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ENCOURAGING FOREIGN DIRECT INVESTMENT IN VIETNAM: ECONOMIC REFORM, PROTECTION AGAINST EXPROPRIATION, AND INTERNATIONAL ARBITRATION

HIEP D. TRUONG*

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I. INTRODUCTION

On February 3, 1994, President Clinton lifted the trade embargo imposed against Vietnam.[1] Although this marked a pivotal point in Vietnam's transition from a non-market economy to a market economy, the lifting of the embargo did not mean that normalized relations between the United States and Vietnam would result. This is evidenced by President Clinton's statement that Vietnam must show "more progress, more cooperation, and more answers" with

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1. Clinton Lifts Vietnam Embargo: Emphasizes Further POW/MIA Accounting, Daily Rep. for Executives (BNA), at A23 (Feb. 4, 1994).

respect to the POW/MIA issue before relations are completely normalized.[2] As of 1995, the United States was Vietnam's seventh largest investor nation.[3] Michael Chaney, the managing director of Wesfarmers Ltd. (a business that has recently done business in Vietnam), stated that: "Everyone recognizes there's potential there in a few years time when certain things are more defined like laws—property laws and corporate laws—and people have more experience in operating in a commercial environment."[4]

The Vietnamese government has a stated goal of doubling its gross domestic product (GDP) by the year 2000.[5] To accomplish this targeted growth rate, the Vietnamese government must sustain an investment of forty billion dollars throughout the rest of the decade.[6] Of this amount, foreign direct investment is expected to contribute twelve to thirteen billion dollars.[7] It is essential, then, to examine the various political, economic, and legal mechanisms Vietnam has created to encourage this economic growth through foreign direct investment. Part II.A examines Vietnam's implementation of "Doi Moi"—an ambitious program of economic reform—through its foreign investment laws. Part II.B discusses Vietnam's new membership in the Overseas Private Investment Corporation (OPIC). Part III explores Vietnam's efforts in promoting the privatization of its state-owned firms. Part IV.A examines the extent of the protection Vietnam is willing to extend to foreign investors against changing economic laws. Parts IV.B and C examine the shortcomings of some of Vietnam's laws regarding foreign direct investment. Part V gives the potential investor a legal perspective with respect to the Act of State Doctrine and how its applicability may bar any claims from being adjudicated in a U.S. court. Finally, Part VI explores Vietnam's willingness to defer disputes to an international arbitration panel. By examining these various programs created to attract foreign direct investment, a potential investor may appreciate the benefits and limits of doing business with Vietnam.

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2. *Id.*

3. *See Foreign Investments Still Need Legal Reforms* (visited Mar. 4, 1999) <http://home.navisoft.com/vfp/invest1.htm>.

4. *Id.*

5. *See Vietnam: Strategy for Danish Bilateral Development Cooperation with Vietnam* (visited Mar. 4, 1999) <http://www.um.dk/english/udenrigspolitik/udviklingspolitik/landestragier/vietnam/vietnam.4.a.html>.

6. *See id.*

7. *See id.*

II. VIETNAM'S PROACTIVE EFFORTS TO ATTRACT FOREIGN DIRECT INVESTMENT: THE DOI MOI AND LAW ON FOREIGN INVESTMENT

A. *Economic Legislation Promoting Foreign Direct Investment*

Doi Moi, which means "new day," was launched in 1986 to encourage foreign direct investment in Vietnam.[8] The key features of Doi Moi are: (1) dismantling the collective farming system and returning the land to family-centered farming; (2) removing price controls; (3) developing and promoting the private sector; (4) devaluing the currency; (5) demobilizing the army and reducing the subsidies to state enterprises; (6) reforming interest rates to fight inflation; and (7) encouraging foreign direct investment.[9] Doi Moi's implementation was made possible when the Law on Foreign Investment (FIL) was passed in 1987.[10] The FIL is touted as "one of the most liberal foreign investment codes of any developing nation in the world, let alone Southeast Asia."[11] Its purposes are to expand economic cooperation with foreign countries, develop the national economy, and increase exports through the efficient use of natural resources, labor, and other potentialities of the country.[12] The 1987 FIL was amended in 1990 and 1992 and was implemented by Decree No. 18-CP.[13]

The FIL requires all foreign investors to seek approval from the Vietnamese government before conducting business in Vietnam.[14] Foreign investors must apply for an investment license through the State Committee for Cooperation and Investment (SCCI), which is responsible for reviewing and approving the proposed enterprise's investment contracts, charters, and available levels of governmental control.[15] The SCCI is a very powerful agency with broad powers of approving and issuing investment licenses to foreign-owned companies. It also has the power to oversee the ongoing operations of the foreign investment enterprise; to approve changes in joint venture contracts or in charters of one hundred percent foreign-owned

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8. *See* Camellia Ngo, *Foreign Investment Promotion: Thailand As a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L COMP. L. REV. 67, 73; *see also* WORLD BANK, VIETNAM TRANSITION TO THE MARKET: AN ECONOMIC REPORT, at ii, iii (Sept. 15, 1993).

9. *See* Ngo, *supra* note 8, at 73.

10. *See* Law on Foreign Investment in Vietnam (1987), *reprinted in* 30 I.L.M. 930, 932 (1991).

11. Thomas R. Stauch, *The United States and Vietnam: Overcoming the Past and Inventing the Future*, 28 INT'L LAW. 995, 1011 (1994).

12. *Id.* at 1011-12.

13. *See Decree of the Government No. 18-CP Regulating Detailed Implementation of the Law on Foreign Investment in Vietnam* (visited Mar. 5, 1999) <http://home.vnd.net/english/legal_docs/doc0073.html> [hereinafter *Decree No. 18-CP*].

14. *See* Law on Foreign Investment in Vietnam, *supra* note 10, at 938.

