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## Vietnamese Company Law: The Development and Corporate Governance Issues

Bui Xuan Hai\*

\*Ho Chi Minh City University of Law, Vietnam,

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# Vietnamese Company Law: The Development and Corporate Governance Issues

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Vietnamese company law is derived from the French law that applied to Vietnam during its colonisation by France. However, its development has been influenced by local factors, especially the economic policies of the Communist Party of Vietnam. Nevertheless, Vietnamese company law and the corporate governance regime have significantly developed since Doi Moi (renovation) 1986 through corporate law reforms, especially in 2005. However, the existing corporate governance system exposes problems that need to be addressed. This paper examines the development of company law, including its corporate governance regimes. Problems of the contemporary corporate governance regime in Vietnam are next examined to argue for a further reform.

**KEYWORDS:** corporate governance, reform, Vietnam, company law

# VIETNAMESE COMPANY LAW: THE DEVELOPMENT AND CORPORATE GOVERNANCE ISSUES

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Vietnamese company law is derived from the French law that applied to Vietnam during its colonisation by France. However, its development has been influenced by local factors, especially the economic policies of the Communist Party of Vietnam. Nevertheless, Vietnamese company law and the corporate governance regime have significantly developed since *Đổi Mới* (renovation) 1986 through corporate law reforms, especially in 2005. However, the existing corporate governance system exposes problems that need to be addressed. This paper examines the development of company law, including its corporate governance regimes. Problems of the contemporary corporate governance regime in Vietnam are next examined to argue for a further reform.

## **Introduction**

Since independence (1945), Vietnamese company law has been influenced by political events and economic policies of the CPV. Nevertheless, the *Đổi Mới* (renovation) policies of the CPV created conditions for business freedom and the development of company law in Vietnam. In only 15 years, the following three company statutes were enacted by the National Assembly in 1990, 1999, and 2005. Since *Đổi Mới*, the Vietnamese corporate governance system has much been improved through corporate law reforms to accommodate demands of a transition economy.

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\* PhD candidate, Law School, La Trobe University, Australia;  
Lecturer of Business Law, Ho Chi Minh City University of Law, Vietnam.

The first part of this article examines the reception of Vietnamese company law and its corporate governance regime during French rule. Next, the development of company law after independence, especially since the economic reforms, is discussed. The concept of corporate governance and problems of the contemporary corporate governance system in Vietnam are examined in the following sections of this article.

### **The Reception of Company Law and its Corporate Governance Regime in Vietnam under French Rule**

The first state of Vietnamese appeared very early in the history<sup>1</sup> but, Western countries, corporate forms and company law did not exist in Vietnam until the French occupation in the late 19th century. Cultural, political and economic factors may account for the non-existence of corporate forms and company law in Vietnam in the feudal period.<sup>2</sup>

Vietnamese company law is derived from French law as a result of colonial rule. Under the 'dividing to rule' policy (*chính sách chia để trị*) of the French, Vietnam was divided into three regions with different administrative institutions and different legal systems<sup>3</sup> the South (Cochin-china) and three biggest cities (Hà Nội, Hải Phòng, and Đà Nẵng) were considered French territories; the North (the Tonkin) a semi-protectorate/semi-colonial region; and Central Vietnam was a

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1 Vietnam was occupied by China for about 10 centuries. In the 10th century, the Vietnamese people recovered and retained their independence until the French conquest in the late 19th century. As to this issue, see generally, Vu Quoc Thong, *History of Vietnamese Law (Phap che su Viet Nam)* (1971) 45-8.

2 In the feudal period, Vietnamese Kings promulgated significant codes in the Vietnamese law history: the *Lý Criminal Code (Lý Triều Hình thư)* in 1042, the *Trần Criminal Code (Trần Triều Hình luật)* in 1231, the *Le Code (Quốc triều Hình luật or Bộ luật Hồng Đức)* in 1471-1497, and the *Gia Long Code (Bộ luật Gia Long)* in 1813. These statutes covered criminal law, constitutional law, administrative law, inheritance law, and family law, but not commerce and business entities. Nevertheless, commercial relations, based on trade custom and village practices, still existed around villages. See generally, Vũ Quốc Thông, *History of Vietnamese Law (Pháp chế sử Việt Nam)* (1971) 21-3, 386, 388, 390, and 394; John Gillespie, 'Corporations in Vietnam' in Roman Tomasic (ed.), *Company Law in East Asia* (1999) 298.

