



Viet Nam

Legal and judicial development

Working Paper 3

Prepared for AusAID
April 2000



The Australian Government's
Overseas Aid Program

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Published by the Australian Agency for International Development (AusAID), Canberra, June 2001

The views presented in this paper are the consultant's and are not necessarily those of the Government of Australia or the Government of Viet Nam.

Glossary

ASEAN	Association of South-East Asian Nations
CIDA	Canadian International Development Agency
CIEM	Central Institute for Economic Management
CPV	Communist Party of Viet Nam
DANIDA	Danish International Development Assistance
GDLA	General Department for Land Administration
HCMC	Ho Chi Minh City
JICA	Japan International Cooperation Agency
MARD	Ministry of Agriculture and Rural Development
MOJ	Ministry of Justice
MPDF	Mekong Project Development Facility
NA	National Assembly
ONA	Office of National Assembly
PAR	Public administration reform
SIDA	Swedish International Development Agency
SOE	State-owned enterprise
UNDP	United Nations Development Programme
UNIDO	United Nations Industrial Development Organisation

Background to legal reform in Viet Nam

During the last decade, Viet Nam has undergone a massive legislative transformation. Emerging from decades of rule through administrative fiat, reforms now aim to shift economic regulation from government edicts to universally applicable legislative norms and macroeconomic levers. In addition to enacting a legal framework broadly in line with a Continental civil law system and international legal norms, the state is belatedly reconfiguring legal institutions to suit the post-*doi moi* environment. Since it has the potential to radically change both state implementation and social perceptions of law, this institutional transformation forms the focus of this survey. From the Vietnamese perspective, the dilemma of law reform is to what extent legal rules can bifurcate to accommodate foreign and domestic investors in the pursuit of industrialisation and modernisation, while largely ignoring the political side of the legal system.

The 'rule of law' in the governance context

The Governance Mission Programming Areas identified the goal of Legal and Judicial Development as 'promoting effective and equitable legal systems and strengthening the rule of law'. These terms were clarified in a passage taken from the UNDP Discussion Paper 'Completion of Viet Nam's Legal Framework for Economic Development'¹, which opines that 'well-conceived' legal systems facilitate 'foreign and domestic investment ... and spread the benefits of economic growth'. In discussing what constitutes a 'well-conceived' legal system, the paper makes a series of assumptions about underlying state and social institutions summarised below.

- Societies are comprised of individuals, civil society organisations and the state.
- States exercise control through laws that address individuals.
- Laws are made through pluralistic processes, and are accordingly understood and widely obeyed.
- Rules rather than political ideology, religious precepts and cultural practices guide officials.

After a decade of legal reform, Vietnamese society remains very different from the western ideals informing many donor legal interventions. Despite the enactment of a commercial legal framework largely based on western legal transplants (laws and legal practices), Viet Nam's legal system overwhelmingly resonates with local rather than imported principles, precepts and processes. For reasons that are poorly understood, some legal transplants take root and flourish, others lie dormant and still others are rejected. In the main,

¹ John Bentley UNDP Discussion Paper 2, Hanoi Viet Nam March 1999 at 2, 3, 8-10.

investigations reveal a complex mosaic of transplanted behavioural norms, overlaying and rarely informing subordinate legislation and official decision-making, much less business and social practices.

Montesquieu² captured this uncertain relationship between transplanted law, local environmental and social conditions, when he (and many others³) argued that rules of law only coincidentally produce the same behavioural outcomes in different societies. The uneven reception of imported law in Viet Nam resembles the history of law reform elsewhere in East Asia.⁴

External pressures for legal harmonisation (an aspect of economic integration) have both stimulated and influenced commercial law reform since *doi moi* policies were promulgated in 1986. Initially law reforms sought to attract and accommodate foreign investment, however, since accession to ASEAN in 1995 the orbit of legal harmonisation has broadened to encompass trade, taxation, tariffs, transport, customs protocols, and banking. Western proponents of transplanted legal development, such as the World Bank, UNDP and Asian Development Bank⁵ argue that as law becomes a more sophisticated regulator of commerce, it also becomes ever more remote from its host culture. Globalising forces are credited with accelerating and reinforcing this 'de-coupling' process by creating one international legal dialogue comprised of a collection of regional sub-variations.

In its extreme form, some donors postulate a future where a single transnational jurisdiction emerges as national legal systems wither away.⁶ It is a small step from this vision of global equivalence and conversion, to the assumption that legal transplants no longer convey ideology and culture from one society to another, but rather are a series of technical adjustments between legal systems. In a world of converging legal systems, it makes sense for multilateral donors to use release conditions in large structural adjustment loans to accelerate legal 'harmonisation'.⁷

² See MONTESQUIEU, DE L'ESPIRIT DES LOIS, Chap. 3 (LIVRE I, (J. P. Mayer & A. P. Kerr eds., Gallimard 1970) (1749).

³ See ANN SEIDMAN & ROBERT SIEDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS 46 (1994); Pierre Legrand, *The Impossibility of Legal Transplants* 4 MAASTRICHT J. EUROPEAN COMPARATIVE L. 111, 119 (1997).

⁴ See PHILLIP A. WELLONS AND KATHARINA PISTOR, SYMPOSIUM ON THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 35-50 (1997).

⁵ For an example of the transplant model of law reform see UNDP, Completion of Viet Nam's Legal Framework for Economic Development, Hanoi (March 1999).

⁶ See Mauro Cappelletti et. al., *Introduction*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN EXPERIENCE (Mauro Cappelletti et. al. Eds. , 1986).

⁷ For example, an Enterprise Law was a condition for the release of the first tranche of a Financial Sector Development and Capital Market Loan of \$100. Despite Vietnamese resistance that delayed signing for twelve months, a release condition of the second tranche is the enactment of a new Bankruptcy that reportedly will grant automatic liquidation of companies unable to repay debts within a prescribed time.

Informed by observing the interface between imported laws, legal institutions and business practices, some multilateral donors (MPDF, UNIDO), bilateral donors (SIDA and CIDA) and researchers⁸ believe that effective interventions in the legal and judicial sector must comprehend and accommodate differences in the ideological, institutional and cultural composition of donor and host countries. This nuanced approach to law reform rejects as naive the belief that if laws are improved, legal institutions strengthened and law schools modernised, nothing can hold back the ‘rule of law’s’ triumph. The history of law reform in East Asia suggests, on the contrary, that interventions at best stimulate host country institutions to move in different directions. Drawing on a deep knowledge of law and social practices, carefully constructed interventions can guide local responses within predetermined behavioural corridors. Experienced donors advise that even these comparatively modest objectives should be measured over ten-year periods. The following discussion briefly explores some of the major factors affecting the transplantation and reception of commercial laws and practices in Viet Nam and makes recommendations about the future shape of AusAID interventions in the legal and judicial arena.