15. *See id.*

enterprises; and to dissolve joint ventures or one hundred percent foreign-owned enterprises that violate the law or deviate from their authority under their investment licenses.[16] The SCCI's mandatory approval process is a severe obstacle to foreign direct investment because it allows the Vietnamese government to screen out proposed business projects that may be quite lucrative and progressive for the Vietnamese economy, but may be denied approval because of the project's potential to undermine the Vietnamese Communist Party's (VCP) control over the business.[17] Vietnam has the most burdensome business license application process in all of Southeast Asia. Foreign direct investment would dramatically increase if the Vietnamese government were to abolish this time consuming and laborious process.[18] Although the 1987 FIL provides that the duration of foreign investment enterprises may be extended beyond the twenty-year limit, the law is not clear on who has the authority to make such extensions, or under what circumstances they would be granted.[19] The FIL encourages foreign direct investment by assuring investors that throughout the duration of their investment in Vietnam, the invested capital, property, and assets of foreign enterprises and private persons shall not be expropriated or requisitioned by administrative procedure, and the enterprises with foreign invested capital shall not be nationalized.[20]

There are three ways of doing business in Vietnam under the FIL: (1) under the business cooperation contract; (2) as a joint venture enterprise; and (3) as a wholly-owned foreign enterprise.[21] The business cooperation contract is simply a partnership between a foreign investor and a Vietnamese partner.[22] A joint venture enterprise is one that is "set up in Vietnam either by the two sides pursuant to a

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16. *See The State Committee for Co-operation and Investment* (last visited Mar. 4, 1999) <http://park.org/Thailand/MoreAboutAsia/vninfo/ministry/scci.html>. The SCCI was founded on March 25, 1989. Its other powers and responsibilities include formulating and submitting to the Government for approval, all drafts of laws, ordinances and policies concerning foreign direct investment in Vietnam and Vietnam's investment in foreign countries as well as preparing and submitting to the Government all agreements on reciprocal protection and encouragement of investment with the countries concerned. *Id.*

17. *See* Ngo, *supra* note 8, at 81. Ngo makes a very persuasive argument with respect to the prohibitive effects of the FIL's mandatory approval process. The author notes that no socialist country has successfully maintained the "antithetical objectives" of linking economic freedom with firm political control. *Id.* at 81-82.

18. *See id.* at 81 (explaining that the approval process requirement "causes delays, generates excessive bureaucracy, fosters corruption, and undermines the Vietnamese government's efforts to rapidly revitalize Vietnam's inert economy").

19. *See* Law on Foreign Investment in Vietnam, *supra* note 10, at 935.

20. *See id.* at 936.

21. *See id.* at 933.

22. *See id.* at 932-33.

joint venture contract . . . or pursuant to an agreement between the Government of the Socialist Republic of Vietnam and a foreign government . . . ."[23] A wholly-owned enterprise is one where "the capital of which is one hundred (100) per cent owned by foreign organizations or individuals and which is authorized by the Government of the Socialist Republic of Vietnam to be established in Vietnam."[24] Although these business opportunities have definitely paved the way for foreign direct investment, they are not free of hidden costs. For instance, although the Vietnamese economic regulations are considered the most liberal in Southeast Asia insofar as the investor retains all the profits, the legal protections provided to foreign investors are oftentimes intentionally vague.[25] Also, the profits are unattainable insofar as the Vietnamese dong, the national currency, cannot be converted.[26] Therefore, investors are left with the choice of either purchasing Vietnamese products to sell outside of Vietnam, or leaving a substantial portion of their profits in Vietnam.[27] Additionally, wholly-owned enterprises have a very significant string attached: when foreign ownership is one hundred percent, these foreign owners are required to hire more expensive labor through the Vietnamese government agencies.[28] Even with the liberal economic regulations, if Vietnam wants to stimulate foreign direct investment it must provide less burdensome means by which wholly-owned enterprises may hire laborers.

B. OPIC and the Protection of Foreign Direct Investment

Until recently, Vietnam was not allowed to be a party to OPIC because of the Jackson-Vanik Amendments to the Trade Act of 1974.[29] OPIC is the premiere overseas investment insurance for U.S. companies and only insures and provides guarantees for projects in countries that have signed an agreement with the United States for OPIC programs.[30] The Jackson-Vanik Amendments explicitly restrict U.S. economic relations with any communist country that obstructs

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23. *Id.* at 933.
24. Law on Foreign Investment in Vietnam, *supra* note 10, at 933.
25. *See* Beth Castelli, *The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Cooperation?*, 13 DICK. J. INT'L L. 297, 323 (1995).
26. *See id.*
27. *See id.*
28. *See id.*
29. *See OPIC Signs Bilateral Agreement to Open Programs in Vietnam* (visited Mar. 5, 1999) <http://www.opic.gov/subdocs/public/press/press98/8%2D15.htm>.
30. *See id.*

free emigration.[31] On March 19, 1998, OPIC signed a bilateral agreement with Vietnam to re-open its programs in Vietnam. Prior to the agreement, OPIC had not supported any American investments in Vietnam for over twenty years.[32] Vietnam's new membership marked a very significant step for U.S. companies wishing to invest in Vietnam.[33]

OPIC was designed to encourage new investment for U.S. businesses by protecting against the risk of losing an investment due to the: (1) inconvertibility of currency; (2) expropriation or confiscation of property; or (3) loss of property because of war, revolution, insurrection, or civil strife.[34] Expropriation includes, but is not limited to, "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project."[35] The maximum term of insurance is twenty years for any one investor, and OPIC is authorized to issue up to $7.5 billion in investment insurance.[36] With its recent entry into OPIC, Vietnam could get a deluge of new foreign investment by U.S. companies.

III. PROMOTION OF PRIVATIZATION: CAN VIETNAM CONTROL ITS ECONOMIC DEVELOPMENT WITHOUT CURTAILING FOREIGN DIRECT INVESTMENT?

