unable to take on new attorneys, effectively ensuring that the number of new lawyers entering the profession each year was reduced to a trickle. As a result, more than half of Vietnam's judges and over sixty percent of its prosecutors have had no formal legal training. Until about five years ago, these jobs were mainly bureaucratic assignments in the Ministry of Justice.

B. *Hanoi Law Schools*

The National University in Hanoi unexpectedly canceled our first day of lectures. When we arrived with our colleague, Arthur Pinto, at the campus, we were promptly led into the office of the Vice-Chancellor of the International School. The Vice-Chancellor greeted us warmly and offered us chilled bottled water and mangoes. After exchanging pleasantries, the electricity suddenly failed. During our conversation, the power went out two or three more times. With each blackout, a student assistant scurried to the window to let light in through the shutters. All the classrooms, we were told,

opened onto the quadrangle so that the law classes could continue without power.

The university matriculated approximately eleven thousand students, of whom forty-two hundred were part of the law faculty. There were twenty-five full-time legal academic staff, with 150 part-time instructors. Similar to the European model, the first three semesters of the students' degree were dedicated to general studies. Required subjects included Political Economy, Introduction to Sociology, Introduction to State and Law, Introduction to Political Science, Introduction to Population Issues, Philosophy, Practical Vietnamese, Introduction to Logic, Mathematics, and Informatics (Computer Science). Optional courses included a wide variety of social and natural sciences.

The next five semesters focused on legal studies. To reach this second stage, students had to pass a comprehensive examination which tests their knowledge of philosophy, theory issues on state and law, and either English or French. During this second stage, students are required to take courses in Communist Science, History of the Vietnamese Communist Party, Practicing Army, and a foreign language. We were informed that English has rapidly replaced Russian as the preferred foreign language.

The school offered twenty-four basic legal subjects, some of which bore titles familiar to American law students.²⁰ There were also twenty additional specialized courses organized under headings for State Management, Justice, Economic-Civil, and International Law. Finally the students were required to undertake five months of practical training at the end of their third year and again at the end of their final year.

Our arrival on campus had evidently stirred up considerable confusion. The Dean of the law faculty was willing to meet with us, but apparently no one in the law faculty nor any of the students had been informed of our visit. The Dean's office

20. *E.g.*, Theory Issues on State & Law, History of State & Law in the World, History of State and Law in Vietnam, Constitutional Law, Administrative Law, Criminal Law (I & II), Civil Law (I & II), Economic Law, Public International Law, Private International Law, Marriage & Family Law, Labor Law, Criminal Procedure, Civil Procedure, Constitutional Law of Foreign Countries, Finance and Banking Law, History of Political Theories, Theory & Skill of Drafting Legal Documents, Social Security Law, Comparative Law, Environmental Law, and Land Law.

was a large, sparsely furnished room with a desk, a conference table, ten chairs, and a bookcase containing what we were told was the school's entire collection of foreign language materials—perhaps twenty-five treatises of English and American origin and a couple of French and German volumes.

We were soon joined by some members of the faculty who happened to be free at that time. One was an elderly man whose legal career clearly predated the unification of 1975 (and possibly even the rise of Ho Chi Minh in the 1940s). A second was an assistant professor in his twenties; a third was a woman who appeared to be in her early thirties; and the fourth a slightly older man with a mustache, whose position remained unclear.

We conversed mainly with the younger faculty members, whose business law interests and English skills made conversation easier. The professor in his twenties informed us that he taught banking law, a subject which he claimed existed as of yet "only in the classroom" in Vietnam. He grilled us on a variety of issues relating to business organization and joint ventures in a manner which led us to suspect that he was working on some very specific foreign investment transaction in his other capacity as a practitioner with one of the emerging Vietnamese law firms.

The woman appeared the most Western in terms of dress, mannerisms, comfort with English, and knowledge of legal topics. Her areas of expertise were public international law and international trade. She was the only member of the faculty to have spent time in the West, having studied for a year at the University of London. The man with the mustache never uttered a word, leading us to surmise that his role may have been more political than academic.

A lecture to the students was arranged for the following day. Ignoring our prepared lecture plan, the Dean requested an afternoon lecture on corporations and business organizations. One of the professors later apologized, explaining that the other subjects in our planned lecture were simply "too political."

