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Lan Cao

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REFLECTIONS ON MARKET REFORM IN POST-WAR, POST-EMBARGO VIETNAM

LAN CAO*

I. INTRODUCTION

Vietnam's long war ended on April 30, 1975, more than twenty-five years ago. I was one of the lucky ones who was able to leave, and along with hundreds of thousands of others, made my new life in the United States, all the while with my eyes glued to the events in Vietnam. In *Midnight's Children*, Salman Rushdie told the story of a boy, Saleem, born on the stroke of midnight on the day India declared independence from the British.¹ By virtue of that coincidence, Saleem was bestowed—along with 1,001 other children born in the first hour of India's Independence, between midnight and 1:00 a.m. on August 14, 1947—with telepathic powers.² *Midnight's Children* is about the interweaving of myth, magic, and history in the little boy's life, a mythical refiguration, a surrealistic mirror in other words, of India itself, with all the cracks, fissures, dashed hopes, and unrealized

* Lan Cao is Professor of Law at the College of William and Mary, Marshall-Wythe School of Law. Professor Cao graduated magna cum laude, phi beta kappa from Mount Holyoke College and Yale law School, where she was an Editor of the Yale Law Journal. Professor Cao has published widely on a range of topics, such as privatization in transitional economies, globalization, U.S. trade laws, law and economics, and economic development. Her recent publications include *Chinese Privatization: Between Plan and Market*, 63 L. & Contemporary Problems 13 (2000) and *Looking at Communities and Markets*, 74 Notre Dame L. Rev. 841 (1999). In 1996, upon invitation from the Ministry of Education, Professor Cao delivered a series of lectures on international business law at the University of Ho Chi Minh City, Hanoi.

1. Salman Rushdie, *Midnight's Children* (Alfred A. Knopf, Inc. 1989).

2. *Id.*

aspirations that accompanied post-independence construction.³ As Saleem remarked self-importantly, "Thanks to the occult tyrannies of those blandly saluting clocks I had been mysteriously handcuffed to history, my destinies indissolubly chained to those of my country."⁴

To a certain degree, though on a much less hallucinatory or fantastic scale, the personal lives of many Vietnamese overseas in America remain tied, in one way or another, to the collective history of the country we left behind. Whether we like or dislike the new regime, even if we have severed ourselves from the government, the umbilical cord connecting us to the country remains strong. And so, it was with great emotional and political interest that we watched as Vietnam embarked first on a policy that walled the country off from the global economy, and then in recent years, a policy that has shifted the country's course away from separation, toward international integration.

The so-called "new"⁵ law and development movement, with its emphasis on market economics,⁶ is currently experiencing a resurgence, as interest in development shifts from one that relies on a declaration of a "right to development," and other rights under United Nations' auspices, to one that relies on market-based reforms.⁷ This essay briefly chronicles Vietnam's postwar years, its policy of isolation instituted after April 30, 1975, and its subsequent shift toward incremental reintegration with the global economy. After five years of negotiations, Vietnam has entered into a comprehensive bilateral trade accord with the United States, another step toward greater integration. With its new emphasis on more openness, more communication, and more connection,⁸ what else must Vietnam do to ensure that openness

3. *Id.*

4. *Id.* at 11.

5. "New," presumably, to distinguish itself from the out-of-style sociology-dominated law and development movement of the 1960s.

6. See generally Robert D. Cooter, *The Theory of Market Modernization of Law*, 16 *Intl. Rev. L. & Econ.* 141, 142 (June 1996).

7. See e.g. Lan Cao, *Toward a New Sensibility for International Economic Development*, 32 *Tex. Intl. L.J.* 209, 266 (1997) (discussing efforts to move the economic development debate from the market norms of the GATT/WTO to the norms of the UN, through the International Covenant on Economic, Social, and Cultural Rights; the declarations to a new international economic order; and a "right to development" in order "to create a more sweeping affirmative ethos deemed more conducive to the economic needs of the developing world").

8. *Investors Cautiously Applaud Vietnam Phone Rate Slash*, *Deutsche Presse-*

becomes a reality and to facilitate its transition from a closed, centrally planned economy to a more diverse market-based one? More specifically, which policies, given the structural and political constraints posed by Communist Party (Party) rule, will best facilitate its efforts at legal reforms to further its objective of economic integration and its self-professed commitment to the "rule of law"?⁹ This essay will situate these questions within the specific context of Vietnam's historical experiences with the Chinese, French, and Soviet legal systems.

I have, however, no grand conclusions to offer, partly because the observations in this essay are somewhat impressionistic, drawn from my personal experience and intuition, and partly because Vietnam itself has no comprehensive or grand conclusion either. One often hears that Vietnam and other countries such as China, and a few Eastern European countries, are not only "developing" but also "transitional"—that is, countries still not fully formed, not "quite there" yet, but on their way toward a place already predestined, probably very much like the place arrived at by Western industrialized countries. But as the writer Jorge Luis Borges remarked, "time forks, perpetually, into countless futures."¹⁰

My observations are limited to which future, among the innumerable ones facing postwar, post-embargo Vietnam, that Vietnam must *not* embrace. That it must abandon a command and control economy is clear, with its built-in ideological notion that the government is empowered to preempt all allocations except those planned, ordered, and administered by it. A system in which the government decides who is to enter into what kind of exchanges with whom, and in which quantities and for what purpose, does not have much to say in terms of allowing, much less furthering, individual rights and freedom.

Agentur (Sept. 22, 2000). As the deputy administration manager of the Directorate General of Posts and Telecommunications announced this year, "We want to facilitate Vietnam's process of integration into the global community and we want foreign investors to understand they are welcome in Vietnam." *Id.*

9. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 1 (1997) (discussing the varying interpretations of the "rule of law."). "The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before." *Id.*

10. Jorge Luis Borges, *The Garden of Forking Paths*, in *Collected Fictions: Jorge Luis Borges* 127 (Andrew Hurley trans., Viking Press 1998).

Vietnam is currently engaged in legal reform, or as the process has been popularly termed, the construction of a "rule of law." This is a term with problematic overtones. One could object that *what* the Western law-and-development advisers aim to introduce in a rule-of-law project is a cultural export that seeks to impose Western standards and understanding onto other societies. But an even more basic, first-order objection should be noted. The term "rule of law," and not just its content, whatever that may be, is value-laden. It assumes that certain societies that do not have the characteristics of a "rule of law" are characterized by anarchy and lawlessness, disorder and chaos, and must therefore be "remade," their culture re-invented from the outside in, from the top down. For example, is a society whose members are guided by, and comply with, traditional norms of behavior,¹¹ a society that is devoid of law? Should community reliance on traditional dispute resolution, such as informal mediation that emphasizes conciliation under the guidance of a community elder (usually male) be replaced by more institutionalized mechanisms consisting of courts and lawyers engaged in formal litigation? Are norms that exist outside the state-supported edifice of codes and rules less "law-like" than formal law? Indeed, scholars of the United States in recent years have studied the operation of informal community norms in a variety of settings and have suggested that such norms act not only as a guide for behavior, but also provide their own sets of enforcement and sanctions against breach. It is thus paradoxical that the law and development "rule of law" projects pay so little attention to the norms or private law of countries at issue, or more specifically, to the interaction between private law and state law in such countries—even while their counterparts in other fields of law are devoting time and intellectual energy to this very concept.

This criticism, however, is not intended to be an argument against legal reform as such, but merely against legal reform undertaken with the presumption that whatever system certain countries have, that regime does not qualify as law. It might very well be that pre-reform sets of rules, norms, standards, even formal laws, are not conducive to the establishment of a certain *type* of society or a certain *mode* of

11. That is, "informal" community or "private law"—rather than by the rules of "formal," state law enacted by the legislature. See generally Lan Cao, *Looking at Communities and Markets*, 74 Notre Dame L. Rev. 841 (1999).

economic system. This does not necessarily mean, however, that such a pre-reform regime is a Hobbesian one without a "rule of law."