Legislative processes

Legal ideology

Socialist legal orthodoxy was openly challenged during the Fifth National Congress of the CPV in 1982. Reformers argued for a separation of the party from the day to day running of the government. Little was done, however, until the Sixth National Congress of the CPV in 1986, which decided that ‘the management of the country should be performed by law instead of simply by moral concepts. It is necessary to systematically supplement and perfect the legal system so as to ensure that state machinery organises and operates in accordance with the law’.⁹

As the economy shifted from command to mixed-market principles, the state needed a legal framework that devolved economic decision-making power to SOEs and private market players. This, in turn, required the replacement of internal secret relationships with ‘rational’ legal instruments. Under a doctrine called *nha nuoc phap quyen*, or ‘law based state’ (often mistranslated as ‘rule of

⁸ See generally, Leila Webster, SMEs in Viet Nam: On the Road to Prosperity, MPDF Private Sector Discussions No. 10 (Nov. 1999); MPI-UNIDO, Research Report: Improving Macroeconomic Policy and Reforming Administrative Procedures to Promote Development of Small and Medium Enterprises in Viet Nam, Hanoi, (January 1999); Ove Bring, Christer Gunnarsson and Anders Mellbourn, Viet Nam: Democracy and Human Rights, SIDA (MAY, 1998; Per Bergling Theory and Reality in Legal Co-operation-the Case of Viet Nam, in LEGAL ASSISTANCE TO DEVELOPING COUNTRIES, 61-80 (Per Sevastil ed. 1997); John Gillespie, *Law and Development in ‘The Market Place’: An East Asian Perspective*, in LAW, CAPITALISM AND POWER IN ASIA, 118-150 (K. Jayasuriya ed. 1999).

⁹ Truong Chinh, *Introduction to the Political Report* VIETNAM NEWS AGENCY Dec. 15, 1986 at Part 4.

law' or 'rule by law')¹⁰, legal reformers called for stable, authoritative and compulsory law; equality of economic sectors before the law; the use of law to constrain and supervise legal enforcement and a retrained judiciary to resolve private, commercial disputes

In addition to proclaiming the 'law based state', the Seventh Sixth Party Congress also reaffirmed *phap che xa hoi chu nghia* ['socialist legality'], which for decades expounded the three tenets of socialist governance: the people as owners, the party as leader, and the government as manager. Although the focus of the party and state has shifted from class struggle to economic development, the Marxist metaphor of the base (mode of production) determining the superstructure (ideals, culture and law) is still alive in the minds of central policy makers.¹¹ In this view, the purpose of law is to create a superstructure that reflects the 'will of the ruling class' (*y chi cua giai cap thong tri*) and its domination over the means of production. As a recent Party communique confirms:

The characteristics of our laws are different from those of bourgeois laws. Our laws are aimed at developing our nation in accordance with the socialist orientation while the laws of the bourgeois state are aimed at protecting capitalism.¹²

Further subverting the principle of the 'law-based-state', attempts to separate the functions of party and state have not addressed the party's indirect intervention in state organs and SOEs through the *nomenkultura* system.¹³ Indirect personal control exercised through party networks is sufficiently pervasive for one party writer to opine, 'no matter how big an economic unit is,

¹⁰ This new terminology first appeared in a speech made by Do Muoi at the 7th Party Congress in 1991. See *Sua Doi Hien Phap Xay Dung Nha Nuoc Phap Quyen Viet Nam Day Manh Su Nghiep Doi Moi* [Amending the Constitution, Establishing a "law based state" and Promoting Doi Moi Achievements], 30, 32-3, 37 (1992).

¹¹ Applying a historical-materialist analysis, society passes through various stages of development during its transition to advanced socialism. According to their respective Communist Parties, China and Viet Nam are currently traversing state-capitalism, where a dominant state sector coexists with private ownership. In this mixed economy, private ownership is tolerated provided it does not disrupt state economic management and 'collective mastery'-state and collective ownership.

¹² 'Resolution 7, Mid-term Congress Resolution, Part V', *Saigon Giai Phong* [Saigon Liberation] 2 (Mar 19, 1994); Vu Oanh, 'Developing Combined Forces in Mass Motivation Work and Renovating the Work Content and Method of the Fatherland Front and Mass Organizations, NHAN DAN 3, (Dec 23, 1993); Do Phuong, Party-State-Law (1995) 1 *Viet Nam Law and Legal Forum* (5), 3, 3-5; Do Muoi, 'Building and Perfecting the State', (1995) 1 *Viet Nam Law and Legal Forum* (6), 6. It should be noted that articles 11 and 12 of the Constitution not only demand official obedience to the law, but also require citizens to observe the law and assist the state to observe the law.

¹³ The *nomenkultura* system is controlled by party committees at all levels of government to ensure that party members occupy important state positions. See 'Political Report of the Central Committee (6th Term) at the 7th National Congress', in *Communist Party of Viet Nam 7th Congress Documents*, The Gioi: Hanoi, 92-93. (Discusses the failure of the party to carry out any effective reform since the 6th Party Congress in 1986).

if it is headed by a person who is not a party member, this does not mean that the unit lies outside party leadership.’¹⁴

In summary, programs designed by foreign donors to transform the legal system from bureaucratic discretion to universal legislative norms are subverted by cultural preferences for ‘non-legal’ methods of dispute resolution, unfamiliarity with regulations that are based on external norms and a political system that places the CPV policy above legal norms.

The effects of socialist legality on law making

Legal ideology affects the enactment of the market-oriented legal framework in two main ways. First, the development and importation of laws suited to mixed-market conditions are selected and adapted to reflect the pivotal principle of ‘state economic management’ (*quan ly nha nuoc kinh te*). Devised in the Soviet Union to link state planning and economic production in command economies, state economic management unified political and economic leadership in the state.¹⁵ As sole owners of productive assets, socialist states monopolised control over economic production. Since law was only ‘an important tool in the socialist state’s management of society and economy,’¹⁶ the ‘legal position of the parties in economic law [was] defined by their rights and obligations under the law, the plan, or the economic contract’.¹⁷ This meant that state policy embedded in economic plans and administrative contracts drafted by line-ministries enjoyed a regulatory status equivalent to written laws.