Another area that the Vietnamese government has focused on in promoting foreign direct investment is the gradual privatization of property. Foreign investors are naturally concerned about private ownership of property by Vietnamese citizens because the return on investment will be higher and the risk of expropriation lower, if Vietnam's transition to a full market economy is successful. Although Vietnam has made a significant step in the right direction, it should seriously reconsider its objective of maintaining socialist

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31. *See id.*

32. *See id.*

33. *See id.* Arizona Senator McCain, a former Vietnamese prisoner of war, exclaimed that "the opening of OPIC programs in Vietnam provides a critical indication of U.S. interest in trade and investment with Vietnam, and goes a long way towards ending a difficult chapter in our two nations' history." *Id.* Senator Kerry added: "A brighter future for U.S.-Vietnam relations must include an economic relationship that works for both countries. The availability of OPIC programs will help to generate renewed American investment in Vietnam, resulting in a lasting and positive impact, not only on the Vietnamese economy, but on U.S.-Vietnam relations." *Id.*

34. 22 U.S.C. § 2194(a)(1)(A)-(C) (1998).

35. 22 U.S.C. § 2198(b) (1998).

36. *See* 22 U.S.C. §2197(e) (1998).

policies while trying to implement capitalist programs of economic reform. These two diametrically opposed principles have led Vietnam to maintain an inordinate amount of control in new capital investments, which detracts from the ease with which foreign direct investments are processed.[37] Vietnam has developed three laws in the hopes of reforming their markets and promoting privatization: the Law on Companies, the Law on Private Enterprises, and the Temporary Regulation on the Issuance of Bonds and Stocks of State Owned Enterprises.

The Law on Companies (LC), allows Vietnamese individuals to establish private limited liability and shareholding companies.[38] It also allows individuals to invest capital and share in the profits and losses.[39] Although the LC permits investors substantial freedom from government interference, its sense of economic liberalization is not absolute. For instance, the SCCI is still in control of what the investor is allowed to do through the investment license. Similar to investors under the FIL, prospective founders of a company must still submit an application to the SCCI in the province or city where the company will be located.[40] This allows the government to oversee and control any new companies—a policy that would fail to promote the interests of the Vietnamese nation as a whole, or that would limit the control of the VCP.[41] The LC's procedural requirements are quite rigorous. For instance, Article 13 requires companies to give priority to domestic labor; Article 11 requires the Prime Minister's approval before companies can engage in certain industries; and Article 21 requires a company to notify the People's Committee if it wants to change its business objectives, area of business, charter capital, or any other item on its business registration file.[42]

The Law on Private Enterprises (LPE) allows Vietnamese individuals to establish their own private enterprises.[43] Compared to the old command market system where the government decides what, when, and how much to produce in its commercial activities, the LPE is a significant step forward in promoting privatization in Vietnam. The private enterprise is defined as "a business unit that has a level

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37. *See Vietnam Moves to Clarify Privatization Process*, Apr. 18, 1996, *available in* LEXIS, News Library, Curnws file.

38. *See* Law on Companies, art. 1, Dec. 21, 1990 (amended July 1, 1994), *translated in* 3 State Committee for Co-operation & Investment & Phillips Fox, at XIV-13.

39. *See id.* art. 2.

40. *See id.* art. 14.

41. *See id.* art. 11.

42. *See id.* arts. 13, 11, and 21.

43. *See* Law on Private Enterprises, Dec. 21, 1990 (amended July 1, 1994), *translated in* 3 State Committee for Co-operation & Investment & Phillips Fox, art. 1.

of capital no less than that of its legal capital, which is owned by an individual who shall . . . be responsible for its business activities."[44] The owners of a private enterprise may freely make their own business decisions as well as own the production, assets, and capital of the private enterprise. The private enterprise, however, is not free of state control. Article 9 of the LPE places many restrictions on the private owner before the People's Committee will grant a license.[45] First, the private enterprise's business plan must be specific and submitted to the People's Committee.[46] It must define in sufficient detail the enterprise's "[o]bjectives, branches, and areas of business."[47] Second, once individuals categorize their business, they must meet the initial capital investment mandated by the government for that particular type of business.[48] Third, once the private enterprise has designated its managers or owners, they must meet the qualifications established by law for that particular area of business.[49] Furthermore, a private enterprise is required to give priority to local labor,[50] so it is deprived of the benefit of using more skilled foreign workers. These restrictions are distinctly tantamount to a non-market economy way of doing business, and the Vietnamese government should recognize that this is not an auspicious way of attracting foreign direct investment.

The Temporary Regulation on the Issuance of Bonds and Stocks of State Owned Enterprises (TRIBSSOE) is Vietnam's first and most significant step in privatizing state-owned companies. The initial purpose of TRIBSSOE was to mobilize capital for the operation of state-owned enterprises, but purchasers were able to receive some interests and control in the decision-making process.[51] Stock owners' rights and duties include the following: voting for the board of managers and on any amendments to the by-laws, business plan and profit-sharing arrangements at stockholders' meetings; receiving share interests in production output; enjoying tax preferences on the revenues from share interests; and assuming liability when the enterprise is disbanded or bankrupt.[52] When analyzing the provisions of

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44. *Id.* art. 2.
45. *See id.* art. 9.
46. *See id.*
47. *Id.*
48. *See id.*
49. *See id.*
50. *See id.* art. 25.
51. *See Legal Documents On Issuing Stocks and Bonds In Vietnam* (visited Mar. 4, 1999) <http://www.vietnamaccess.com/law/10-nxbct.htm>.
52. *See Temporary Regulation on the Issuance of Bonds and Stocks of the State Owned Enterprises*, art. 23 (visited Mar. 4, 1999) <http://home.vnn.vn/english/legaldocs/doc00042.html>.