The Vietnamese government, for example, has embarked on a path of "market socialism"—a market-based economy within the perimeters of government-controlled socialism. In this respect, it *is* appropriate and necessary to ask what type of law is required to support a market economy generally, and a market economy in a globalized system particularly. Does the current regime of laws, formal or informal, promote market exchanges? The government has proclaimed that it is putting into place a "rule of law." However, it seems that the Vietnamese government currently confuses the enactment of laws with the establishment of a "rule of law." "Rule of law," at least in the context of a modern, open-market system of economic exchanges, is something altogether different from "rule by law"—that is, the institution of multiple laws, decrees, and circulars that together add up to legislation overload, increased bureaucratization, and the very opposite of transparency, impartiality, and predictability—the basic principles necessary for a "rule of law" in a market economy. "Rule by law," in other words, means the state continues to rule by the use of "law" rather than by party fiat. "Rule of law," by contrast, implies a situation where the government's rule is itself constrained by the limits of law. A market economy, especially one that seeks integration with the global economic system, needs to ensure that its economic laws are transparent, impartial, and predictable. The obvious conclusion then, is this: The "rule of law" project for a country that seeks to establish a market economy is one that will put in place the values of transparency, impartiality, and predictability.

II. "DAY OF NATIONAL LIBERATION" AND YEARS OF POSTWAR ISOLATION: ANTI-MARKET, ANTI-CAPITAL, ANTI-INTEGRATION

In the Little Saigons scattered across the United States, April 30 is remembered as the Day of National Mourning. In Vietnam, April 30 is officially designated the Day of National Liberation.

For years since the war's end, Vietnam, under the control of the Party, has adopted a policy of national liberation—"liberation" of the market from individual bourgeois preferences and "liberation" of the national economy from the international economic system. Vietnam adopted economic policies that were aimed at ensuring Party control of the domestic market, while severing the domestic market from the

international market. When North Vietnam declared independence from the French in 1945, it adopted a central plan to ensure Party control of the market for the pursuit of economic policies that the Party favored. To the extent that a free market of voluntary exchanges reflects individual preferences, the Party took steps essentially to strangle the market and force it to reflect Party-imposed plans and preferences¹² in accordance with the Marxist view that markets are neither fixed nor natural, but contingent on, and a reflection of, social and hegemonic constructs. Hegemony—originally a Greek term used to designate the power of a state over other states, Athens over the other Greek states for example, or as it later came to be understood, the power of Prussia over the German states¹³—was later extended to include a system of domination that relies not on brute force, but on control by more subtle or seemingly consensual means.¹⁴ Building on

12. Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & Socy. Rev. 93, 98 (1998). According to a Vietnamese scholar, the Party's rule by decree ensured that individual preferences, whether as reflected in the economic sphere, or some other sphere, would be subordinated to the State's preferences.

Everything was prearranged by the State, while personal interests had to entirely submit to the interests of the State and the collective. Thus, there was only one option left for social relations: to obey the administrative orders issued from above and at all levels. In such a situation even a semblance of legality became superfluous or just a formality.

Id. (citation omitted).

13. 7 Oxford English Dictionary 105 (2d ed. 1989). Besides Gramsci's reformulation of the term "hegemony," it is also used in international relations to suggest the condition of control by one state over another, through force, culture, and economics. See generally William I. Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* 21 (Cambridge U. Press 1996).

14. See Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (Quintin Hoare & Geoffrey Nowell Smith eds., 1971) [hereinafter *Prison Notebooks*]. Gramsci explained the concept of hegemony as a condition in which the supremacy of a social group is maintained not by physical force or command, but by the submission of the very group dominated. Control must be maintained with "force and . . . consent, authority and hegemony, violence and civilisation." *Id.* at 180. The first type of control may be achieved through state action, the police, the army, and the courts. The second, more insidious, type may be achieved through the co-opting of dissent, the dissemination and perpetuation of the dominant beliefs as universal and natural and neutral—internalized and accepted by a range of institutions such as schools, churches, museums, and culture. Domination therefore is often achieved not through constant force, but through subtle and often consensual means. *Id.*

Marx's idea of a base and superstructure,¹⁵ in which Marx espoused a deterministic causality from the base, defined as the relations of economic production, to the superstructure, consisting of law, morality, and ideology, Marxists, such as Gramsci, introduced the idea of the "historical bloc"—consisting of "structures and superstructures."¹⁶ Thus, "[s]tructures and superstructures form a 'historical bloc.' That is to say the complex, contradictory and discordant ensemble of the superstructures is the reflection of the ensemble of the social relations of production."¹⁷ The idea of a historical bloc, which draws in other institutions neglected by Marx, such as art, education, and religion, but which also captures the degree to which the dominant order is reflected in and reproduces itself at multiple levels, does not mean that the economic sphere—the market—is not central. "For though hegemony is ethical-political, it must also be economic."¹⁸ If the market is a reflection of politics, then it should be politically controlled.¹⁹ The

15. Karl Marx, *Preface to A Contribution to the Critique of Political Economy*, in *The Marx-Engels Reader* 3 (Robert C. Tucker ed., 2d ed., W. W. Norton & Co. 1978).

16. *Prison Notebooks*, *supra* n. 14, at 377.

17. *Id.* at 366; see Giuseppe Fiori, *Antonio Gramsci: Life of a Revolutionary* 238 (E.P. Dutton & Co., Inc. 1971)

Gramsci's originality as a Marxist lay . . . in his argument that the system's real strength does not lie in the violence of the ruling class or the coercive power of its state apparatus, but in the acceptance by the ruled of a conception of the world which belongs to the rulers. The philosophy of the ruling class passes through a whole tissue of complex vulgarizations to emerge as common sense: that is, the philosophy of the masses, who accept the morality, the customs, the institutionalized rules of behavior of the society they live in.

Id.

18. *Prison Notebooks*, *supra* n. 14, at 161.

19. The Marxist critique of the market is based to a large degree on the notion that the market is by no means free nor reflective of individual preference, but rather a reflection of a hegemonic social order and vice versa. However, by no means is the critique of the market as a social construct solely a Marxist critique—communitarians and others have also questioned the claim of market advocates that the market is non-judgmental because it merely reflects individual preferences. See e.g. Mark Sagoff, *Should Preferences Count?*, 70 *Land Econ.* 127 (1994) ("Markets create desires . . . as quickly as they satisfy them; that is why there are salespeople. Markets, then, may be inefficient in the sense that the preferences they satisfy tend to be endogenous to them."). "As Sagoff suggest[ed], it cannot be argued that the satisfaction of preferences is a good thing in itself, for many preferences are sadistic, envious, racist, or unjust." Jane B. Baron & Jefferey L. Dunoff, *Against Market Rationality: Moral*

state therefore, in its construction of a socialistic society, should not favor individual or market-based preferences, but should seek affirmatively to inculcate socialist virtues, even if it means acting to circumvent the market or individual preferences as reflected in market transactions.

Like other countries that had liberated themselves from colonial domination, such as India under Gandhi and Nehru, Tanzania under Nyerere, or Egypt under Nasser, North Vietnam exhibited a profound distrust of market and market norms, and generally equated the market with foreign domination, colonialism, and imperialism, so that national liberation and anti-colonialism meant the imposition of anti-market, anti-capital economic policies in the name of nationalism. European capital accumulation, as Marx noted, was accomplished during the colonial times when "the treasures captured outside Europe by undisguised looting, enslavement and murder flowed back to the mother-country and transformed themselves into capital."²⁰ Given this history, for the developing world, foreign investment by capitalists from the developed world was viewed as a form of neocolonialism because it subjects the national economy to foreign control by, and dependency on, foreign capitalists in the developed world.

The dependency theory of development has generally meant the adoption of policies designed to extricate the national economy from the international economy,²¹ and to put an end to dependent development, that is Third World development dictated by the needs of the rich First World. As a result, economic development meant state control and administration of the national economy in a way that would reflect the preferences and developmental objectives of the state, and concomitantly, withdrawal of the national economy from the international. Trade barriers were instituted to keep out foreign goods and foreign capital and subsidies were bestowed on domestic industry. To accomplish this objective, Vietnam, through the Party, promptly brought the means of production under unitary state control after its declaration of independence. Lands belonging to "reactionary"

Critiques of Economic Analysis in Legal Theory, 17 Cardozo L. Rev. 431, 439 (1996) (citing Mark Sagoff, *Values and Preferences*, 96 Ethics 301, 302 (1986)).