As most command mechanisms have now been dismantled in Viet Nam, the locus of ‘state economic management’ has migrated from production plans and supply contracts to market entry licences, detailed prescriptive regulations and economic policing and monitoring. The duty of ‘unified management’ implicit in ‘state economic management’ remains a central organisational principle of the state.

Secondly, party monopolisation of policy formulation impoverishes law-making. As the executive committee of the ruling class, only the party has the right to decipher and formulate the ‘will of the ruling class’ into concrete policy. Directed by party resolutions, law-makers only cautiously bring experience to bear on legislation. Since local level experience is generally filtered through party controlled mass organisations, feedback channels tend to validate

¹⁴ Nguyen Huu Tho, *Phan Dinh Chuc Nang Giua To Chuc Dang va Nha Nuoc-Dieu Kien Dau Tien Thuc Hien Phap Luat* [Assignment of Functions between Party Organizations and the State-the Pre-Conditions for Observance of Laws], TAP CHI CONG SAN (5) 1988 at 7.

¹⁵ See Nguyen Nien, *Several Legal Problems in the Leadership and Management of Industry Under the Conditions of the Present Improvement of Economic Management in Our Country*, LUAT HOC [JURISPRUDENCE] (14) 33, 33-35 (1976), trans. J.P.R.S., Sep. 30, 1976 at 34-36.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 43.

predetermined policy objectives, isolating law-makers from practice on the ground.

Despite these limitations, the processes surrounding the enactment of the Enterprise Law suggest an alternate trajectory where rigorous data-collection and analysis can surmount ideological hurdles. With considerable donor assistance, the CIEM manufactured support for open market access for companies through collaborative research projects conducted with selected ministries and business groups. Naturally, if the party had fundamentally objected the law would not have been drafted, much less submitted to the National Assembly. The enactment of the Enterprise Law is nonetheless highly significant, as it implies that although ideology and sectional political interests are powerful constraints, within authorised parameters they are susceptible to well researched arguments. More typically political prudence and institutional inertia ensure that opinion and guesswork guides law making.

Coordinating the legal framework

Surveys routinely show that private business planning is constrained by inconsistent and overlapping high-level laws (Luat) issued by the NA and low-level subordinate legislation issued by ministries and peoples committees. Since the party has relinquished its legislative role, no other state institution commands the political authority to ensure that subordinate legislation (that is decrees, decisions, circulars and instructions) complies with NA legislation. Though entrusted with 'supreme supervision' over legislation,¹⁸ the NA lacks the capacity and mechanisms to impose its will on the Prime Minister and line ministries. Attempts by the Ministry of Justice (MOJ) to coordinate legislative reforms have for similar reasons proved fruitless.¹⁹ Proposals to locate a national legal database at the MOJ will for the first time bring all legislation together, in principle enabling the Ministry to perform its statutory role of consolidating and eliminating legislative duplication.

There are five areas of concern with the existing system of policy development and legislative drafting.

- Legal drafters do not take broad policy considerations into account. After convincing the Standing Committee of the National Assembly to include bills in the law-making agenda, legal drafting agencies establish multi-ministerial drafting committees. Though in theory reflecting the interests of many ministries and government agencies, in practice, lead-drafting agencies ensure that laws predominantly reflect their own specific concerns. Drafts are next submitted to the Government for consideration. Meeting only two or three days a month, Government working agendas are extremely crowded

¹⁸ Law on the Promulgation of Legal Documents art. 81(1) (1996).

¹⁹ See Mark Sidal, *The Re-Emergence of Legal Discourse in Viet Nam* 43 INT'L COMPARATIVE L. QUARTERLY 163, 171-72 (1994).

leaving little time to consider the policy ramifications of draft laws. Consequently, drafts submitted to the NA invariably reflect the sectional interests of drafting committees without adequately explaining the economic implications of the law. In the end, NA delegates are compelled to debate policy issues best resolved by Government specialists.

- Since most NA delegates only vaguely understand and are frequently hostile to market reforms, numerous compromises are required to pass complex commercial legislation. Open-ended drafting techniques used to strip laws of controversial detail effectively devolves responsibility for social policy formulation to implementing authorities. Legislative responsibility is as a result shifted from the NA, the most democratically accountable state organ, to inaccessible and publicly unaccountable executive organs.
- As legal regulation is highly instrumental and tied to party policy, subordinate regulations change with every fluctuation of policy. Ministries and People's Committees use opaque and voluminous regulations to expand their political turf and implement 'state economic management', and vigorously subvert public administration reforms designed to streamline and clarify legal rules.²⁰ Attempts by the NA and other bodies to coordinate legislation are accordingly perceived as political constraints on policy, rather than improvements to regulatory processes. Ultimately policy determines laws, but law does not effectively constrain policy; partially explaining why ten years of drafting assistance has had so little impact on the quality of legal regulation.
- The technical quality of subordinate law drafted by Ministries and People's Committees is generally poor. Terminology is vague and/or changeable, legal rights are invariably qualified with discretionary powers and are too often obtuse or grammatically incorrect.
- New legislative provisions often repeal prior inconsistent legislation without precisely specifying which laws or provisions are abrogated.

The commercial legislative framework

Though still incomplete, law-makers since *doi moi* have enacted a legislative framework that covers most aspects of market activity. Not unexpectedly, the framework reflects the dual legal policies of the 'law-based state' and 'socialist legality'. The former is evident in the principle of equality before the law found in most commercial legislation. For example, all domestic incorporated entities operating in the same line of business are in principle taxed at equivalent rates;²¹ the Law on Business Bankruptcy does not differentiate between

²⁰ The preamble to Resolution No 38 of 1994, and subsequent public administrative reform instruments clearly lay the blame with line-ministries and provincial peoples committees.

²¹ Law on Enterprise Income Tax arts. 1, 10 (1997); Decree No. 30/1998/ND-CP Detailing the Implementation of the Law on Enterprise Income Tax arts 1, (May 13, 1998)

ownership in any substantive way and the rules governing civil obligations²² in the Civil Code and economic contracts in the Ordinance on Economic Contracts²³ treat legal sectors equally.

'Socialist legality' finds expression in discretionary authority devolved to central and local level bureaucrats. If at all, powers are defined by poorly drafted and frequently contradictory rules increasingly located in non-legislative administrative instruments, such as unpublished ministerial letters and bulletins. Discretionary powers are used to punish violations of 'state economic management' with administrative and criminal penalties. Chapter eight of the Enterprise Law, for example, invests provincial/city peoples committees with powers to monitor compliance with licenses (if any) and subordinate regulations. At first glance, state management provisions differ little from administrative rules found in corporation laws the world over. Their implementation through administrative and criminal penalties, however, sets Vietnamese economic management apart from other countries.