TRIBSSOE, one thing is certain—the VCP has no intention of relinquishing its control of Vietnam's economic development. By requiring companies to have three years of profit, the government is attempting to mitigate any economic hardships that might occur while it improves and privatizes state-owned companies. The VCP has provided itself with an effective means of controlling how much and how fast privatization occurs by requiring the Ministry of Finance to make any decision permitting state-owned companies to issue stocks or bonds.[53] Thus, the ultimate decision of whether or not to relinquish control of a state-owned company is left to the sole discretion of the VCP. Furthermore, the decree to sell stocks and bonds in state enterprises is temporary.[54] After a year-long trial run, the Minister of Finance and the Governor of the State Bank of Vietnam may then study the economic results of these issuances of stocks and bonds and draw its own conclusions.[55] Once these conclusions are drawn, the government could then consider using the TRIBSSOE document to further maintain and develop its market economy.[56] Although the TRIBSSOE decree is a significant attempt by the VCP with respect to implementing market-oriented reform through privatization, few state firms have been privatized. For instance, out of the six thousand state firms in existence in 1995, only eight had been fully privatized by April of 1996.[57] Therefore, Vietnam needs to further strengthen and improve its privatization measures to boost its foreign direct investments.

IV. LEGISLATIVE RISK AND FOREIGN DIRECT INVESTMENT: ARE VIETNAMESE LAWS CONSISTENTLY APPLIED?

A. *Protection Against Changing Economic Laws*

Vietnam's sovereign powers permit it to expropriate any investments, property, and projects of any foreign-owned company. It has full and permanent authority to take privately owned property for any public purpose.[58] Vietnam has yet to cede its sovereign power of expropriation and individual investors cannot contract around it. However, Vietnam does ensure adequate compensation should expropriation occur and has emphatically stated that it has no

53. *See id.* arts. 8-9.
54. *See id.* arts. 1-2.
55. *See id.* art. 2.
56. *See id.* art. 23.
57. *See Vietnam Moves to Clarify Privatization Process*, *supra* note 37.
58. *See* CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM art. 23.

future intention of expropriating any foreign-owned businesses.[59] The 1992 amendment to Vietnam's FIL provides that when any changes in the law of Vietnam adversely affect foreign investors, the state shall take appropriate measures to protect their interests.[60] Article 23 of the Vietnamese Constitution, however, reserves the right of the Vietnamese government to expropriate property conditioned on payment of appropriate compensation made in a freely convertible currency.[61] It is left open to interpretation whether Article 21 of the FIL supersedes Article 23 of the Constitution, so investors should not rely on these self-serving proclamations made by the Vietnamese government. Although Vietnam has stated it does not intend to expropriate, there is no guarantee that it will not later change its policy.[62]

Although the expropriation of property presents a slight risk, the greater risk to the foreign investor is the risk that Vietnam will adversely change its laws during the project. Vietnam's current legal structure is a "hodgepodge of remnants of the French civil law system, pre-Doi Moi socialist decrees, and the recent proliferation of commercially oriented regulations lifted wholesale from market economies."[63] The Vietnamese government "has become a virtual legislation factory with new laws, decrees, circulars, directives and regulations, often in draft form, coming out almost weekly."[64] Consequently, what may be a legally permissible investment practice today may not be so tomorrow. The potential investor, therefore, should receive assurances from the Vietnamese government that the laws will remain substantially similar to those in effect when the project is started. As one savvy lawyer doing business in Vietnam has stated, the "laws and regulations currently in effect in Vietnam can, and most likely will, be changed to [the foreign investor's] detriment either before . . . or after [the] project is started . . . ."[65]

The Vietnamese government measures the harm created by adopting any new legislation by examining the investment license between the foreign-owned company and the SCCI. The investment

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59. *See Law on Foreign Investment in Vietnam (amended, supplemented)* (visited Mar. 4, 1999) <http://home.vnd.net/english/legal_docs/doc00241.html>.

60. *See id.*

61. *See* CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM art. 23.

62. *See* Laura A. Malinasky, *Rebuilding With Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 BERKELEY J. INT'L L. 438, 449 (1996).

63. Jonathan L. Golin, *Tiger by the Tail*, 81 A.B.A. J. 62, 63 (Feb. 1995).

64. *Id.* at 64.

65. Mathilde L. Genovese, Esq., *What Every Investor Needs to Know About Doing Business in Vietnam*, 18 No. 8 E. ASIAN EXECUTIVE REP. 9, 24 (1996). The author adds that "[l]aws and regulations are often poorly drafted and ambiguous, and are apt to be construed differently by various government bodies." *Id.*

license also serves as a baseline for measuring damages.[66] Thus, to fully realize the benefits of the FIL's protection against potentially hazardous legislative changes, investors must draft a comprehensive and detailed investment license with the SCCI. The investment license serves as a source for potential grandfathering of exceptions to any new law that may prove to be adverse to a foreign-owned company. To qualify for any potential grandfathering, it is critical for the investor at the outset to identify what laws the investor's project is subject to, and to expressly include any essential provisions of that law in the investment license.[67] Failure to include such provisions may result in a waiver of any grandfathering rights.

Insofar as Vietnam's stabilization clauses are concerned, they are not often found in national investment laws. Vietnam should go even further and provide a stabilization clause that would guarantee that any laws and regulations in effect at the time of the issuance of the investment license remain the same for the life of the project. In so doing, Vietnam would send a clear message to foreign-owned businesses that its goal of increasing foreign direct investment is genuine. Nevertheless, in its efforts to promote and develop foreign direct investment, Vietnam has gone above and beyond its duties in providing a measure of protection against the countries' ever-changing investment laws.

B. Creeping Expropriation

The Vietnamese government, in acknowledging its responsibility to protect foreign-owned interests, recognizes that its domestic laws must sometimes give way to international customs and laws. In 1992, Vietnam created its constitution, which declares that "[e]nterprises with foreign invested capital shall not be nationalized."[68] Due in part to Vietnam's constantly changing legal system, however, any changes in the law may subject a foreign investor's project to "creeping expropriation" due to the gradual increase in economic and regulatory restrictions placed on the investor's project.[69] Notwithstanding Vietnam's many promises not to expropriate property or to provide adequate compensation if they do, Vietnam does not have a

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66. *See Decree No. 18-CP, supra* note 13, art. 99.