20. Karl Marx, *Capital: A Critique of Political Economy* 823, 826 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Modern Lib. 1936).

21. See generally Richard Grabowski & Michael P. Shields, *Development Economics* 10 (Blackwell Publishers, Inc. 1996).

landlords and the French were nationalized,²² and agriculture and industry were placed under state and collective ownership,²³ most through administrative decree.²⁴ Similarly, pursuant to its policy favoring delinkage from the international economic system and economic self-reliance, the Party, following the victory of North Vietnam in 1975, extended the central plan already in place in the North over the entire country and collectivized agriculture in the former South Vietnam.

Economic production in Vietnam stagnated in the late 1970s and the 1980s.²⁵ The post-war economy suffered from hyperinflation, as annual rates exceeded 100 percent and reached 400 percent in 1985 and 1986.²⁶ Vietnam's standard of living declined precipitously, dropping to among the lowest in the world, with a gross national product per capita of \$200.²⁷ An aunt who remained in Saigon, and whom I visited in 1996, told me about a morning in early 1975 when she walked downstairs to find a couple of young North Vietnamese men in her kitchen, trying to make sense of the kitchen appliances. To her astonishment, they were trying to make coffee and had apparently mistaken her bra for a coffee filter. These were the same men who would be assigned to run her business, a small factory manufacturing "tiger balm" ointments that the government promptly confiscated. The

22. See John Gillespie, *Land Law Subsystems? Urban Vietnam as a Case Study*, 7 P. Rim L. & Policy J. 555, 566-67 (1998). "The Land Reform Law of 1953 . . . [and subsequent implementing decrees] . . . divided the . . . population along class-lines into landlords, rich peasants, middle peasants, poor peasants, agricultural laborers, and the urban proletariat." *Id.*

23. John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 Stanford J. Intl. L. 325, 331 (1994).

24. See Rose, *supra* n. 12, at 97 n. 10. Of the 1,747 legal documents passed between 1945 and 1954 in the North, only one was a formal law—the 1953 Land Reform Law. *Id.* The rest consisted of 621 presidential orders, 656 government decrees, and 413 ministry circulars. *Id.* In 1961, the Ministry of Justice was dismantled, and the Party, which ruled by decree, not legislation, controlled the executive bodies of the government. *Id.* at 97.

25. See generally Adam Fforde & Suzanne H. Paine, *The Limits of National Liberation: Problems of Economic Management in the Democratic Republic of Vietnam* (Croom Helm 1987); Dang T. Tran, *Vietnam: Socialist Economic Development, 1955-1992* (ICS Press 1994).

26. See Inst. S.E. Asian Stud., *Vietnam's Dilemmas and Options: The Challenge of Economic Transition in the 1990s* 4-5 (Mya Than & Joseph L.H. Tan eds., Inst. S.E. Asian Stud. 1993).

27. *Id.* at 31.

two had been buffalo herders before being assigned the job of factory manager.

In response to Vietnam's human rights abuses,²⁸ and the apparent lack of progress in the POW/MIA issue,²⁹ the United States reinforced Vietnam's segregation from the rest of the world by imposing an economic embargo on Vietnam throughout the 1970s and 1980s.³⁰ Economic contact with Vietnam was prohibited, including such commercial activities as export to Vietnam of all but the most basic humanitarian commodities,³¹ import of all Vietnamese commodities into the United States,³² the movement of U.S. ships and planes to Vietnam,³³ and the transportation of goods to Vietnam in U.S. planes and ships.³⁴

In 1986, Vietnam dramatically shifted course. Faced with economic decline and dwindling Soviet support, the Sixth Communist Party Congress announced that Vietnam, like China almost a decade earlier, would transform its centralized command and control economy into a market-based system open to foreign investment.³⁵ This pivotal shift, called *doi moi*, meaning "new day" or "renovation," was undertaken, among other purposes, to dismantle the collective farming

28. See generally Brad Parker, *Vietnam and Perspectives on Development Assistance and Human Rights* <http://members.aol.com/_ht_a/fanta07/myhomepage/artgallery.html> (accessed Apr. 4, 2001).

29. See generally Sen. Exec. Rpt. 103-1 (Jan. 26, 1993) (reprinted in 139 Cong. Rec. S688-06 (daily ed. Jan. 26, 1993)) (available in 1993 WL 14760) (POW/MIA Affairs); *National Defense Authorization Act for Fiscal Year 1995*, amend. nos. 1847, 1848 (reprinted in 140 Cong. Rec. S7587-88 (1994)) (available in 1994 WL 279514).

30. See generally Frederick Z. Brown, *President Clinton's Visit to Vietnam* <<http://www.asiasociety.org/publications/clintoninvietnam.html>> (accessed Apr. 2, 2001). In 1977, the Carter administration made overtures to normalize relations with Vietnam, whereby the U.S. would establish diplomatic relations with Vietnam, lift the embargo, and support international financial loans to Vietnam, as well as grant Vietnam most favored nation status. *Id.* Vietnam, however, demanded that the U.S. honor President Nixon's promise, under the 1973 Paris Peace Accords, of \$3.25 billion in economic assistance before it would accept the U.S. offer of normalization. *Id.* The U.S. responded with the claim that Hanoi's violations of the Paris Peace Accords nullified any obligation of economic assistance. *Id.*

31. 15 C.F.R. § 785.1 (1994) (amended at 59 Fed. Reg. 6524-25 (Feb. 10, 1994)).

32. 31 C.F.R. § 500.204 (1994).

33. 44 C.F.R. § 403.1 (1993) (revised at 59 Fed. Reg. 8412-01 (Feb. 22, 1994)).

34. *Id.* at § 403.2.

35. Gillespie, *supra* n. 23, at 325 n. 1. The official policy was announced at the 8th Plenum of the Communist Party of Vietnam, June 10-17, 1986. *Id.*

system, introduce a private sector, and encourage direct foreign investment.³⁶ Pursuant to the initial 1986 *doi moi* policy, the state retained its dominant role as economic planner while also taking steps to deregulate prices. Subsequently, the Party limited state ownership to key industries but liberalized the rest of the economy by allowing mixed state and private ownership, including foreign ownership.³⁷ *Doi moi* marked the beginning of the country's transformation—from a command economy under absolute Party control, insulated from the global economy, to a mixed market, on the way to re-integrating with the global economy.

On February 3, 1994, President Clinton lifted the U.S. economic embargo on Vietnam,³⁸ marking the beginning of a series of steps taken to normalize relations between the United States and Vietnam. Since 1994, the United States has established an ambassadorial level diplomatic relationship with Vietnam, allowed the Overseas Private Investment Corporation and the U.S. Export Import Bank to support U.S. exports to or operations in Vietnam, and granted a waiver from the Jackson-Vanik amendment.³⁹ Pending congressional approval is the comprehensive bilateral trade accord between the United States and Vietnam,⁴⁰ which is yet an additional step in Vietnam's efforts in recent years to liberalize the market, reverse its inward-looking policy in favor of a more outward-looking one that favors integration into the

36. See generally *Law on Foreign Investment in Vietnam with Amendments and Additions*, 30 I.L.M. 930 (1991) [hereinafter *Law on Foreign Investment*]. On December 29, 1987, the Eighth National Assembly of the Socialist Republic of Vietnam at its second session passed the *Law on Foreign Investment*. *Id.* at ch. VI, art. 42. See Vietnam Trade Network, *Law on Foreign Investment in Vietnam* <http://www.vitrinet.com.vn/fdi/luat/html/anh/1002_169.htm> (accessed Apr. 13, 2001).

37. See *Id.* at ch. I, art. 1; Gillespie, *supra* n. 23, at 325 n. 1; Vern Weitzel, *Const. of the Socialist Republic of Vietnam*, art. 26 <http://coombs.anu.edu.au/~vern/van_kien/constit.html> (accessed Apr. 12, 2001).

38. See generally Douglas Jehl, *Clinton Drops 19-Year Ban on U.S. Trade with Vietnam; Cites Hanoi's Help on M.I.A.'s*, N. Y. Times A1 (Feb. 4, 1994).