3 See Ha Noi Law University (Trường Đại học Luật Hà Nội HLU), Textbook of the History of State and Law (*Giáo trình lịch sử Nhà nước và Pháp Luật Việt Nam*) (2002) 492.

French protectorate.<sup>4</sup> Consequently, the Vietnamese legal system was fundamentally changed; it was divided and influenced by French law.<sup>5</sup>

The French applied their laws, including company law, to the South and the three ceded cities in the late 19<sup>th</sup> century. French law and its legal ideology also influenced the remaining regions of Vietnam. Important codes, which appeared as copies of French civil and commercial statutes,<sup>6</sup> were enacted either by the French or by Vietnamese Kings: the *Abbreviated Civil Code* 1883 (*Bộ Dân luật Giản yếu* - hereinafter the *South Civil Code* 1883) in the South,<sup>7</sup> the *Civil Code Implements in the Vietnamese Courts in the North* 1931 (*Bộ Dân luật thi hành tại các Tòa Nam án Bắc kỳ* - hereinafter the *North Civil Code* 1931) in the North,<sup>8</sup> the *Central Vietnam Civil Code* 1936 (*Hoàng Việt Trung kỳ Hộ luật*)<sup>9</sup>, and the *Central Vietnam Commercial Code* 1942 (*Bộ Luật Thương mại Trung kỳ*) in Central Vietnam.<sup>10</sup> The North and the South did not have their own commercial codes; hence, French commercial law was also applied to these regions.

As the French company law tradition, company legislation in Vietnam was prescribed in civil and commercial codes. Corporate forms and their corporate governance law regimes were prescribed in the *North Civil Code* 1931 and the

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4 See also, Thông, above n 2, 385-6; HLU, *ibid* 492.

5 Legislation in the French colonial period was promulgated by the French government, the Indochinese Governors-General, the Governors of Cochinchina, the Resident Superiors of the North, and the Nguyễn Dynasty; see generally, Phạm Diem, *Legislation in French – Rule Vietnam*, (1997) June, *Vietnam Law & Legal Forum*, 25, 25-7. As to court systems in this period, see Phạm Duy Nghĩa, 'Where Businessmen Look for Justice' (*Nơi Doanh Nhân tìm đến Công lý*) (2003) 3 *Legislative Studies Journal (Tạp chí Nghiên cứu Lập pháp)* 45, 47-9.

6 See Lê Tài Triển, *Summary of Commercial Law (Luật Thương mại Toát yếu)* (Vol. 1) (1959) 9, 15. The *Central Vietnam Commercial Code* 1942 consisted of 270 articles (an 'article' in Vietnamese language is similar to a 'section' in Australian law), which prescribed traders and commercial activities; see also, *ibid* 9.

7 See Phạm Duy Nghĩa, *Vietnamese Business Law in Transition* (2002) 31. The *South Civil Code* was a copy of the French Civil Code; as to a discussion on this issue, see Vũ Văn Mẫu, *Lectures of Law (Pháp Luật Diễn Giảng)* Vol 2, Book 1 (1973) 8-11.

8 This statute had 1455 articles in four books.

9 This Code had 1709 articles, and was a copy of the *North Civil Code* 1931; see Vũ Văn Mẫu, above n 7, 16. However, this code did not regulate business forms (company forms) as the *North Civil Code* 1931, because this was considered as a matter of commercial law; see Mẫu, *ibid* 17.

10 The *Central Commercial Code* 1942, a copy of the *French Commercial Code* 1807, came into force on 25 January 1943; see Sài Gòn Law College (*Đại học Luật khoa Sài Gòn*) – Nguyễn Văn Thành, *Commercial Law (Luật Thương mại)* (1972) 22-3.