Implementing 'state economic management'

Market entry and the Enterprise Law

By abolishing business licenses, the Enterprise Law has significantly reduced the capacity of bureaucrats to proactively regulate private investment. Previously, People's Committees exercised wide discretionary powers to direct private capital into selected economic sectors. Despite reforms, private investors remain barred from economic sectors considered harmful to the public interest, such as national defence and areas reserved for SOEs, such as telecommunications, transport and rice export. Of an estimated 270 licences controlling market access, eighty four were abolished by the Prime Minister in Decision No. 19-2000-QD-TTg on the Revocation of all Types of Licences Inconsistent with the Provisions of the Law on Enterprises (2000).

Some of the abolished licences were ludicrous. Take for example, the Ministry of Information and Culture service licences for typing, music teachers and photocopying. The abolition of other licences, such as those certifying food safety and hygiene raise concerns about ongoing monitoring and safety standards. Prior to deregulation, HCMC two food safety inspectors incorporated food hygiene standards into licence conditions. This practice generated regulatory discrepancies and corruption. However, the HCMC People's Committee was unprepared for deregulation and has not issued food safety guidelines to facilitate self-regulation by the industry and monitoring by health

²² Civil Transactions, which cover all civil contractual and tortuous acts, apply to individuals and legal persons. Civil Code art. 130 (1995). Article 94 of the Civil Code does not differentiate between legal persons according to their ownership.

²³ See Ordinance on Economic Contracts art. 2 (1989).

inspectors.²⁴ Threats to public safety are also likely in regulatory vacuum left by the abrogation of licences for environmental pollution and finance brokers.

Recent liberalisations have not removed licences controlling market entry into important economic sectors such as manufacturing, mining, tourism, various import/export activities, access to foreign markets (quotas) and technology transfers. Companies providing ‘cultural activities’, such as theatres, cultural houses, dance halls and hotels, advertising services,²⁵ tourism services²⁶ to name a few, also require operating permits. Perhaps more importantly, the psychology of ‘state economic management’ remains firmly entrenched. Undeterred by losing some licences during the current deregulatory cycle, the Ministry of Information and Culture intends licensing the performance of folk music to foreigners.²⁷

Another problem with licence deregulation was revealed during 1998 when the Ho Chi Minh City People’s Committee experimentally issued broad business licenses authorising some companies to engage in ‘the textile and clothing trade’ and ‘general manufacturing’.²⁸ Rather than stimulating commercial autonomy, many participating companies subsequently sought more restrictive and precise license conditions.

This counter-intuitive response is explained by a representative incident. A company licensed to ‘trade in consumer goods’ was fined by *ban quan ly thi truong* [market control police] for selling televisions. The administrative order classified televisions as luxury, rather than consumer goods. The company returned to the Industry Department of the People’s Committee requesting a licence specifying each permitted trade item. Clear business objectives are essential, since *ultra vires* [beyond power] contracts are automatically void, exposing entrepreneurs to civil, administrative and in serious cases, criminal liability.²⁹

Policing regulatory compliance

Regulatory compliance is policed by a variety of city/provincial organisations, including market management boards (*Chi cuc quan ly thi truong thanh pho*),³⁰

²⁴ See Nguyen Van Cam, *Business Beat*, Viet Nam News, Feb. 2, 2000 at 2.

²⁵ Decree No. 87 CP Promulgating Regulations on the Business and Circulation of Films, Video Tapes/Disks, Audio Tapes/Disks, and Rental of Publications; Cultural Activities and Service in Public Areas; Advertising, Writing and Installation of signboard arts. 19, 27 (Dec. 12 1995).

²⁶ Decree No. 9 CP (Feb. 5, 1994); Circular No. 15/TCD (July 29, 1994).

²⁷ *Viet Nam Investment Review* Mar. 3, 2000.

²⁸ These comments are based on interviews with Vietnamese private legal practitioners in Ho Chi Minh City during July 1998.

²⁹ Civil Code art (1995); Criminal Code art 159 (1999); also see John Gillespie, *Corporations in Viet Nam*, in COMPANY LAW IN EAST ASIA 310 (Roman Tomasic ed, 1999).

³⁰ Decree No 1 on Administrative Punishment for Economic Actions (1996).

economic police (*Canh sat kinh te*) and economic security police (*An ninh kinh te*). Adding to the confusion, certain Ministries and People's Committees conduct specialised inspections. For example, the Ministry of Labor monitors compliance with the Labor Code, the Ministry of Transport inspects vehicles, traffic police control road safety and the Taxation Department collects and monitors taxation.

The plethora of inspection agencies generates multiple visits by the same or different teams of inspectors.³¹ In some circumstances, official harassment is attributable to overlapping responsibilities and poor interdepartmental coordination, but more generally informants believe that inspections are intended to *lam luat* [make law]), a popular expression describing the misuse of discretion to extract rents or simply reinforce state authority over private entrepreneurs. Visits evidently reach a climax immediately before Tet, in line with seasonal expectations of gift-giving

According to an authoritative report published by CIEM 'entrepreneurs feel that the difficulties they face in Viet Nam is not to find ways of producing cheap and good products, but coping with inspection agencies and satisfying their requirements.'³² Some informants believe that as licensing gateways close, 'state economic management' has migrated to economic policing.³³

Criminalising commerce

Entrepreneurs regard the blurred distinction between administrative and criminal penalties as the most potent weapon in the arsenal of 'state economic management'.³⁴ Criminal penalties apply not only to offences described in the Criminal Code 1999, they also extend to administrative violations of commercial regulations. Where recidivism³⁵ or quantitative criteria³⁶ determine criminality, the threshold between relatively minor administrative and harsh criminal sanctions is comparatively clear. Uncertainty arises, however, where intention transforms illegal acts into *hanh vi* [criminal acts]. It is a crime to intentionally

³¹ See .e.g. Cao Cuong, *No More Harassment* SAIGON TIMES July 11, 1998, at 28-9.

³² See Vien Nghien Cuu Quan Ly Kinh Te Trung Uong [Central Institute of Economic Management], *Danh Gia Tong Ket Luat Cong Ty va Kien Nghi Nhung Dinh Huong Sua Doi Chu Yeu*, [Review of the Current Company Law and Key Recommendations for its Revision] Hanoi, January 1998, at 104.