39. H.R. Asia & P. Subcomm., Intl. Econ. Policy & Trade Subcomm. of the Intl. Rel. Comm., *U.S.-Vietnam Trade Relations*, 106th Cong. ¶ 3 (Sept. 19, 2000) (statement of Representative Doug Bereuter, Co-Chair).

40. See Off. U.S. Trade Rep., *Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations* ch. 6, arts. 1-8 <<http://www.ustr.gov/regions/asia-pacific/text.html>> (accessed Apr. 12, 2001) [hereinafter *Agreement*].

global economy, and export promotion as the key to economic development.⁴¹

III. ECONOMIC REFORM, ECONOMIC LEGISLATION, AND THE BRIDGE BACK TO THE GLOBAL ECONOMY: "CAPITAL, CAPITAL, AND MORE CAPITAL"

As Mr. Do Muoi, Vietnam's then-Party Secretary, declared in 1996, the Party's new "slogan must be capital, capital, and more capital."⁴² Given the transnational mobility of goods, capital, and technology, economics is now essentially international. The preamble to the bilateral U.S.-Vietnam trade accord states that Vietnam "is taking steps to integrate into the regional and world economy by . . . joining the Association of Southeast Asian Nations (ASEAN), the ASEAN Free Trade Area (AFTA), and the Asia Pacific Economic Cooperation forum (APEC) . . ."⁴³ Vietnam is currently presiding for the first time over ASEAN, an irony President Clinton noted during an economic summit meeting in Brunei, as Vietnam "is heading an organization that was invented to contain it."⁴⁴

Like China's path of reform, the Vietnamese path is defined by the retention of the state's dominant role in the state sector and the creation of a parallel non-state sector consisting of private and foreign-invested enterprises.⁴⁵ In 1986, the Sixth Communist Party Congress, launching *doi moi*, issued an order to modify the command economy by permitting the institution of private and foreign-invested sectors.⁴⁶ In 1991, the Seventh Communist Party Congress extended *doi moi* to legal reform. Prime Minister Vo Van Kiet announced that, "there must be a complete change from bureaucratic management to running the

41. See Brown, *supra* n. 30.

42. Jeremy Grant, *Vietnam Party Chief Urges Debt Repayment*, Fin. Times (London) 3 (Jan. 15, 1996).

43. See *Agreement*, *supra* n. 40.

44. David E. Sanger, *Clinton In Hanoi, Intent on Forging New Relationship*, N.Y. Times A1 (Nov. 17, 2000) (quoting President Clinton).

45. See generally Justin Yigu Lin, *Why Has China's Economic Reform Been Successful?* <http://www.franserinstitute.ca/montpelerin/papers/china_success/> (accessed Apr. 4, 2001) (discussing China's economic reform).

46. See Luke Aloysius McGrath, *Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 Fordham Intl. L.J. 2095, 2095-96 (1995).

nation by law.”⁴⁷ The Constitution was revised in 1992 to reflect the state’s new priority—to “promote a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation.”⁴⁸

A market economy, in other words, is now permitted, as long as it does not unduly disrupt the government’s preferences of a “socialist orientation.” A private sector economy, under the 1992 Constitution, would be permitted, as long as it remains “under the management of the State” and does not threaten state ownership and the one-party apparatus. According to the 1992 Constitution, the Party remains the “force leading the State and society” and “the vanguard of the Vietnamese working class, the faithful representative of the rights and interests of the working class, the toiling people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh’s thought”⁴⁹ Indeed, in a prompt statement issued in response to President Clinton’s speech in Vietnam in November 2000 advocating a “more open, sophisticated free market, based on international rules of law,”⁵⁰ Mr. Le Kha Phieu, the Party’s General Secretary, warned: “Our economy has many sectors, in which the state sector plays the leading role. We have a private economy but we do not privatize the economy.”⁵¹

Like Deng Xiao Ping’s slogan exclaiming that “[t]o get rich is glorious” in China, “capital, capital, and more capital,” the Vietnamese government hoped, would come from the private sector, which includes the domestic private sector and the heavily promoted foreign-invested sector. Reflecting the policy of encouraging a private sector, the Law on Companies, for example, allows Vietnamese individuals to form private limited liability and shareholding companies.⁵² The Law on Private Enterprises permits Vietnamese individuals to establish their

47. See Rose, *supra* n. 12, at 99 (citation omitted).

48. Vern Weitzel, *Const. of the Socialist Republic of Vietnam*, art. 15 <http://coombs.anu.edu.au/~vern/van_kien/constit.html> (accessed Apr. 12, 2001).

49. *Id.* at art. 4.

50. Seth Mydans, *Clinton Basks in the Adulation of a City Once Called Saigon*, N.Y. Times A1 (Nov. 20, 2000) (quoting President Clinton).

51. *Id.* (quoting Le Kha Phieu).

52. See Pham Van Thuyet, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Viet-nam*, 27 L. & Policy Intl. Bus. 541, 563-67 (Spring 1996).

own private enterprises,⁵³ defined as “a business unit which has a level of capital no less than that of its legal capital, which is owned by an individual who shall . . . be responsible for its business activities.”⁵⁴

Similarly, reflecting the policy of promoting a foreign-invested sector, the government has passed a litany of laws to support both foreign investment and commercial transactions. The Law on Foreign Investment (LFI), passed in 1987,⁵⁵ was touted as “one of the most liberal foreign investment codes of any developing nation in the world, let alone Southeast Asia.”⁵⁶ The 1987 LFI, for example, provides for a duration period of twenty years for foreign-invested enterprises, which may be extended.⁵⁷ The LFI also assures investors that the invested capital and assets of foreign enterprises and private persons shall not be expropriated by administrative procedure, and that the enterprises shall not be nationalized.⁵⁸ It also allows foreign investors to set up wholly owned foreign enterprises,⁵⁹ rather than requiring foreign investors to do business through the joint venture form, whereby foreign investors may be relegated by law to minority equity ownership. Investors are also allowed to repatriate capital and profits freely.⁶⁰

Effective July 1, 2000, the National Assembly amended the LFI to further liberalize the country’s foreign investment regime.⁶¹ “The

53. See Batin, Ltd., *Law on Private Enterprises in Vietnam* ch. 1, art. 1 (amended June 22, 1994) <<http://www.batin.com.vn/vninfo/docs/t339.htm>> (accessed Apr. 13, 2001).

54. *Id.* at ch. 1, art. 2.

55. See *Law on Foreign Investment*, *supra* n. 36.

56. Thomas R. Stauch, Student Author, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 *Intl. Law.* 995, 1011 (1994).

57. *Law on Foreign Investment*, *supra* n. 36, at ch. II, art. 15.

58. *Id.* at ch. III, art. 21 (amended Dec. 23, 1992). The 1992 amendment to the Law on Foreign Investment emphasizes Vietnam’s commitment to adequate compensation in case of expropriation. *Id.* Art. 23 of Vietnam’s Constitution retains for the government the right to expropriate property upon payment of appropriate compensation in a freely convertible currency. Weitzel, *supra* n. 48, at art. 23.

59. *Law on Foreign Investment in Vietnam*, *supra* n. 36, at ch. II, art. 4(3) (forms of investment allowed consist of “[e]nterprise with one hundred (100) [percent] foreign owned capital.”) *Id.*

60. *Id.* at ch. III, art. 22. The fact that the local currency, the *dong*, is not convertible makes repatriation a problem, but that has to do with convertibility, not with restrictions imposed by the Law on Foreign Investment.

61. Natl. Assembly Vietnam L. No. 18/2000/QH10, 10-7 Legis. (June 9, 2000) (available at <<http://vietnam.com/Eng/BUSINESS/LAWS/Investment/investmentlaw/law18.asp>> (accessed Apr. 13, 2001)) (amendments & additions to *Law on Foreign*

unanimous voting principle in joint venture enterprises," previously required for certain joint venture actions, "was removed [with] respect [to] the appointment and dismissal of the Chief Accountant [and] approval of . . . [certain] loan arrangements."⁶² The amended LFI contains other provisions generally favored by foreign investors, including: (1) a new article allowing a foreign-invested enterprise to purchase foreign currency from banks to meet its current transactional needs;⁶³ (2) a provision reducing profits remittance tax rates to a low of three percent, five percent, and seven percent from the previous five percent, seven percent, and ten percent respectively;⁶⁴ and (3) a provision allowing investors to mortgage land use rights as security for loans from local and foreign banks.⁶⁵

By all indications, Vietnam is assuredly on the path toward integrating with the global economy and reducing barriers to trade. It has announced its intention to join the World Trade Organization and "plans to sweeten its bid . . . by offering initial market access in goods during the next round of entry talks."⁶⁶ According to estimates by the United Nations, Vietnam has attracted almost \$11 billion in foreign direct investment in the last five years.⁶⁷ The government has signed bilateral trade agreements with fifty-seven countries and territories, and has reached agreement on exchanging most favored nation status with seventy-two countries and territories.⁶⁸ The U.S.-Vietnam bilateral

Investment in Vietnam).