67. *See id.* The provisions investors may want to lock into their investment license are the following: price schedules for raw materials, labor law regulations, import and export duties, tax rates, profit repatriation restrictions, environmental protection regulations, account rules and regulations, and any other rules that may increase the cost and time of an investor's project.

68. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM art. 25.

69. *See* Malinasky, *supra* note 62.

national policy of compensation with respect to any prospective expropriation. Yet, many other developing countries provide assurances of adequate compensation to foreign investors in the case of expropriation. These international investment laws, adopted by many developing countries since 1979, have set a standard of prompt and effective compensation in the case of expropriation.[70] Vietnam is at a distinct disadvantage by not including any similar language in its foreign investment laws.

C. *Conflict Between the National Policy of "Doi Moi" and Pecuniary Regional Interests*

There is presently a disturbing gap between the application of Doi Moi laws at the regional and national levels. Unless the VCP addresses this gap, the disparate application of foreign investment laws may have a negative impact on the flow of foreign direct investment in Vietnam. Because local officials are given broad authority to implement the laws promulgated under the FIL, they are likewise more apt to engage in corrupt government practices in contravention of the national policy of Doi Moi. Many businessmen complain about the ever-changing rules that must be dealt with from week to week.[71] This is a classic case of the state delegating too much power to regional authorities without the requisite supervision. The VCP heads the national government in advocating a comprehensive plan of economic development through increased foreign investment.[72] The goals of the VCP, consistent with the national policy of Doi Moi, are to: (1) reform the Vietnamese market to increase the standard of living for its people; (2) enable Vietnam to become more competitive in the Southeast Asian and global markets; (3) improve the GDP; and (4) restructure the economic and political climate of Vietnam.[73] The VCP understands that the only sure way of attracting foreign direct investment is through the application of consistent and comprehensive sets of commercial laws to provide investors with a sense of economic stability. This, in turn, will lead to an increase in the level of foreign direct investment in Vietnam from the global community.[74]

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70. *See id.*

71. *See Investing in Vietnam: Another Quaqmire?*, ECONOMIST, Apr. 7, 1990, Westlaw, Allnews database.

72. *See* Luke Aloysius Mcgrath, *Vietnam's Struggle to Balance Sovereignty, Centralization, and Investment Under Doi Moi*, 18 FORDHAM INT'L L.J. 2095, 2110 (1995).

73. *See id.* at 2119–20.

74. *See id.* at 2120-21.

However, the regional interests—trade unions, People's Committees, individual ministries, agencies, and local party officials—have no such national concerns.[75] Rather, these regional interests are more concerned with the short-term aspects of foreign investment, and essentially view themselves as being in direct competition with the VCP's national program of foreign investment.[76] The VCP's delegation of power to local authorities has led to arbitrary and capricious applications of the foreign investment laws. It has also led many foreign-owned businesses to become disenchanted with the rule of law in Vietnam, and to systematically ignore such national laws for the more informal and freewheeling regional ones.[77] This regional race for a share of foreign investment funds has resulted in graft, corruption, and unfair practices.[78] As one commentator noted, "[c]orruption is a way of life in Vietnam, and requests for payments are often made by various government officials at different levels of government. Early in the game, [foreign investors] need to develop a strategy for dealing with corruption."[79]

V. ACT OF STATE DOCTRINE AND BANK EXPROPRIATION: HOW U.S.- AND FOREIGN-OWNED COMPANIES CAN AVOID ITS APPLICATION TO BANKING DISPUTES IN THE UNITED STATES

A. *Background of the Vietnamese Banking System*

The biggest and most significant way for Vietnam to encourage foreign direct investment is to stimulate and build consumer confidence in the banking system.[80] The banking system is the cornerstone of any program of foreign direct investment. Without a solid banking mechanism in place, Vietnam is at a serious disadvantage in attracting foreign direct investment. Though a non-convertible currency, the dong has been quite stable, and is subject to a regulated exchange rate and relatively low inflation.[81] The State Bank of Vietnam is responsible for regulating the currency's official exchange

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75. *See id.* at 2121–22.
76. *See id.* at 2122.
77. *See id.* at 2123.
78. *See id.* at 2122.
79. Genovese, *supra* note 65, at 24. Genovese goes on to warn that U.S. businesses may violate the Foreign Corrupt Practices Act if they were to make payments or to obtain or retain business on the basis of making payoffs. *Id.*
80. *See id.* Currently, the Vietnamese public keeps an "estimated 45% of broad money as cash and over 50% of local business transactions are conducted outside of the banking system . . . [and presently], there are only 10,000 individual bank accounts for a population of 77 million. Vietnam continues to operate largely as a cash economy." *Id.*
81. Vietnam: Trade and Project Financing (visited Feb. 18, 1998) <http://www.tradeport.org/ts/countries/vietnam/financing.shtml>.

rate and has recently allowed it to more widely fluctuate—currently the rate is about 11,650 dong to the dollar.[82] The Vietnamese government has adopted a principle of self-sufficiency for foreign-invested companies.[83] This means that the State Bank in Vietnam will strictly enforce its "lax" regulations, and require foreign-invested companies to meet their foreign-exchange needs by operating on the basis of self-sufficiency.[84] Investors in Vietnam are well-advised to obtain a prior determination of currency convertibility rights for any given proposed project because they will be unable to generate their own foreign exchange for "profit repatriation or other hard-currency-debt obligations."[85]

If Vietnam wants to maintain its steady flow of foreign direct investment, Vietnamese banks must adhere to international banking standards, instead of shirking their obligations under international law. Recent actions by Vietnamese banks have shaken the international investing community's confidence in the Vietnamese banking system.[86] Several banks in Vietnam have delayed letter of credit payments, which they were obligated to make immediately under the U.S. Uniform Commercial Code and international conventions.[87] Vietnam still owes over $800 million in outstanding letter of credit payments for 1997.[88] Documentary transactions, such as letters of credit, drafts, and wire transfers, are the typical methods of payment by U.S. firms conducting business in Vietnam.[89] Foreign-owned businesses operating in Vietnam usually insist on using irrevocable, confirmed letters of credit when beginning their commercial

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82. *See id.*

83. *See id.*

84. *See id.* The "self-sufficiency" requirement is meant to assure that foreign investor's activities are directed at export products to bring foreign currency into Vietnam. Enterprises and representative offices of foreign investors are required to open a bank account in a Vietnamese bank with foreign currency.