³³ These findings were reported by Nguyen Dinh Cung in an internal memorandum prepared by CIEM in March 1999 that discussed the effects of prior liberalisations of the business-licensing regime.

³⁴ See Tan Duc, *Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An*, [Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business], THOI BAO KINH TE SAI GON [SAI GON ECONOMIC TIMES] May 20, 1999, at 10, 11.

³⁵ For example, the administrative offences of 'doing business illegally' are criminalised on the second and subsequent breach. Criminal Code art. 159 (1999).

³⁶ For example, article 9 of Decree No. 16-CP Regulating Administrative Sanctions in State Management Over Customs (1996) provides that the unlawful importation of certain kinds of goods valued over ten million *dong* constitutes an administrative offence, while importing goods exceeding that value is a criminal activity.

conduct business without a license, for example.³⁷ Representative of entrepreneurial sentiment, is the following statement of Nguyen Thi Nghia, a Ho Chi Minh City based company director:

In principle, 'intentional contravention' breaches the law, however, it is very difficult to apply the relevant law in practice. *Boi duong* [feeding up] customs officers, for example, is obviously an intentional contravention, but we cannot help doing it while operating our businesses. It is very difficult to do business in a vague legal environment that is full of unclear and general provisions. In fact, enterprises cannot exist without 'intentional contravention'.³⁸

Worse still, those 'acting against', though not necessarily breaching 'state regulations' commit a criminal offence under article 165 of the Criminal Code.³⁹ Though frequently vague and contradictory, subordinate legislation is at least static, the term 'state regulations' is sufficiently broad to encompass unpublished ministerial letters, instruction and even oral directives.⁴⁰

Attempting to redress the problem, Directive No 16 CT-TTg on Fighting against Criminalisation of Economic and Civil Relations (1998) instructed the Ministry of Interior to ensure that police 'should not take advantage of their power and position to get enterprises into trouble'.⁴¹ Notwithstanding these measures, a report prepared by the Legal Committee of the National Assembly in December 1998 estimated that thirty percent of commercial violations investigated were criminalised (*hinh su hoa*) by state officials.⁴² Although the Government has abrogated other provisions in the Penal Code considered unsuited to a mixed-market economy, its decision to retain article 174 in the 1999 Penal Code is widely interpreted as a reaffirmation of the state's commitment to 'state economic management'.⁴³

³⁷ Criminal Code art. 159 (1999) (penalties ranges from one to seven years imprisonment).

³⁸ Tan Duc, *Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An, [Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business]*, THOI BAO KINH TE SAI GON [SAI GON ECONOMIC TIMES] May 20, 1999, at 11

³⁹ Criminal Code art. 165 (1999) (penalties range from three and twelve years imprisonment for serious breaches).

⁴⁰ See Tan Duc, *Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An, [Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business]*, THOI BAO KINH TE SAI GON [SAI GON ECONOMIC TIMES] May 20, 1999, at 10, 11.

⁴¹ See *Chong Hinh Su Hoa: Moi Dung Dung O Chi Thi Hoi Tao [Fighting Against Criminalization is Only Conducted in Directives and Workshops]* TOI BAO KINH TE SAI GON [SAIGON ECONOMIC TIMES] May 27, 1999 at 14.

⁴² *Ibid.*

⁴³ The offence of 'obstructing the implementation of the State's regulations on socialist transformation' described in article 164 of the Penal Code has been abrogated. See Nguyen Dinh Loc, *Amending and Supplementing the Penal Code-A must in the New Situation*, 6 VIETNAM L. & LEGAL FORUM (62), 14, 20 (1999). Also see '*Hinh Su Hoa*': *Khong Phai Tai Luat [Criminalization is not Due to the Laws]* THOI BAO KINH TE SAI GON] May 27, 1999 at 12-13.

More than any other penal provision, the vague and ambiguous nature of article 174 induces a psychology of compliance. Broad enough to apply to most administrative violations,⁴⁴ private investors are never certain whether their activities offend contradictory and obscure 'state economic management' 'principles and policies'. The mere threat of prosecution transforms calculable commercial risk into incalculable criminal risk, inhibiting and controlling entrepreneurial endeavour.

Uncertainty surrounding the boundaries of private commerce encourages entrepreneurs to rely on family and patronage relationships with state offices. This practice not only breeds corruption, but profoundly undermines confidence in the ability of imported commercial norms to accurately predict the limits of state power.

Legal compliance and personalism: a case example

The subordination of the 'law based state' by 'state economic management' blurs legality and personalism. Consider the regulation of private banking in HCMC. Contradictory and poorly disseminated State Bank lending provisions and incoherent jurisprudential rules make it virtually impossible to predict the limits of regulatory power. Worse still, provincial and even central bank officials cannot provide advice, because lending policy is decided at the political level by Ministers and/or Deputy Prime Ministers. Without the political networks available to state owned banks, private banks must approach high level officials obliquely through ministerial advisers or other bureaucrats. Ministerial letters clarifying lending practices confer a competitive edge over rival banks. Inside information and 'umbrella' (*o du*) protection against interference from provincial/city officials, enable some banks to expand their business into new profitable areas. Over time, family and patronage-based regulation has generated fragmented capital markets where different rules apply to each credit institution.

Bureaucratic culture

The concept of state economic management is not unique to Viet Nam. Variants of state-directed market economies exist throughout East Asia. What distinguishes regulation in Viet Nam is a highly politicised bureaucracy and an associated ideological antipathy towards the private sector. Senior bureaucrats, primarily trained in former Eastern bloc countries in public law concepts, administer the economy and legal system. They lack a theoretical and cultural

⁴⁴ See Tan Duc, *Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An*, [Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business], THOI BAO KINH TE SAI GON [SAI GON ECONOMIC TIMES] May 20, 1999, at 10, 11; Tran Vu Hai, *Kinh Te Thi Truong Va Viac Quy Dinh, Xu Ly Toi Pham Trong Hoat Dong Kinh Doanh*, [The Market Economy and the Definition of and Sanctions for Offences in Business Activities], THOI BAO KINH TE SAI GON [SAIGON ECONOMIC TIMES], May 6, 1999 at 37-38.

understanding of the western, liberal theories that underpin market laws.⁴⁵ Moreover, in socialist legal theory law is considered a management tool (*cong cu quan ly*) to preserve the state's interest. Where the law is clear it must be followed. Where it is unclear, state officials are required to favour party-state interests.