62. *Landmark Year for Vietnam*, Asia Today (Oct. 2000) (available in Lexis, News library). In order to attract the maximum amount of foreign capital, Vietnam's law does not impose a ceiling on foreign equity ownership in joint ventures, which means that the majority equity partner, foreign or domestic, would be granted greater control via board representation. In order to ensure that the minority equity partner would not lose control, the LFI imposes a unanimous voting principle on certain actions, so that the minority's affirmative vote is necessary because the joint venture can take certain actions. The unanimity rule, combined with the absence of a foreign equity ceiling, generally mean that foreign capital can be attracted without the fear of losing control to foreign investors. *Law on Foreign Investment in Vietnam*, *supra* n. 61, at art. 14 § 1, art. 21.

63. *Law on Foreign Investment in Vietnam*, *supra* n. 61, at art 33

64. *Compare Law on Foreign Investment in Vietnam*, *supra* n. 36, at art. 43 with *Law on Foreign Investment in Vietnam*, *supra* n. 61, at art. 43.

65. *Law on Foreign Investment in Vietnam*, *supra* n. 61, at art. 46(3).

66. John Zarocostas, *Vietnam Pushing to Advance Its WTO Entry Bid*, U. Press Intl. (Oct. 13, 2000) (available in Lexis, News library).

67. *Id.*

68. *Id.*

accord⁶⁹ gives Vietnam Normal Trade Relations (NTR) status. It is comprehensive, with six chapters covering goods, including agricultural goods, intellectual property, services, investment, business facilitation, and transparency.⁷⁰ The trade accord will expand the type of products that Vietnam could export to the United States at the low NTR tariff rate.⁷¹ The World Bank estimates that Vietnam's exports in the first year of NTR could double the 1999 levels and rise to \$1.3 billion.⁷²

In return for access to the U.S. market, Vietnam must open up its market to U.S. products and services.⁷³ For example, Vietnam must reduce, by a third to a half, tariffs across a wide range of high-tech, agricultural, and industrial goods.⁷⁴ It will also eliminate non-tariff barriers such as quotas, discretionary import licensing, and guarantee trading rights for Americans and Vietnamese over a phased-in period.⁷⁵ Vietnam will adopt WTO standards for protection of intellectual property within one year for patents and trademarks and within eighteen months for copyrights and trade secrets.⁷⁶ Services will also be liberalized, providing an opportunity for American firms to compete in the growing telecommunications sector,⁷⁷ Internet services,⁷⁸ banking, insurance, financial services, and professional services such as legal, architectural and engineering.⁷⁹ In the investment field,

69. See *Agreement*, *supra* n. 40.

70. *Id.* at chs. I-VI.

71. *Id.* at ch. I.

72. See generally Brown, *supra* n. 30.

73. See *Agreement*, *supra* n. 40 at ch. I, III.

74. *Id.* at ch. I, annex E.

75. *Id.* at ch. I, art. 3.

76. *Id.* at ch. II, art 18.

77. *Id.* at ch. II, annex F. The Vietnamese government is ambivalent about whether to open up the telecommunications industry, a necessary step if the country is to be technologically connected to the rest of the world, yet also a risky undertaking given the government's determination to retain monopoly power. According to the representative in Vietnam for Nokia of Finland, the mobile phone manufacturer, only seven tenths of one percent of Vietnamese have cell phones, and 72 percent of these are in Saigon. See Mydans, *supra* n. 50.

78. See Mydans, *supra* n. 50. According to Gene Sperling, the White House economic policy adviser in the Clinton Administration, commenting on Internet use in Vietnam, "one-tenth of [one] percent are on the Internet; by 2005, the projection is still that there will be less than [one] percent." *Id.* An hour on the Internet costs the user three dollars, in a country where the per capita income is six dollars a week. *Id.*

79. See *Agreement*, *supra* n. 40, at ch. III, annex F.

Vietnam's commitments include the elimination of local content and export performance requirements.⁸⁰ Under the trade agreement, Vietnam is also required to commit to a process of transparency⁸¹ by reforming its administrative policies. As discussed in Part IV, this commitment is perhaps the single most important step toward a legal reform process necessary to effectuate its economic *doi moi* policy.

The promotion of a private and foreign-investment sector is also accompanied by efforts to reform the state sector by a process the government calls "equitization,"⁸² in a deliberate attempt to avoid the more ideologically provocative term "privatization." Since 1993, Vietnam has allowed state-owned enterprises to be transformed into shareholding companies.⁸³ Up until 1998, about thirty companies had in fact sold their shares, mainly to employees.⁸⁴ In 1999, Vietnam granted three companies permission to sell up to thirty percent of their shares to foreign investors, thereby allowing those investors to participate directly in the equitization process, and as many hope, raising share quality and improving transparency.⁸⁵ In July 2000, a securities exchange was established, with four privatized state-owned companies licensed to list on the exchange.⁸⁶ However, like China's

80. *Id.* at ch. IV.

81. *Id.* at ch. IV, art. 5.

82. Pham Nguyen Xuan Bac, *Equitisation Buzzword Fails to Grab Headlines*, Vietnam Inv. Rev. (June 12, 2000) (available in 2000 WL 9575744). Note that state sector equitization fits into Vietnam's policy of encouraging foreign investment, in this case, investment in Vietnamese stocks. *Id.*

83. See Frederik Balfour, *Vietnam Approves Three Companies to Sell Shares to Foreigners*, Agence France-Presse Intl. News (Jan. 14, 1999) (available in Lexis, News library); *Vietnam Earmarks 390 Firms for Privatization this Year*, Agence France-Presse Fin. Pages (May 8, 2000) (available in 2000 WL 2788986); Bac, *supra* n. 82 (explaining that although only five state enterprises were equitized by 1996, 370 had been equitized by the end of 1999).

84. Balfour, *supra* n. 83; Minh Quang, *Stock Trading Only Be Boosted By More Share Issues: Business*, Saigon Times Daily (Sept. 18, 2000) (available in 2000 WL 24467798). "Equitized companies have asserted the need to issue new shares to boost the stock market and avoid negative sentimental impact, instead of relying on already issued shares, which are mostly held by company employees and the State." *Id.* The large numbers of shares currently held by company employees and the government has also created a liquidity problem. *Id.*

85. Balfour, *supra* n. 83; see *Vietnam Exchange Tied Up in Red Tape: Investors Stay Home*, Natl. Post D01 (July 20, 2000) (available in Lexis, News library) [hereinafter *Red Tape*].

86. See *Red Tape*, *supra* n. 85; *Establishing St. Stock Comm.*, Nov. 28, 1996, Decree No. 75-CP, art. 1 Vietnam Off. Gaz. (Jan. 31, 1997); Michael Mathes, *Are*

"privatization" of the state sector,⁸⁷ Vietnam's state sector reform is designed primarily to coax domestic capital accumulated in the private sector into state enterprises where the government acts as controlling shareholder. This strategy allows the government to accomplish two goals. First, it can bring private capital under government control, hence diffusing a possible threat to its power. Second, it can use private capital to raise funds for the ailing state sector.⁸⁸ Indeed, private sector growth has allowed the local population to accumulate savings estimated at \$10 billion or more in gold or hard currency, hidden and not deposited in banks because of a general distrust of formal banking channels.⁸⁹ Consequently, the government views the institution of shareholding and a securities market as a means through which the state can channel private capital into its state enterprises.⁹⁰ Indeed, the government views economic reform, even state sector equitization, as a vehicle to further socialism, or as Deputy Premier Phan Van Khai put it, "the most important guarantee for socialist orientation."⁹¹

Equitization of the state sector in Vietnam, then, is being conducted for the ideological purpose of furthering "market socialism." This has led the government to adopt a number of problematic policies. First, the state is less concerned that the stock market serves as a vehicle for the most economically promising company to raise capital,

Investors Giddy About Vietnam Again?, Deutsche Presse-Agentur Fin. Pages (July 21, 2000) (available in Lexis, News library); *Profits Hard to Come by For Vietnam Stock Brokers*, Deutsche Presse-Agentur Fin. Pages (Oct. 31, 2000) (available in Lexis, News library).