85. *Id.*

86. *See id.* For instance Viet Hoa Bank has resisted repaying a deposit made by Shinhan Bank of Korea, claiming that the deposit was never made. Vietcombank and Incombank have both held up payments for outstanding L/Cs because of ongoing fraud investigations at client firms. And, finally, the Vietnam Bank for Private Enterprise Bank has experienced liquidity problems and have failed to pay outstanding L/Cs on time. *Id.*

87. *See* Vietnam: Trade and Project Financing (visited Feb. 18, 1998) <http://www.tradeport.org/ts/countries/vietnam/financing.shtml> Thompson BankWatch, Inc. of New York, a bank rating agency, has downgraded the sovereign risk rating and short-term local-currency debt rating of several major commercial banks in Vietnam in June 1997. BankWatch cited concern about "Vietnam's inability or unwillingness to honor financial commitments, given growing short-term trade debt and reduced foreign reserves." *Id.*

88. Vietnam: Trade and Project Financing (visited Feb. 18, 1998) <http://www.tradeport.org/ts/countries/vietnam/financing.shtml>.

89. *See* Vietnam: Trade and Project Financing (visited Feb. 18, 1998) <http://www.tradeport.org/ts/countries/vietnam/financing.shtml>.

relationships with distributors and importers.[90] Vietnamese companies do not like to use confirmed letters of credit because of the cost and the collateral requirements, but foreign-owned companies should nevertheless insist on these forms of letters of credit because they are the most reliable.[91] Failing this, foreign-owned companies should seek "silent" confirmation from foreign banks that are willing to assume the payment risk of the opening bank.[92] There are many banks in Vietnam purporting to specialize in letter of credit transactions, but there is a consensus among foreign companies doing business in Vietnam that Hanoi and Ho Chi Minh City are the two most savvy areas for Vietnamese banks opening letters of credit.[93] They have found that these two commercial centers have a substantial amount of experience with foreign investors, and that the bank branches outside of these two cities have a general lack of expertise and knowledge of letters of credit.[94]

B. The Act of State Doctrine

1. The Complete Fruition Test

When doing business in Vietnam one would expect that Vietnamese law would, naturally, apply—and for the most part it does apply. However, the United States has developed comprehensive and usually consistent case and statutory laws with respect to commercial investments. Thus, U.S.-owned companies and some foreign-owned companies may want U.S. courts to adjudicate their expropriation claims in the event that a dispute arises with the Vietnamese government and an arbitration panel's decision has proven unsatisfactory.[95] Because Vietnamese officials are loath to apply any laws other than their own, U.S. companies should not count on such a contractual provision. Even when sovereign nations are hauled before a U.S. court, there is the usual affirmative defense of the Act of State Doctrine.[96] This doctrine precludes U.S. courts from adjudicating the acts of a foreign government when those acts

90. *See id.*

91. *See id.*

92. *See id.*

93. Vietnam: Trade and Project Financing (visited Feb. 18, 1998) <http://www.tradeport.org/ts/countries/vietnam/financing.shtml>.

94. *See id.*

95. Foreign companies may also contract independently for the right to have a U.S. court adjudicate any disputes that may arise.

96. The other affirmative defense is the "Foreign Sovereignty Immunities Act."

are performed within the foreign country's own territory.[97] What this means, essentially, is that U.S. courts may not second guess the merits of a sovereign's expropriation policy in a U.S. court. While the Act of State Doctrine precludes U.S. courts from determining the validity of the foreign country's acts, U.S. courts may still determine the scope of the validity of the acts.[98]

Although the Act of State Doctrine has constitutional underpinnings,[99] U.S. courts have carved out three exceptions to the doctrine: the Bernstein exception,[100] the commercial activities exception,[101] and the treaty exception.[102] The most important exception, for purposes of any potential expropriation by Vietnam, is the commercial activities exception. This exception effectively bars the applicability of the Act of State Doctrine and would allow a U.S. court to adjudicate the validity of any expropriation decree issued by the foreign government to the extent that the foreign nation participated in the international market.[103] Therefore, if Vietnam were to expropriate U.S.-owned investments and/or property and it were doing so in its commercial capacity, then the Act of State Doctrine would not apply. A U.S. court would then have plenary review authority.

However, the applicability of the Act of State Doctrine, when applied to the expropriation of intangible property, depends on which situs determination test the sitting court uses.[104] This is the single most important factor for foreign-owned companies to consider when drafting any contracts with a Vietnamese bank.[105] In determining the situs of the intangible property, U.S. courts tend to favor the complete fruition test in lieu of the archaic and inflexible

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97. *See* 45 AM. JUR. 2D *International Law* §83 (1969).

98. *See id.*

99. *See id.*

100. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (stating that a U.S. court will not apply the doctrine if the State Department notifies the court that the executive branch may adjudicate the merits of a foreign nation's act).

101. *See* Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 706 (1976) (stating that the sitting U.S. court will not defer to actions of foreign governments if the foreign government acts in its proprietary capacity).

102. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (stating that the Act of State Doctrine will not apply if the disputed action is the subject of a treaty between the foreign state and the United States).