1. *Lecture at National University, Hanoi School of Law*

When Professors Pinto and Cao returned the following day to present the lecture, the students had been gathered and

were waiting. They stood as we entered the room, and remained standing until we asked them to sit. The school provided an interpreter, and Professor Pinto began by speaking generally on the basics of American corporate law. He covered the mechanics of incorporation, the general notion of limited liability, basic agency principles that govern the relationships between shareholders, directors, and managers, the regulation of the U.S. securities market, and general notions of disclosure, transparency, and shareholders' rights.

The lecture aroused considerable interest among students and professors alike. Vietnam was beginning to embark upon the Chinese model of development and privatization—a “market socialist” economy in which a non-state sector is made to coexist with the state sector, with a limited transfer of state shares to private interests. A question which students and professors repeatedly asked in varying forms was whether it is true that anyone can form a corporation in the United States. Not satisfied with Professor Pinto's answer (“Yes, although some states require incorporators to be at least eighteen years old”), many persisted: “Anyone? From any political party?”

When Professor Cao spoke on the various models of foreign investment, the issue which seemed to interest the students most was how to attract foreign investment. Here, regional differences between North and South Vietnam appeared most stark. While Vietnam had succeeded in attracting a great deal of foreign investment—primarily through joint ventures—most of the capital and technology had flowed to the South, to Saigon and its immediate vicinity. Foreign businesspeople typically went to Hanoi only for the limited purpose of negotiating the licensing agreements with certain governmental departments. Whereas the law faculty in Saigon was interested in American civil procedure and separation of powers, the law faculty in Hanoi displayed more interest in foreign investment and trade issues. Several questions related to the American trade embargo and the possibility of Vietnam's accession to the World Trade Organization.

2. *Phuong Dong University*

Professor Waller lectured alone the next day at the new private university of Phuong Dong. The very concept of a private university was intriguing. There had been no such crea-

ture in the South since the 1975 reunification, and presumably none in the North since the defeat of the French in the 1950s.

Phuong Dong University consisted of two buildings rented from one of the public universities. The Vice-Chancellor explained to Professor Waller, over the obligatory bottled water and mangoes, that the University was three years old, and thus had no graduates yet. There were eight hundred students per class, and students could major in three areas: Law, Business, and Foreign Languages. The tuition was roughly double that of a state university, at \$200 per year. In response to Professor Waller's question about how the University attracted students, the Vice-Chancellor explained that the National University had rigid quotas for each entering class, so the demand for a university education left many excellent students to attend the private university. Other students came from families that had a preference for a private-sector education, and a number of the students were full-time employees, typically in government ministries, whose tuition was subsidized by the state.

The Phuong Dong faculty was small, the library non-existent, and the buildings more cramped and shabbier than those of the National University. But the spirit was refreshingly liberating. The Vice-Chancellor gratefully accepted Professor Waller's gift of a pocket version of the American Constitution. He encouraged Professor Waller to speak about the basic structure of the Constitution and the U.S. legal system. There was no suspicion, and no fear of treading on forbidden political topics—only an eagerness to have his American guest make a presentation to the law students.

Professor Waller lectured in the main classroom to over one hundred students from all three class-years. He outlined the basic structure of the Constitution, pitched somewhere between an American high school civics course and a college introductory course to American government. He covered the history of the American Revolution, the concept of separation of powers, and the functions of the three branches of government. The students were attentive, occasionally interrupting the translator when they felt he had made a mistake in the translation.

The Vice-Chancellor insisted that Professor Waller return for the afternoon to have informal discussions with the stu-

dents. The students spent their lunch hour writing out questions in Vietnamese to be read to Professor Waller through the translator. Most were routine questions about Professor Waller's law school and his role as a professor. How big was the school? How many professors were there? How much was the tuition? What classes were required for an American law student? How much money did American lawyers make? Was there much unemployment for lawyers after graduation? What subjects did he teach? And so on. Professor Waller used the last question to introduce the concept of antitrust law in three minutes, wondering how even the most basic concepts of the rules of fair competition were coming across through translation. He also spoke at length about clinics, externships, and summer jobs as ways in which American law students gain practical experience while in school. There were apparently few such opportunities for these students, but there was great interest in the concept.

The second largest cluster of questions related to Professor Waller's morning lecture on the Constitution. What were the requirements to be President of the United States? What does the Vice-President do? Does the Constitution discuss the role of the political parties? (Professor Waller responded, respectively, "The president must be thirty-five years of age and a native-born citizen"; "We're not really sure besides preside over the Senate and cast tie-breaking votes"; and "No.")