87. See generally Lan Cao, *Public Perspectives on Privatization: Chinese Privatization: Between Plan and Market*, 63 L. & Contemporary Problems 13 (2000) (discussing China's privatization policy).

88. See Fuminori Murata, *Little Stock in Exchange in Vietnam: Observers Doubt Market Will Open Before End of Century*, Nikkei Wkly. 17 (Feb. 10, 1997) (discussing the government's objective of encouraging the local population to invest because growth in the private sector has allowed many to hoard savings).

89. *Id.*

90. See Nick J. Freeman, *On Course for a Bourse*, Bus. Times (Singapore) 13 (Aug. 29, 1998) (available in 1998 WL 27111339).

91. Cindy Nguyen, *The Vietnamese Stock Market: Viability in Southeast Asia and Appeal Around the World*, 21 Loy. L.A. Intl. & Comp. L.J. 607, 610 (Aug. 1999) (quoting Phan Van Khai); Bus. Vietnam Staff, *Hanoi Refuses to Let Go*, Bus. Vietnam (June 1, 1996) (available in 1996 WL 11680301) ("While the 8th Congress is unlikely to return Vietnam to a command economy, it will reassert the importance of the state sector . . .").

but is rather more concerned that it serves the purpose of raising capital for state enterprises. Thus, shares traded on the securities exchange are expected to be those from state-owned enterprises,⁹² not private firms, even though private companies, which are the country's engine of growth, are in great need of capital. The government is also the chief beneficiary of the securities market—on the first day of the exchange's opening, the government offered \$22 million dollars of its own bonds for trading.⁹³ Second, Vietnam, like China until the beginning of 2000,⁹⁴ has a quota system in which the government, not the market, establishes quotas for the relevant ministries and provincial authorities, who then decide how many state enterprises in their jurisdiction are allowed to equitize.⁹⁵ Third, and finally, the large number of shares held by company employees and retained by the state due to ideological considerations has resulted in illiquidity in the market.⁹⁶ For example, trading in one of the listed companies, Transimex, had to be suspended because insufficient shares had been made available.⁹⁷ The company's employees had apparently agreed not to sell shares to outsiders. As a result, according to an official with the state-owned Enterprise Reform Board, "[b]uy orders were plentiful while holders of shares were not ready to yield up any of theirs, most of them company employees."⁹⁸

The government's current equitization efforts, like its other policies aimed at international economic liberalization, are marred by the state's pursuit of "market socialism," as market-based allocation and individual preferences are permitted, but only to the extent that they do not threaten socialism's foundation. Indeed, while the United States insists that it is through an expansion of commercial ties that even hard-line Communist governments can be pulled into alignment with the West, Vietnam insists on the reverse—that market reforms

92. See *Profits Hard to Come by for Vietnam Stock Brokers*, *supra* n. 86.

93. See *Red Tape*, *supra* n. 85.

94. See Cao, *supra* n. 87.

95. See Viet D. Dinh, *Financial Reform and Economic Development in Vietnam*, 28 L. & Policy Intl. Bus. 857, 885 (Spring 1997); *Stock Market Struggles to Take Off*, Bus. Vietnam (Oct. 1, 1996) (available in 1996 WL 11680367).

96. See Quang, *supra* n. 84.

97. *Id.*

98. *Id.* (quoting Nguyen Thieng Duc). In one company, the state held a thirty percent stake, while the employees held a fifty-five percent stake. In another, the ratio was forty-five percent to twenty percent, respectively. *Id.*

could only be palatable if they do not damage socialism. Vietnam's top Party leader, Le Kha Phieu, warned that the battle with the West has moved from the battlefield to other arenas. According to Mr. Phieu, "They continue to seek ways to completely wipe out the remaining socialist countries and attack the movements for independence, democracy and social progress. We should never relax our vigilance for a minute."⁹⁹

IV. RULE OF LAW AND RULE BY LAW

A. VIETNAM'S LEGISLATION FACTORY

Doi moi was supposed to unleash a burst of energy from within, as capital poured in from foreign investors. After the United States lifted the embargo, more than 400 U.S. firms joined European and Asian companies already doing business in Vietnam.¹⁰⁰ "By 1996 foreign direct investment . . . reached [\$]8.3 billion" and accounted "for more than a third of Vietnam's GDP."¹⁰¹ Over the past three years, however, foreign firms have retreated, with foreign direct investment falling below the 1992 level.¹⁰² Many factors have been cited to explain the apparent failure of the country to fulfill early expectations that it would be the next "Asian Tiger": Asia's financial crisis of 1997; a non-convertible currency; a rudimentary financial system; a see-saw attitude exhibited by some factions of the Party toward foreign investment; and the Party's waging of a "social evils" campaign in 1996.

But one of the keys, if not *the* key, to the problem that Vietnam faces as it engages in the process of reform is its legal system. Then Prime Minister Vo Van Kiet, speaking at the 1993 National Juridical Conference in Hanoi, acknowledged the country's need to pursue legal renovation as well as economic renovation. "We lack many laws. In the economic field, which is a priority in legislation, a legal framework still has to be worked out."¹⁰³ Yet, as discussed above, Vietnam has in

99. See Sanger, *supra* n. 44 (quoting Le Kha Phieu).

100. F.T. McCarthy, *Goodnight Vietnam: Foreign Direct Investment: Vietnam Was Meant to Be the Next Asian Phenomenon, But this Tiger Never Roared*, *Economist* (Jan. 8, 2000) (available in 2000 WL 8140317) [hereinafter *Goodnight Vietnam*].

101. *Id.*

102. *Id.*

103. Rose, *supra* n. 12, at 105.

fact filled the void by passing many laws. It is also true that there has been a “quiet resurgence of legal discourse”¹⁰⁴ in Vietnam, with law faculties reopening and institutions of legal education established.¹⁰⁵ It is also true that the Seventh Communist Party Congress expanded *doi moi*’s economic policy initiated by the Sixth Communist Party Congress to include legal reform. The Central Committee of the Party called on the National Legislature to “improve the skills of lawmakers in promulgating and organizing the implementation of law.”¹⁰⁶ According to Prime Minister Vo Van Kiet, “there must be a complete change from bureaucratic management to running the nation by law.”¹⁰⁷ The Constitution, accordingly, states that “[a]ll Party organizations operate within the framework of the Constitution and the Law.”¹⁰⁸

Yet the “rule of law”—the institution of law that subjects the government as well as the people to its rule in a transparent, impartial, and predictable manner—is far from a reality in the country. “[L]egal education in Vietnam remains tethered to abstract socialist political principles, under which law is considered to be a purely political tool to shape the people and to build a new society.”¹⁰⁹

The Vietnamese government has passed “hundreds of new laws and ordinances—running up to 20,000 pages in the last decade”¹¹⁰ Indeed, “[t]he government has become a virtual legislation factory with new laws, decrees, circulars, directives and regulations, often in draft

104. Mark Sidel, *The Re-Emergence of Legal Discourse in Vietnam*, 43 Intl. & Comp. L.Q. 163, 163 (1994).

105. *Id.* at 165; See Rose, *supra* n. 12, at 101 n. 21. Similarly, law school enrollment has increased, with courses ranging from traditional legal subjects such as constitutional law, administrative law, civil and criminal procedures, “Law and State,” and courses on Marxism/Leninism. *Id.*