Legal theory is reinforced by a bureaucratic culture that after decades of Marxist–Leninism is inculcated with respect for the state economic sector and antipathy for the private sector.⁴⁶ Treatment of economic entities continues socialist class distinctions first introduced to Viet Nam in the Agrarian Reform Law 1953. Social moral classifications ordering poor, middle and rich peasants have been replaced by preferential support for SOEs and cooperatives, and antipathy for private enterprises.

Cultural disdain for entrepreneurs predates socialism. Encapsulated by the Confucian saying, 'emphasise agriculture, commerce is peripheral' (*trong nong mat thu ong*), imperial policy inhibited the emergence of large-scale commercial organisations independent of Royal patronage and particularistic linkages.⁴⁷ These precepts instil state officials with unqualified confidence in their ability and mission to manage society. Echoing traditional governance principles, the state is placed at the centre of society, and social problems are, as a result, attributed to lapses in the morality of officials. Known as 'manage in order to manage' (*quan ly de quan ly*), state management is often an objective in its own right, obscuring the original economic goal.

Land law

The unequal allotment of land use rights

Access to, and state management of land is another critical factor constraining private development. Though succeeding in clarifying land entitlements, the Law on Land 1998 entrenches the unequal distribution of land use rights (*quyen su dung dat*) across economic and social sectors. Urban residential occupants are allotted (*giao*) land, but companies can only lease (*thue*) land. Allotted land is available for an unspecified duration (in perpetuity), is freely transferable and in most other respects differs little from Western freehold estates.⁴⁸ In contrast,

⁴⁵ See Tuong Lai, *The Issues of Social Change after Ten Year of Doi Moi in Viet Nam*, in DOI MOI: TEN YEARS AFTER THE 1986 PARTY CONGRESS, 195 (Adam Fforde ed. 1997).

⁴⁶ See Vo Dai, *Renovation of the Ownership Structure in Viet Nam in the Shift to a Market Economy* ECONOMIC PROBLEMS (17), 2 4-5 (July-Aug. 1992).

⁴⁷ See ANTHONY REID, *SOUTHEAST ASIA IN THE AGE OF COMMERCE 1450-1680* 62-77 (vol. 2 1993).

⁴⁸ Law on Land art. 20 (1998); Decree No 60 CP on Dwelling House Ownership and Residential Land Use Rights in Urban Areas art. 10 (1994) (ownership of dwelling houses automatically conveys occupation rights over the substratum owned by the state); Decree No 61 CP on Dwelling House Purchase, Sales and Business arts. 12-20 (1994) (provisions for a real estate market for private dwellings).

land use rights leased to ‘domestic economic organisations’ cannot be transferred without state approval, subsist for a limited duration (usually the length of the investment license), cannot be mortgaged (except by Vietnamese banks) and on termination revert to the state.⁴⁹

The classification of land use according to the legal status of the occupant produces some market anomalies. For example, it is comparatively easy for entities registered under Decree 66 on Household Business 1992 (that is, unincorporated businesses with a low market capitalisation) to mortgage hotels constructed on residential land use rights. In contrast, hotels owned by companies, but constructed on short-term leasehold land are extremely difficult to use as collateral. More importantly, if the hotel industry is unprofitable, Decree 66 entities can convert their buildings to any business permitted under applicable zoning provisions. Companies, however, must strictly use leasehold land for licensed purposes, otherwise their land use rights automatically revert to the state.

Finally, state land management (a subset of ‘state economic management’) is used to control business activities. Land use rights in Viet Nam are classified according to the type of user and nature of land use. In addition to land use zoning controls, the state controls business activities by narrowly circumscribing land use activities. For example, although the Enterprise Law allows companies to choose their own business activities, land can only be used for issued purposes and cannot be transferred without permission. In practice, the Enterprise Law shifts discretionary powers over business objectives from People’s Committee industry departments to housing and land departments. Either way officials exercise ‘state economic management’ over private investment.

Gender and land use rights

Some studies indicate that the current system of household ownership unfairly advantages registered users, who are invariably male household-heads. Women, it is argued, are vulnerable on two accounts. During matrimonial disputes there is evidence that some district level officials have illegally transferred land use rights without the consent, and contrary to the interests of female household members. Although only the household head’s name appears on land use right certificates, the signature of another (spouse) registered household members is required on land transfer documents. In other circumstances, female household members have reportedly encountered difficulties using land as collateral for business related loans.

⁴⁹ Decree No 85 CP Prescribing the Implementation of the Ordinance on the Rights and Obligations of Domestic Organizations with Land Assigned or Leased by the State art. 9 (1996).

Discussions with officials from the GDLA and provincial judges suggest that the former problem is attributable to the failure of the Family Law to allow family members to notify court orders on land use right certificates. These issues are being explored by the working committee reviewing the Family Law. The problem with collateral is more difficult to fathom. Under existing laws any household member, including household heads, require written permission from all registered household occupants before mortgages or encumbrances are registrable. Moreover, recent studies (for example, the MPDF report number 8) uniformly report that credit institutions rarely advance funds to entrepreneurs of either gender.

A definitive position regarding these issues is, however, not possible since Oxfam and UNDP studies discussing these issues were not made available to the Mission. More importantly, further work is being carried out in this area by a policy unit attached to MARD and a research team funded by JICA, and working through the Institute of Legal Research at the MOJ. When these studies are completed in late 2000 these issues should be revisited.

Judicial reforms

A shift from bureaucratic to normative regulation?

Currently all economic sectors are to varying degrees regulated bureaucratically, legislative norms are poorly understood and widely ignored, while courts are considered expensive, corrupt and incompetent. Through deregulatory reforms, the state has signalled its intention to partially shift commercial decision making from bureaucratic to market players. Such a change will require improved legislative drafting, coordination and dissemination, further checks on the discretionary powers of bureaucrats, more independent and competent private legal practitioners and greatly improved dispute resolution fora, bankruptcy and debt enforcement mechanisms.