The questions on American politics were markedly more interesting: "Can the Communist Party run candidates in U.S. elections," and "What is the overall role of the 'Party' in American society?" Professor Waller explained that the Communist Party and any of the various socialist parties were legally permitted to run candidates, but that to the best of his knowledge, no Communist Party candidate had ever won a single election at any level. Socialist candidates had received varying portions of votes in past elections, and only one member of the House of Representatives was not a member of either major party and had identified himself as a Socialist in the past.²¹

"Was he a Democrat or a Republican?" Professor Waller explained that while it depended somewhat on the specific candidates and the specific office under consideration, he almost always voted Democratic. This, he explained, was a func-

21. Vermont independent Rep. Bernard Sanders.

tion of his growing up in Chicago, which like Vietnam had a one-party system. It was unclear whether anyone understood that this was said tongue-in-cheek—we fear that years from now, some prominent Vietnamese government officials may puzzle over notes indicating that, alone in the United States, Chicago is ruled by the dictatorship of the proletariat.

On occasion, Professor Waller had to stop and put himself in the shoes of the questioner in order to understand the question. For instance, “Was there a gap in American law?” Professor Waller fumbled with some generalities while trying to grasp the essence of the query. He thought back to the banking law professor at the National University who taught a subject that did not yet exist in Vietnam. He ended up responding that there was no specific subject matter gap in U.S. law, but that the law in the United States was always trying to catch up to changes in society. The greatest persistent gap, he concluded, was the difficulty of eliminating discrimination and ensuring equal justice regardless of wealth.

The final question was illuminating. One student wanted to know whether there was much discrimination against students who attend private schools. This question spoke volumes regarding the continuing struggle of a private-sector institution in Vietnam, even after *doi moi*. The students seemed pleased, but dubious, when Professor Waller told them that the reputation of the school is more important in the United States than whether the school is public or private, and that, in fact, many of the finest schools were privately operated.

IV. LAW IN ACTION IN VIETNAM: INTELLECTUAL PROPERTY ENFORCEMENT

Our sojourn also provided us with the opportunity to witness firsthand how the law is enforced in Vietnam and what the law means to the average Vietnamese citizen. Popular attitudes and norms regarding the role of law have obvious implications for the task of law reformers. The most conspicuous indicator of such attitudes was the proliferation of a black market for counterfeit goods—especially music CDs.

Unlike the central role the enforcement of intellectual property rights plays in U.S. foreign policy, in many Asian countries, market opportunities rather than bilateral diplo-

macy ultimately determine the level of enforcement and the availability of black-market counterfeit items. Since the 1980s, the United States has made enforcement of intellectual property rights a major international trade priority. Section 301 of the Trade Act of 1974 has been amended and vigorously enforced to allow the United States unilaterally to impose sanctions on countries that habitually violate the intellectual property rights of U.S. firms.²² Preferential trading privileges with lesser-developed countries have been conditioned on the enforcement of intellectual property rights.²³ The United States insisted on a separate intellectual property chapter in NAFTA as the price for free trade with Mexico.²⁴ The United States also pushed hard for a separate intellectual property agreement as part of the Uruguay Round of the GATT.²⁵

Bilaterally, intellectual property rights have become the cornerstone of the United States' trading relationship with the People's Republic of China and a road map for its negotiating strategy with Vietnam. The United States has seemingly raised intellectual property issues above human rights and geopolitical issues. This policy has been for the most part unsuccessful, however, at achieving copyright compliance on the ground in Vietnam. Both in the North and the South, small merchants openly hock Guess jeans and belts, designer sport shirts, and famous label cosmetics at prices that scream counterfeit. The rumor among expatriates is that the local 7-11 is a knock-off, not licensed from the world-wide convenience store chain. Street-vendors everywhere sell bootleg copies of Graham Greene's *The Quiet American*²⁶ and Bao Ninh's *The Sorrow of War: A Novel of North Vietnam*.

The availability of *The Sorrow of War* was the most surprising. This anti-war novel, written by a former soldier in the North Vietnamese army, clearly reveals the conflict between the state and the market. *Doi moi* is about the opening of mar-

22. 19 U.S.C. sec. 2411(d)(3)(B)(II).

23. 19 U.S.C. sec. 2462(b)(4)(c)(5).

24. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 17, 32 I.L.M. 296 and 32 I.L.M. 605, (1993).

25. Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 83 (1994).

26. *The Quiet American* is a well-known novel of an American's experiences in Saigon in the 1950s at the close of the French colonial adventure in Vietnam.

ket opportunities, not the relinquishment of political control by the Vietnamese Communist Party. The Party was apparently willing to tolerate—or unable to stop—the sale of bootleg copies of this protest novel.