106. Rose, *supra* n. 12, at 99.

107. *Id.*

108. Weitzel, *supra* n. 48 at ch. 1, art. 4.

109. Rose, *supra* n. 12, at 101.

110. *Id.* at 100. A slew of laws have been adopted, such as: “a Criminal Code (1986), a Criminal Procedure Code (1989), a Law of Trade Unions (1989), a Press Law (1989), Taxes on Natural Resources, High Income and Housing (1990), Law on Religion (1991), Laws of National Assembly Organization and Elections (1992), Foreign Investment Law (1987), Bankruptcy Law (1994), and an Environmental Protection Law (1994).” *Id.* at 101, n. 19. In an attempt to shift from rule by the Party to ostensibly the “rule of law,” the government enacted an 834-article Civil Code in 1995 that covers comprehensively the various aspects of Vietnamese life. *Id.* at 101.

form, coming out almost weekly.”¹¹¹ While the shift from a system based on rule by Party decree to one based on the “rule of law” is significant, legal reform requires more than passing laws. The deluge of new laws has resulted in increased bureaucratization whereby overlapping ministries and agencies issue contradictory laws, ordinances, decrees, and circulars, leading to inconsistent application of the law and the fostering of “an uncertain climate.”¹¹² In addition, local People’s Councils often issue decrees that vary from national laws.¹¹³ It has thus been widely reported that “[l]aws and regulations are often poorly drafted and ambiguous, and are apt to be construed differently by various government bodies.”¹¹⁴ The more official published laws are surrounded by a morass of decrees, unpublished “drawer regulations,” and freewheeling local regulations, the greater the chances are for “flexibility” and corruption. As noted, “[c]orruption is a way of life in Vietnam, and requests for payments are often made by various . . . officials . . . at different levels of government.”¹¹⁵ Furthermore, the absence of a mechanism to provide the public with legal information has only added to the confusion. To ensure adequate dissemination of information among governmental agencies, official laws are supposed to be published in the Office of the

111. Jonathan L. Golin, *Tiger by the Tail*, 81 ABA J. 62, 64 (Feb. 1995).

112. See Rose, *supra* n. 12, at 102.

[T]he local administrative agency is subject to the “horizontal” subordination of the People’s Committee at the same level and the “vertical” subordination to the relevant ministry (or the agency of ministerial rank) in professional matters. Local administration seems to be a decentralized system but the principle of double subordination reintroduces a certain kind of centralization However, this does not mean that the Government has hierarchical power over the organs on a lower level. The power of the Government over the lower levels is “indirect.”

Id. (citation omitted).

113. See Rose, *supra* n. 12, at 102-03; McGrath, *supra* n. 46, at 2121-22 (for a discussion of the tension between the local or provincial level and the national government).

114. Mathilde L. Genovese, *What Every Investor Needs to Know About Doing Business in Vietnam Practical Guidelines and Tips*, 18 E. Asian Exec. Reps. 9, 24 (Aug. 15, 1996).

115. *Id.*

Government Gazette; yet, its circulation of 3,000 copies is far below the 20,000 to 30,000 required.¹¹⁶

Ever-changing rules and unpublished and non-uniform rules have not created a system based on the "rule of law." Rather, the reverse has occurred, impeding the development of a comprehensive and consistent framework of law and leaving investors more vulnerable to abuse and corruption by local officials. As aptly put by *The Economist*:

Every investor has a different horror story. The paper that 3M imports to make Post-It Notes faces an arbitrarily high tariff as "office products" (40% duty) rather than "adhesive-backed paper" (10%). This makes it more expensive than the same Post-It Notes smugglers bring in from Thailand. . . . A Taiwanese investor was so frustrated by corrupt customs officials who failed to do what they had been bribed to do that it tried to sue one of them for breach of contract.¹¹⁷

B. THE RULE OF LAW FOR A MARKET ECONOMY

Referring to Vietnam's eclectic legal traditions, a commentator has noted that Vietnam's legal system "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."¹¹⁸ Certainly legal reform has been made more complicated by this confusion.

As has been discussed elsewhere,¹¹⁹ Vietnam has historically been influenced by Chinese traditions with an emphasis on a "rule of moral" rather than the "rule of law."¹²⁰ "There is a tendency in Vietnam, as in China historically, to rely on 'morality, custom, kinship or politics, rather than formal legality.'"¹²¹ Village tradition, rituals,

116. Rose, *supra* n. 12, at 103 n. 28.

117. See *Goodnight Vietnam*, *supra* n. 100.

118. Golin, *supra* n. 111, at 63.

119. Gillespie, *supra* n. 23, at 325-26; Gillespie, *supra* n. 22, at 555.

120. See Rose, *supra* n. 12, at 96. This is not to say that rule of moral systems had no law generally or no contract law specifically. Recent works on China, for example, show that the Chinese had some system of contract law even in the earlier periods. Jonathan D. Spence, *The Death of Woman Wang* 71-72 (Viking Press 1978); Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 S. Cal. L. Rev. 1325, 1376 (1990).

121. See Rose, *supra* n. 12, at 96 (citation omitted).

and familial status constituted a form of "unofficial law" coexisting and sometimes challenging the "official law" of the imperial bureaucracy.¹²² Imperial law was vertical law between the sovereign and the individual and did not concern matters that involved horizontal rights between one individual and another.¹²³ As a result, "private commercial relationships remained creatures of customary practice. . . . Trade was apparently organized along a network of interlocking obligations. Relationships depended upon the observance of patronage obligations, such as son to father, family to clan, and clan to village."¹²⁴ Community trust formed the basis of trade among clan or village members, and the guidance and mediation of "men of virtuous character" were relied upon to resolve disputes.¹²⁵ Local institutions were "states within a state"—hence, the apt proverb, "the laws of the emperor give way to the customs of the village."¹²⁶

Imported into this system was a French colonial civil law system of rights-based law that governed French citizens and other Europeans.¹²⁷ A small number of Vietnamese bureaucrats, judicial officers, lawyers, and merchants also were exposed to and learned French law.¹²⁸ In the North, following independence from the French, a centralized legal system reflecting a Soviet-style planned economy was instituted.¹²⁹ Land was brought under state or collective ownership by the Vietnamese Workers Party, which succeeded in disrupting the traditional "trading culture that had survived both Chinese and French annexation."¹³⁰ Given the Marxist view that the "rule of law" is a form of legal fetishism, it is not surprising that the Party's hostility to legalism was extended to the South at the end of the war.¹³¹ Since the implementation of *doi moi*, the government has embarked on the process of legal reform.

These efforts, however, as suggested above, have merely resulted in legislation overload and confusion. It would appear that, with its

122. See Gillespie, *supra* n. 22, at 559.

123. See Gillespie, *supra* n. 23, at 327-28.

124. *Id.*

125. *Id.* at 328-29.

126. See Gillespie, *supra* n. 22, at 560.

127. See Gillespie, *supra* n. 23, at 329.

128. *Id.*

129. *Id.*

130. *Id.* at 331.

131. *Id.* at 332-33.

neo-Confucian system and a Soviet legacy of immense distrust of law, Vietnam's legal system does not have the type of rules that meet international standards necessary to support a modern market economy. In other words, it does not have what law and development advisers generally term the "rule of law."¹³²

The "rule of law," as many commentators have observed, should achieve the following purposes: to protect against Hobbesian anarchy; to "allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions"; and to guarantee against official arbitrariness.¹³³ Vietnam's legal reform, even in the limited area of market institutions and commercial relationships, has failed to live up to those standards.

For a country that is establishing a market economy aimed at global integration, Vietnam's laws are still more suitable for a society organized along traditional, pre-modern lines. As sociologists have noted, there has been a historical evolution from "community" to "society."¹³⁴ The former is characterized by groups bound by kinship, ethnic, or religious ties, or ties based on other affinities. The latter is characterized by persons who interact more on an arm's length basis than on a relational basis, so that their ties are looser than those forged in a community context. The transformation from community to society has generally accompanied the evolution from feudalism to

132. See Fallon, *supra* n. 9, at 6-7. Fallon has identified four "ideal-typical conceptions" of the "rule of law"—historicist, formalist, Legal Process and substantive—to come up with his thesis that the "rule of law" is "best conceived as comprising multiple strands, including values and considerations to which each of the four competing ideal types calls attention." *Id.* at 5-6.