Interpreting legal rules

For laws to induce a stable and predictable environment for commercial transactions, they must reliably signpost the boundaries of state power. This requires a coherent body of jurisprudential rules giving everyone the ability to ascertain the meaning of legislation and check abuses of state economic management. In civil law countries academic commentary and pronouncements by judicial boards generate the principles guiding the interpretation of otherwise cryptic legislation. This body of accumulated principles unifies and deepens legal analysis. Though providing some clarification, academic commentary in Viet Nam is not intended to create doctrinal rules. As civil servants, legal academics are required 'to strictly abide by the Party's lines and policies and the

State's policies and laws'.⁵⁰ In the grey areas surrounding resolutions and legislation, the 'silent syndrome' (*hoi chung thinh lang nay*) ensures that personal opinions remain private out of a fear of contradicting official ideology.⁵¹

Attempts by the Judicial Committee of the Supreme Court to moderate wild improvisation in the rulings of inferior level courts are not encouraged by the Ministry of Justice and People's Committees. Although summaries of case rulings (*ngghi quyet hoi dong tham pau*) issued by the Supreme Court are not binding, the Ministry of Justice rather disingenuously argues that *ngghi quyet hoi dong tham pau* constrains the independence of inferior courts.⁵² At stake is control over state economic management. The executive arm of the state believes that coherent jurisprudential principles might transfer excessive discretionary authority over 'state economic management' from the bureaucracy to the courts. If jurisprudence fills the gaps between legal rules, bureaucratic decisions become more accountable to factors that may promote legal rules, even private commercial rights, above the state's interest.

Checking bureaucratic discretion

In addition to transferring discretionary power from the bureaucracy to the courts, administrative courts were established under the PAR program to review and ultimately check bureaucratic abuses. Despite significant improvements to their operational powers, administrative courts continue to attract low levels of public support.⁵³ Experience in China indicates that even within the narrow parameters permitted by the party, the public is willing to litigate once convinced that there is some chance of success. Whether these lessons have been understood in Viet Nam is unknown. However, at the 1998 Consultative Group meeting the Government indicated a desire to 'expand the judicial power' of administrative courts.

Towards a bifurcated regulatory system?

Notwithstanding constitutional references to the legal equality of economic sectors, the legal system quarantines foreign investors, domestic companies and small-scale household entities. The proposed consolidation of the foreign and

⁵⁰ Ordinance on Public Employees art. 6(1) (1998).

⁵¹ See generally Nguyen Thi Oanh, *Tu Phim Nghiep Chuong Thu Ban Ve Van Hoa [Lets Discuss Culture from the Film 'Causes and Consequences']* TUOI TRE [YOUTH] Oct. 18, 1998 at 3.

⁵² The administration of the inferior court system creates tension between the Supreme Court, which is responsible for supervising inferior decisions and the Ministry of Justice, which has responsibility for the day to day operation of the judicial system. See Interview Trinh Duc Thao, Vice Director State and Law Faculty, Ho Chi Minh Political Academy, Feb. 17, 1998.

⁵³ Official statistics are not publicly released, however, most estimates suggest that fewer than 50 cases were litigated in 1999.

domestic investment regulations will collapse boundaries between companies, but further bifurcate the regulation of the household and farming sectors. For example, as distinct from companies, small traders are exempt from the Bankruptcy and Commercial laws, are taxed at low rates and enjoy long-term land use rights. The Government's ultimate intentions in this area will profoundly shape public perceptions about the relevance of imported commercial law and economic integration.

Intervention proposals

The preceding discussion contends that buried under an avalanche of imported legislation and domestic implementing regulations, Vietnamese legal structures and cultures are still deeply infused with attitudes and practices echoing syncretic neo-Confucian and Soviet legal thinking. What is conspicuously missing in Vietnamese and donor analysis of law reform is a qualitative assessment of the interaction between imported legal norms and local institutional precepts and organisational processes. With few exceptions, donor analysis gives narrow 'snapshots' of the legal system, missing the dynamic processes that give meaning to, and transform imported 'blackletter' law into social action. Even worse, many foreign advisers start from the presumption that Vietnamese legal reform will roughly follow western legal development and express dismay when reality on the ground obstinately refuses to obey western legal theory.

Certainly legal interventions in Viet Nam are difficult and require long term commitment. However, those based on realistic expectations and sound country knowledge have generally been successful.⁵⁴

AusAID interventions designed to strengthen the private sector and promote economic integration should rest on a systemic understanding of the legal system. Since both objectives rely on imported law, analysis should focus on the gap between legislative exceptions and social action. More particularly a legal system cluster study would evaluate the impact of ideology, institutional structures, organisational cultures, social habits and precepts on legislative drafting, 'state economic management', prosecution, judicial decision-making and enforcement.

Supporting policy formulation, law drafting and dissemination

Drafting and policy formulation

A significant impediment to law reform is the low capacity of National Assembly delegates, Standing Committee members and Government drafting

⁵⁴ See the generally favourable review of the UNDP/DANIDA ONA, Supreme Court and Supreme Procuracy Program Bill Neilson, January 2000.

committees to evaluate the policy implications of draft laws. This shortcoming adversely affects the evaluation of imported commercial norms, and the quality of domestic laws and implementing regulations. Interventions designed to transfer the methodological tools needed to receive foreign commercial legal principles to the Vietnamese context are required.

The issues confronting Vietnamese law-makers include the questions of whose behaviour and what sort of behaviour are modified by law. In order to change behaviour, research must identify the reasons or motivations for behaviour and evaluate the likely impact of laws on target groups. Furthermore, law-makers should decide whether legislation is the most effective form of regulation, or what other solutions (for example self-regulation) could achieve the same result. Finally, law-makers need to understand institutional processes, and what type of organisational structure and sets of skills are required to administer and enforce laws.

Economics and budget committee of the NA

With the assistance of the Budget Committee, the Standing Committee of the NA allocates state funds to ministries and major state projects. Interventions should assist officials to comprehend and draft better finance laws. Better drafted and targeted state budgets would enhance the capacity of the NA to supervise Government, thereby minimising waste and corruption.

Information flows and policy/law dissemination

Public participation in and knowledge of policy formulation and legal drafting is another potent means of making laws more relevant to the public.

Interventions would increase public participation in policy debates surrounding legal drafting. They would also improve communication between NA delegates and their constituents, strengthening the public accountability of delegates.

The Governance Identification Mission concluded that a cluster study centred on the ONA should assess legislative drafting and Economics and Budget Committee activities from a Vietnamese ideological, institutional and cultural perspective. The study will identify appropriate interventions that could assist the ONA to support NA delegates and committees to formulate policy, draft laws, and supervise state organs.

The evaluation of laws

NA delegates and committees require access to information to evaluate the policy implications of draft laws and improve procedures governing plenary session debates. Interventions improving access to information by strengthening library/research support, a database of legal research and exposure to offshore policy-making processes may assist NA delegates and committees to draft and evaluate laws.

Supervision of government activities

The NA is constitutionally responsible for supervising Government compliance with the law. Due to inadequate procedural rules and resources (and perhaps political authority), this role is poorly performed. Interventions improving the capacity of ONA committees to service delegates and plenary procedures may strengthen the investigatory and supervisory functions of the NA.