The small-scale copying of books, however, stood in quaint contrast to the wholesale copying of compact disks that we witnessed. These pirated CDs probably originated in China, although reports have surfaced that some CD factories were moved to Vietnam so that China could comply with copyright agreements while negotiating to join the WTO. On a busy intersection on the edge of Hanoi's old quarter we found a music shop offering a remarkably recent American top-40 list of CDs. The disks all cost three or four dollars, and, as in most of the tourist parts of Vietnam, prices were in U.S. dollars only. The proprietor proudly showed us one disk that was not on display. It was the latest album by Enya, the Celtic/New Age band—a CD that had not yet been released in the United States. We asked him if the disks were made in Vietnam. He shook his head no and pointed north, but was not amenable to discussing the topic further. The front and back of each disk we examined had a washed-out look indicating that it had been photocopied on a medium-grade color copier. One CD, Eric Clapton's *Unplugged*, had been re-typeset in broken English. Ironically, the copyright warning proclaimed, "All Rights Reserred. Unauthorised duplication is a ciolation of applica-ble larcs."

Vietnam presents a stark and difficult choice to the United States in negotiations toward either a bilateral treaty offering MFN status,²⁷ or accession to the WTO.²⁸ If the United States requires the promulgation and enforcement of full intellectual property protections as an initial condition of MFN trading rights in either context, it will achieve only a pyrrhic victory, creating a constant source of friction with a potentially valuable trading partner. The promulgation by Vietnam of copyright and trademark regimes ought to be accepted by

27. For the conditions under which the United States grants MFN status to Vietnam, see 19 U.S.C. sec. 2115.

28. Most-favored-nation status is automatically granted to all members of the World Trade Organization. See Agreement Establishing World Trade Organization, Apr. 15, 1994, 33 I.L.M. 15 (1994); General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 61 stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

the United States as a good-faith down-payment towards regular commercial and trade relations.

Furthermore, U.S. audiovisual and software sectors may well have to accept a certain degree of counterfeiting as the price of more general MFN trading and investment opportunities. While these sectors represent important and growing sources of comparative advantage, they have often dictated U.S. trade negotiating strategy, leading to blockages when more favorable deals were possible. Although they cite astronomical figures in theoretical sales lost to piracy, producers of brand-name goods actually lose little income in developing and transitional economies such as Vietnam. This is because the majority of the population that buys knock-offs of the brand-name goods would not be able to afford the real thing. The few individuals we observed with the disposable income in dollars to afford authentic Western merchandise typically buy these products as a potent symbol of their role in the new Vietnam.

Furthermore, any dilution of the value of the trademarks seems minimal when weighed against the trend of associating Western brand-names with the desirability and growth of market capitalism. Vietnam is struggling to develop a legal regime to protect even real property from the demands of the state—the requirements of creating an effective regime for all forms of intellectual property are beyond the country's current resources. The first order of business is to remove the heavy hand of government from all aspects of economic life, particularly in the North.

Although intellectual property piracy should not be endorsed, we may have to tolerate the problem temporarily and work to reduce it progressively by strengthening market mechanisms which will enable Vietnam to generate the export income to purchase the genuine products. But for the moment, piracy exists, and arguably we have the worst of both worlds: Vietnam has neither the incentive nor the revenue to deal with the problem, either through the law or through the market.

CONCLUSION

Our sojourn gave us a palpable sense that something new is emerging in Vietnam. It is likely that Vietnam will continue on a path of relatively non-ideological, market-oriented au-

thoritarianism, not unlike many of its Asian neighbors. It is also likely that in order for Vietnam to continue to grow its economy, further reforms will be required, and a vastly changed legal infrastructure will be central to that vision.

The new generation of law students and young legal scholars with which we had occasion to interact will likely be the ones who lay the legal foundation upon which the new Vietnam will interact with the international community. As much as there is a need for skilled Vietnamese legal practitioners to understand and interact with their Western counterparts, there is just as much need for foreign investors and law reformers to understand the implications of the political dichotomy in Vietnam, the disparity of wealth, the lack of senior legal scholars and practitioners, and the attitudes toward the rule of law that comprise Vietnam's unique legal culture.²⁹ We hope that our brief experiences educating young Vietnamese scholars about the American legal system, and this article, may help to bridge that gap.

29. For readers interested in providing Vietnamese law schools with seriously needed English language law books, items can be sent to:

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