133. See *id.* at 7-8. Against the context of these background purposes are the five elements of the "rule of law" that Richard Fallon identified: (1) legal rules must be comprehensible so that people can understand the law and comply with it; (2) the law should be able to guide people in the conduct of their affairs; (3) it should be stable; (4) it should constitute a supreme source of authority whose scope should include officials as well as ordinary citizens; (5) it should be impartial and courts should be available to enforce it. *Id.* at 8-9. See Lon L. Fuller, *The Morality of Law* 33-39 (Yale U. Press 1964) (specifying eight criteria for law to exist: generality, publicity, prospectivity, clarity, noncontradictoriness, capability of being followed, stability, and congruence between norms as stated and as applied).

134. See generally Robert A. Nisbet, *The Sociological Tradition* (Basic Books, Inc. 1966); Ferdinand Tönnies, *Community and Society: Gemeinschaft und Gesellschaft* (Charles P. Loomis ed. & trans., Mich. St. U. Press 1957).

modernism, from exchanges based on relations and "natural will" to exchanges based on contract and "rational will."¹³⁵

"The reciprocal ties of social obligation among members of a community defined standards of behavior"¹³⁶ when community was central in members' lives. The shift away from the primacy of "community" toward "society" has meant a shift from exchanges based on community ties to exchanges based on freedom of contract—"a world of independent actors, each of whom should be allowed to pursue his or her own interests without regard for the interests of others," absent fraud and public policy considerations.¹³⁷

Again, a word of caution is in order. The status/contract, community/society distinctions should not be overstated to characterize traditional communities as inert and frozen in time, their inhabitants trapped by status, while Western societies are viewed as progressive and active, with inhabitants freely defining themselves through contract rather than inherited status. There are aspects of both status and contract in different legal systems, and as some sociologists have remarked on the overly blunt categorization of status versus contract, collective versus individual distinction, "collectivity and individuality in legal matters are aspects of all systems, not alternative systems. . . . The generalizations couched in these terms use one aspect of a system to characterize the whole, which is a procedure of dubious worth."¹³⁸

That said, in today's international economic system, commercial laws, such as modern contract law, are necessary to facilitate open market transactions. Such laws allow for the enforcement of individual exchanges, taking into consideration the parties' expectations and allowing for the imposition of damages in case of breach. The enforcement of such exchanges is essential to develop an open market economy (as opposed to an economy based on close familistic or community ties where enforcement depends on trust and ostracism) and is premised on the assumption that an open market furthers

135. See generally Sir Henry Maine, *Ancient Law* 99-100 (J.M. Dent & Sons Ltd. 1917); Tonnies, *supra* n. 134; Emile Durkheim, *The Division of Labour in Society* (W.D. Halls trans., Macmillan 1984).

136. Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829, 831 (1983).

137. See *id.* at 839.

138. Sally F. Moore, *Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-help and Collective Responsibility*, in *The Allocation of Responsibility* 51, 100-01 (Max Gluckman ed., Manchester U. Press 1972).

individual freedom of action and constitutes the most efficient means of allocating resources and maximizing wealth for individuals and society.¹³⁹

Simply put, absent public policy and fraud considerations, market economies generally do not question individual preferences, allowing allocations by the market rather than substituting them with government preferences or commands from the central plan. The legal system facilitates private choices made in the market—thus it is crucial in developing a market economy. Where voluntary exchanges are made on an arm's length basis between strangers, as they generally are in a modern market economy, they must be made with the general understanding that contracts will be enforceable and binding on the parties absent some overriding public policy consideration. If Vietnam is to transform its economy from one that is defined by community norms of the village and the clan to an economy that is defined by non-relational, arm's length norms, then the development of a "rule of law" to enforce arms' length exchanges is all the more urgent.

Without asserting a causal link between economic growth and a market-based economy (although there is increasing evidence that there is some link between the two), I note merely that Vietnam has made the decision to embark on *doi moi* based on its own assessment that a market is necessary to increase efficiency, maximize wealth, and promote economic growth—this despite the fear that attracting global capital to the domestic market might very well lead to the inevitable diminution of the Party's own power. Yet, the exercise of individual choices in a market economy is only meaningful if such exercise is free from arbitrary government interference and enforceable bylaws that are impartial, transparent, and predictable. Take the simple example of a contract between a foreign company and a domestic state enterprise. If the rule of modern contract law were to be established, it should be obvious that even governmental actors would be held subject to the "rule of law." Could investors be certain that a Vietnamese court would apply the law and issue a judgment against a state enterprise or that a Vietnamese court would enforce a foreign arbitral award that had been granted in the investor's favor against a state-owned company? Could investors be certain that the law would not be replaced by a series of laws or decrees seeking to interpret and reinterpret the first

139. See generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Leg. Stud. 103, 132 (1979).

law? These are elementary and obvious questions, yet the answers are neither obvious nor certain in Vietnam.

V. CONCLUSION

Twenty years ago, Vietnam had been virulently anti-capital, anti-market. In the immediate postwar years, it adopted two general policies in its economic development objectives: first, to rely not on the market but on the government, through a central plan, to override individual preferences and implement developmental objectives that reflect state preferences; and second, to insulate the national economy from the international economic system in order to break what it considered to be the neo-colonial, dependent relationship that has defined First and Third World countries.¹⁴⁰ The Party ruled by administrative decree to ensure the institution of those objectives.¹⁴¹

Twenty years later, it is noteworthy that the U.S.-Vietnam bilateral trade agreement—the legal document that governs trade between the two countries—contains a separate chapter detailing the precise steps Vietnam must undertake to establish the rules of law over matters applicable to the agreement.¹⁴² The chapter entitled, “Transparency-Related Provisions and the Right to Appeal,” is designed to ensure, through provisions dealing with public notice, that fundamentals such as the right to comment, the dissemination and publication of applicable laws, the right to a hearing, the right to judicial review, and the basic principles underlying a “rule of law”—transparency, predictability, and impartiality—would be implemented.¹⁴³

Article 1 requires each nation to “publish on a regular and prompt basis all laws, regulations and administrative procedures of general application pertaining to any matter covered by this Agreement”¹⁴⁴ so as to allow those interested to become acquainted with them before they come into effect. Article 3 requires each nation to allow “the other . . . and its nationals the opportunity to comment on the formulation of laws, regulations and administrative procedures of

140. See generally Gillespie, *supra* n. 23, at 330-33.

141. *Id.*

142. See *Agreement*, *supra* n. 40, at ch. 6, arts. 1-8.

143. *Id.*

144. *Id.* at ch. 6, art. 1.

general application that may affect the conduct of business activities"¹⁴⁵ Article 5 requires that all relevant measures be published in official journals on a regular basis.¹⁴⁶ Article 6 requires the respective governments to administer their laws, regulations, and administrative procedures "in a uniform, impartial and reasonable manner"¹⁴⁷ Finally, Article 7 mandates the maintenance of "administrative and judicial tribunals and procedures for the purpose . . . of the prompt review and correction . . . of administrative action relating to matters covered by this Agreement."¹⁴⁸ It also provides for the "right of appeal," and if the right to appeal is initially to an administrative body, "there shall also be the opportunity for appeal of the decision to a judicial body."¹⁴⁹

In 1995, President Clinton dispatched then Secretary of State, Warren Christopher, to Vietnam to establish the groundwork for a post-embargo relationship.¹⁵⁰ Mr. Christopher warned that embarking on economic reform was similar to undertaking "a passage over a ravine."¹⁵¹

The passage is bound to be intricate, arduous, and complicated. Pendulum swings between the hardliners opposed to, and reformers favoring, international economic integration, are bound to occur and recur in the coming years. But on a pragmatic level, if the government wishes to create an economy where its people will be making more than one dollar a day, it will have to work with, not against, the forces of global economic integration, to promote economic engagement, not segregation. In spite of political constraints, Saigon, for example, has built a robust private sector whose ten percent growth rate, according to its mayor, has created jobs and brought the city's poverty level down.¹⁵² It might turn out, indeed, that twenty-five years after the end of the war, it is the South that will be in the position to liberate the North.

145. *Id.* at ch. 6, art. 3.

146. *Id.* at ch. 6, art. 5.

147. *Id.* at ch. 6, art. 6.

148. *Id.* at ch. 6, art. 7.

149. *Id.*

150. See Sanger, *supra* n. 44.

151. *Id.*

152. *Id.*