Reconciling the law-based state and 'state economic management'

Evolving and adapting to imported commercial norms, 'state economic management' has proved to be a deeply ingrained and resilient ideological and cultural phenomenon. Based on narrow sectional foci, donor interventions designed to reduce 'state economic management' by closing licensing gateways (for instance the Enterprise Law) have so far only succeeded in shifting discretionary regulation to other locations. The starting point in any intervention is a thorough understanding of laws, state institutions and business practices. Faced with over 47 000 subordinate rules, a comprehensive mapping of the legislative framework would be very resource intensive and is unnecessary, if a case study approach is adopted instead. In order to predict the probable responses to interventions, project designers need to understand the interaction between Vietnamese law, institutions and society. These processes are not captured by descriptive legal surveys or explanations based on western legal and institutional experiences.

A systemic approach to 'state economic management'

As the preceding discussion reveals, interventions designed to reduce 'state economic management' of the private sector, frequently shift bureaucratic constraints from one location to another.⁵⁵ Further interventions in these areas should be informed by an inter-institutional analysis, within the cluster study of 'state economic management' processes. Selected case studies (for example textiles, trade and food processing) would trace market entry controls, post-incorporation monitoring and policing, land use controls, dispute resolution and debt enforcement.

Market entry controls

Building on detailed economic studies commissioned by MPDF and UNIDO, a legal review within the cluster study should ascertain the effects of market-entry licences/permits on the commercial behaviour of domestic investors. By contrasting state policies and laws with practice on the ground, findings would

⁵⁵ See MPDF, Private Sector Discussion Paper 10 (1999); MPI-UNIDO, Research Report, Improving Macroeconomic Policy and Reforming Administrative Procedures to Promote Development of Small and Medium Enterprises in Viet Nam, (January 1999).

inform interventions assisting deregulatory reforms and identify areas requiring further statutory controls (for instance professional standards).

Land use management

Little is known about land use management and its effects on private sector access to, and disposal and encumbrance of land. Using case studies, the cluster study would assess the processes effecting the issuing of land use rights, issues arising from separate land and building ownership and the creation of land markets. These findings would determine whether to assist the GDLA develop legal policy concerning long-term land use rights, unrestricted land use rights, domestic and foreign bank mortgages and unconditional rights of disposal.

Depending on the findings of the above-mentioned MARD and JICA studies, the cluster study may extend to include the issue of women's access to land use rights.

Monitoring and policing

The preceding discussion depicts 'state economic management' as a fluid adaptive phenomenon, constantly evolving to accommodate protean regulatory and institutional structures. For example, a shift in discretionary power to economic monitoring and policing followed the abolition of business licenses and permits. For this reason, effective interventions need to understand the possible loci of 'state economic management' within, and among state organisations. The proposed cluster study can usefully inform pre-feasibility and design missions by mapping and evaluating the use of administrative and criminal measures by People's Committees, economic courts and procurators as instruments of 'state economic management'.

Dispute resolution

Experiences from China and elsewhere in East Asia strongly suggest that, unless enforceable, statutory norms do not perform the ideological function of establishing universal legal rights.⁵⁶ After a long period of quiescence, economic courts in HCMC report a 30 per cent annual increase in commercial litigation. Over seventy percent of cases currently involve foreign investors, however, litigation among domestic private companies is rapidly increasing. If the state is to succeed in shifting regulatory responsibility from bureaucratic discretion to normative regulation (an important PAR objective) a well-trained, commercially literate and credible judiciary is required.

⁵⁶ See Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, CHINA QUARTERLY (159) 673-683 (1999).

Although the use of courts to resolve economic disputes (that is disputes involving companies and private enterprise) is extremely low,⁵⁷ preliminary investigations indicate that increased levels of foreign investment and inter-provincial trade increase demand for adjudication. Changes in the structure of transactions between firms are slowly replacing internal familial and bureaucratic coordination, with inter-firm connections that require external dispute resolution mechanisms. Current training and level of judicial activity are insufficient to enable judges to develop sophisticated dispute resolution regimes. Interventions designed to improve training provided by the Supreme Court Judicial Training Institute need to understand not only court structures and procedures, but also the legal principles and/or processes used to implement normative rules. The cluster study should accordingly examine the formulation and application of jurisprudential rules in the court system.

More than any other state institution, administrative courts have potential to check the authority of 'state economic management' by protecting statutory rights. Again, experience from China strongly indicates that public accountability through citizen complaint procedures and administrative courts is the most potent means of reconfiguring bureaucratic culture, and reducing bureaucratic harassment of the private sector. For this to happen in Viet Nam, extensive judicial training in administrative law and exposure to foreign systems is essential. Well-informed interventions in the Supreme Court Judicial Training School will in the long term improve the capacity of the Court to develop and inculcate administrative jurisprudence.

Care must be taken to ensure that the cluster study carefully maps and assesses the training already conducted by the UNDP/DANIDA and ongoing training commitments made by DANIDA. Despite this previous and continuing support, the Mission believes that the needs of the Supreme Court are great. There are approximately 1000 provincial judges, over 3000 district judges and approximately 10 000 law clerks and People's Assessors. Provided AusAID's assistance is confined to the commercial and administrative law arenas, there is reason to believe that it will complement existing and proposed donor interventions.

Debt enforcement

Court orders remain pyrrhic victories without effective debt enforcement processes, and better outcomes in this area would significantly assist operation of the private sector. Debt enforcement, however, is a weak link in the judicial system. Little is known about debt enforcement and a detailed study in this area is required to determine whether further intervention is warranted.

⁵⁷ The Supreme Court does not publicise court statistics; however, most estimates suggest that fewer than 400 disputes were referred to economic courts in 1999.

Promoting economic integration through legislative harmonisation

As the above discussion suggests, the processes governing the reception of imported commercial law in Viet Nam are poorly understood. One consequence is the uneven and unpredictable nature of legal harmonisation. Interventions have been invited by the MOJ to support redrafting commercial provisions in the Civil Code and ratification and implementation of the Berne Copyright Convention. However, further knowledge about the modus operandi of drafting committees (this information is also relevant to the ONA studies) and the Government's commitment to the Berne Convention is required before proceeding further.

This is an important project, since measures taken to elaborate the few terse words of prescription in the Civil Code will greatly assist legal institutions (that is government officials and judges) to apply the law to action on the ground. Closer integration between commercial legislative norms and Vietnamese legal precepts will simultaneously reduce bureaucratic power, and increase judicial discretionary power.