103. *See* Alfred Dunhill, 425 U.S. at 706.

104. *See* Note, *Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property:* Braka v. Bancomer, S.N.C., 11 N.C.J. INT'L L. & COM. REG. 121, 124-25 (1986).

105. *See id.* at 121.

domicile test.[106] The complete fruition test more accurately reflects the expectations of the foreign government than the traditional domicile test.[107] A clearer understanding of the foreign government's expectations decreases the likelihood that a U.S. court will frustrate those expectations.[108] This test also allows the parties to decide who should bear the risk of loss in the event of expropriation. Expropriated private property is in complete fruition when the expropriating government has the parties before it and changes the parties' relationship with respect to the property.[109] If the complete fruition of the expropriation occurs in the jurisdiction of the expropriating state, the expropriating state has jurisdiction over the debtor and is the legal situs of the property.[110] In applying the complete fruition test in foreign bank expropriation cases, the court must look at whether the creditor (depositor) and the debtor (bank) were both in the controlling territory of the expropriating state.[111] Once this is established, the court must determine whether the situs of the expropriated property was within the territory of the expropriating state.[112] However, courts disagree about which test to apply in making the threshold situs determination. Moreover, in bank expropriation cases, courts have a tendency to rely far too heavily on the provisions of the deposit contract in determining the situs of the deposit. This does not take into consideration other factors that may provide a more accurate measurement of the foreign government's expectations. Foreign investors should keep in mind that when courts determine whether the Act of State Doctrine applies to any expropriation decree, the relationship of the parties involved, as well as the situs of the investor's property, will influence the situs determination.[113] The situs, in turn, determines the applicability of the Act of State Doctrine.[114] Foreign investors doing business in

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106. *See* Braka v. Bancomer, S.N.C. 762 F.2d 222, 224 (2d Cir. 1985); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 875 (2d Cir. 1976); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714-15 (5th Cir. 1968) (applying the "complete fruition test").

107. *See* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 881-84 (S.D. N.Y. 1983) (holding that in considering such objective factors as the place of contracting, the place of repayment, and the currency of the accounts, a court will be less likely to frustrate the expectations of a foreign sovereign in applying the Act of State Doctrine).

108. *See id.* at 884 (applying the complete fruition test).

109. *See* Tabacalera, 392 F.2d at 713-16.

110. *See id.*

111. *See id.* (holding that since defendant was a Florida corporation with no physical presence in Cuba at time of the expropriation, Cuba could not perform the fait accompli, and therefore the Act of State Doctrine was inapplicable).

112. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d. Cir. 1985).

113. *See* Tabacalera, 392 F.2d at 713-16.

114. *See* Note, *supra* note 104, at 121.

Vietnam should be sure to provide some U.S.-based transaction with which a sitting U.S. court may broadly construe as conferring jurisdiction.

2. *The Incidents of the Debt Test*

Because of the limitations of determining the situs by only looking within the four corners of the deposit contract, the Fifth Circuit in *Callejo v. Bancomer, S.A.*[115] created the incidents of the debt test to make up for the shortcomings of the complete fruition test.[116] The test basically examines "where the incidents of the debt, as a whole, place it."[117] This requires the court to examine a number of factors, such as the intentions of the parties, the extent of involvement of U.S. regulatory agencies, the place of repayment, and the place of deposit.[118] The incidents of the debt test allows a U.S. court to determine whether the interests of the confiscating state outweigh the interests of the U.S. court in adjudicating the relationship between the parties. If the interests of the confiscating state outweigh those of the United States, the court will balance its decision-making. The court will examine the extent to which its decision will interfere with the ability of the President to conduct foreign relations and the extent to which the foreign country's economic intentions are frustrated.[119] In crafting this test, the Fifth Circuit essentially created a test that is most consistent with the separation of powers principle underlying the Act of State Doctrine, insofar as it considers the additional factors outside of the scope of the deposit contract.[120] Despite the availability of this excellent situs determination test created by the Fifth Circuit, U.S. courts have not been consistent in applying any particular situs determination test.

Trinh v. Citibank, N.A.[121] illustrates the problem courts have with respect to determining which situs test to use in order to apply the Act of State Doctrine. In *Trinh*, the court held that the Act of State Doctrine did not apply and, therefore, it did not relieve Citibank of its obligation to repay the Saigon depositors. The plaintiff's father deposited a total of three million piasters in the Saigon branch of Citibank during a four-month period.[122] The account was a joint

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115. 764 F.2d 1101 (5th Cir. 1985).
116. *See id.* at 1123-24.
117. *Id.* at 1123.
118. *See id.*
119. *See* Callejo, 764 F.2d at 1124-25.
120. *See id.*
121. 623 F. Supp. 1526 (E.D. Mich. 1985), *aff'd* 850 F.2d 1164 (6th Cir. 1988).
122. *See id.* at 1528.

account in both the father's and the plaintiff's names. The plaintiff found out about the account and contacted the international division of Citibank in New York about the account.[123] Citibank denied having any responsibility for the three million piaster deposit and claimed that the National Bank of Vietnam was responsible for the deposit.[124] The plaintiff filed a lawsuit and the court applied the domicile test reasoning that shutting down Citibank's banking operations in Vietnam ended its presence there.[125] Therefore, Vietnam as the expropriating country, did not have jurisdiction over Citibank and could not enforce or collect the debt that the branch owed its depositors.[126] Thus, the United States was the proper situs of the deposits at the time of the expropriation.[127] In effect, this meant that the U.S. court could consider the claim that questioned the validity of the expropriation decrees.[128] The court determined that Citibank was bound to honor the repayment demands of its Saigon depositors. However, investors should be aware that if the incidents of the debt test had been applied, the Act of State Doctrine would have shielded Citibank from liability. The disagreement among U.S. courts on which situs test to apply should put investors on notice of the potential forum shopping possibilities available to nullify or activate the Act of State Doctrine in the case of expropriation.

VI. DISPUTE RESOLUTION AND INTERNATIONAL ARBITRATION

Vietnam is currently not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[129] therefore, any attempt by a foreign investor to include an international arbitration clause in its contract may prove futile. Additionally, Vietnam is not a member of the International Center for the Settlement of Investment Disputes (ICSID). ICSID was created by the Convention on the Settlement of Investment Disputes to "provide a forum for conflict resolution in a framework which . . . attempts in particular to 'depoliticize' the settlement of investment disputes."[130]

Vietnam lacks a comprehensive and consistent policy of referring disputes between foreign-owned companies and Vietnamese nationals to an international arbitration panel. Developing such a

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123. *See id.*
124. *See id.*
125. *See id.* at 1536.
126. *See* Trinh, 623 F. Supp. at 1536.
127. *See id.*
128. *See id.*
129. *See Vietnam* (visited Mar. 5, 1999) <http://www.epms.nl/dbtcgi.exe>.
130. IBRAHIM F.I. SHIHATA, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA 5 (1992).

policy would go a long way in developing investor confidence in channeling foreign direct investment in Vietnam. The U.S. government, as well as many foreign investors, has commented that this lack of an effective dispute resolution mechanism may prove to be an obstacle to any further direct investment in Vietnam. Currently, there are three methods of enforcement in Vietnam: the court system, arbitration, and administrative orders. The FIL provides that parties to a foreign investment contract must attempt to resolve commercial disputes through independent negotiation.[131] If this independent negotiation fails to bring about a solution, the parties must either refer their dispute to the Vietnam International Arbitration Centre or another mutually agreed-upon authority.[132] Although both the FIL and Decree No. 18-CP provide for international arbitration in resolving disputes among foreign and Vietnamese parties in a joint venture,[133] the FIL is itself silent with respect to international dispute resolution between a foreign investor and the Vietnamese government. Decree No. 18-CP mandates that any disputes not resolved through conciliation shall be referred to a "competent State body."[134] The regulations do not define what a competent State body is, but a foreign investor should probably be prepared to deal with a VCP-appointed authoritative body.

As a result, it is imperative that foreign investors include who will be deemed a competent body when drafting their investment license with the SCCI in the event of a potential commercial dispute. Foreign investors, as a general rule, prefer that an international arbitration panel, rather than a Vietnamese court or a VCP-appointed authoritative body, handle any disputes. However, the Vietnamese government is unwilling to relinquish any of its control in arbitrating disputes. Thus, foreign-owned companies should be prepared to deal with the Vietnamese government's way of handling disputes. This unwillingness to refer disputes to an international arbitration panel, as well as its lack of enforcement powers in arbitration proceedings, may prove detrimental to Vietnam's goal of attracting foreign direct investment. However, there are encouraging signs of Vietnam's willingness to develop a consistent arbitral framework.

In 1993, the National Assembly created a new arbitral structure to resolve commercial disputes between foreign investors and Vietnamese commercial partners by creating the Economic Court

131. *See* Law on Foreign Investment in Vietnam, *supra* note 10, at 936.
132. *See id.*
133. *See Decree No. 18-CP, supra* note 13, art. 100.
134. *Id.* art. 102.

and the Vietnam International Arbitration Centre.[135] Because this arbitration body is relatively new, it will take some time before this body will gain enough experience in resolving disputes between foreign investors and the Vietnamese government. Therefore, foreign-owned companies would be well-advised in stating with exact precision what body will be designated "competent" in their investment licenses. In addressing this concern, Vietnam passed the Law on the Enforcement of Foreign Civil Judgments, which went into effect on January 1, 1996.[136] The law provides that an award in an international arbitration proceeding will be enforced in Vietnam if the arbitration body has an international arbitration agreement with Vietnam, or by reciprocity.[137] Vietnam's willingness to accommodate the interests of foreign companies by further developing its dispute resolution process is a step in the right direction, but foreign investors should still be wary with respect to any disputes with the Vietnamese government. The FIL's provisions are vague with respect to any commercial disputes with the Vietnamese government, and the Vietnamese government is unwilling to cede its control by using an international arbitration panel to resolve disputes.

VII. CONCLUSION

Vietnam has come a long way in attracting foreign direct investment. It has created hospitable foreign investment laws and joined OPIC. Vietnam is also promoting privatization, protecting against adverse legislative changes, and moving in the right direction by establishing an international arbitration panel to resolve commercial disputes between foreign investors and the Vietnamese government. Although these are substantial steps in promoting foreign direct investment, Vietnam still has a long way to go. For instance, by not becoming a member of either the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the ICSID, Vietnam is putting foreign direct investment at risk, as investors currently have little confidence in Vietnam's ability to resolve commercial disputes. Furthermore, Vietnam may not be as competitive as its neighbors in attracting foreign direct investment. Investors who are hesitant to go through Vietnam's procedural

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135. *See* James S. Finch & Harold P. Fiske, *Vietnam's Evolving Arbitration System*, E. ASIAN EXECUTIVE REP. at 9, Apr. 15, 1995.

136. *See Regulatory Watch in Vietnam*, EIU BUSINESS ASIA, Mar. 25, 1996, *available in* LEXIS, Asiapc Library, Alleiu File. Vietnam has only arbitrated a few international agreements, and mostly with Eastern European countries.

137. *See id.*

gauntlet may opt to invest in one of Vietnam's neighbors, whose rules for setting up a commercial enterprise are less stringent.

Finally, Vietnam's disturbing delegation of power to regional authorities may prove to be the most damaging roadblock to foreign direct investment because foreign investors are less likely to have faith in, and respect for, Vietnamese laws. Without a reliable and adequate legal framework, foreign investors may not view Vietnam as a viable economic prospect. However, Vietnam is on the right track, and, indeed, has come a long way in attracting foreign direct investment.