*Central Vietnam Commercial Code* 1942. These statutes provided for two company forms: (1) human associations (*công ty hợp nhân – société de personnes or sociétés de personnes ou par intérêt*) and (2) capital associations (*công ty hợp cổ – sociétés de capitaux*).<sup>11</sup> A human association was established and operated based on an incorporation contract signed between members who had a close relationship to one another, and its shares could not be transferred.<sup>12</sup> This company form (*công ty hợp nhân*) had four types: (1) common name companies (*công ty đồng danh*),<sup>13</sup> (2) simple capital-supplied companies (*công ty cấp vốn đơn giản*),<sup>14</sup> (3) limited liability companies (*công ty trách nhiệm hữu hạn*),<sup>15</sup> and (4) collective capital companies (*công ty hợp tư*).<sup>16</sup> There were two types of capital companies (*công ty hợp cổ*): (1) anonymous companies (*công ty vô danh*)<sup>17</sup> and (2) share capital-supplied companies (*công ty cấp vốn cổ phần*).<sup>18</sup> These company types came from French law but some were transformed to meet with Vietnam's conditions at that time.<sup>19</sup>

The governance structure of each company type was also provided by the Codes, and corporate governance rules were developed from French company law. The governance structure of a capital company (*công ty hợp cổ*) was different from a limited liability company. The laws required that a capital company must have a shareholders' meeting (*hội đồng cổ đông*), a management board (*ban quản trị*), and

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11 As to details, see Article 22 of the *Central Vietnam Commercial Code* 1942; and Articles 1238, 1247, 1257, 1261, 1263, 1264, and 1265 of the *North Civil Code* 1931. See also Lê Tài Triển, *Summary of Commercial Law (Luật Thương mại Toát yếu)* (vol.2) (1959) 18; Sai Gon Law College, above n 10, 163. It should be noted that when these terms are translated from Vietnamese into English, the meanings are not exactly reserved. As to details of these company forms, see Articles 1238, 1247, 1257, 1261, 1263, 1264, and 1265 of the *North Civil Code*, 1931.

12 Lê Tài Triển, above n 10, 19.

13 As to details, *ibid* 43.

14 *Ibid* 50.

15 *Ibid* 57.

16 *Ibid* 77. As to these human companies, see also Sai Gon Law College, above n 10, 163-4.

17 *Ibid* 82-4.

18 *Ibid* 152-53. As to these capital companies, see also Sai Gon Law College, above n 10, 164.

19 As to details of the development of commerce and companies in Vietnam in this period, see Lê Quốc Sư, *Some Issues of Vietnamese Economic History (Một số vấn đề về lịch sử kinh tế Việt Nam)* (1998) 445, 447.

a supervisory board (*ban giám sát*); both were elected by the shareholders' meeting. Important matters of a company had to be approved by the shareholders' meeting, the decision-making body which played an essential role in governing a company.<sup>20</sup> A management board had from three to seven members who must be shareholders and elected by the shareholders' meeting.<sup>21</sup> The law also provided that a person could not be a chairperson of the management board of more than two companies and a member of the board of more than eight companies.<sup>22</sup>

Derived from French company law, nonetheless, company laws in this period played a trivial role in the economic development of Vietnam due to the hard exploitative policies of the French rulers.<sup>23</sup> The majority of Vietnamese people did not have opportunities to exercise business forms and corporate laws as in Western countries.

## **Company Law and Corporate Governance Regimes since Independence (1945)**

### **Before 1990**

Vietnam declared itself an independent republic in September 1945. After independence, company rules enacted under the French rule still applied in the country.<sup>24</sup> In July 1954, after nine years of struggle against the French, the Geneva Accords for peace in Indochina were signed. Vietnam was temporarily divided into two regions, the North and the South, with the 17<sup>th</sup> parallel as the common border. This resulted in the partition of the country, and, subsequently, the Vietnam War which lasted the next two decades with the participation of the US army and its allies. And, the development of company law was also affected negatively by political factors.

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20 Saigon Law College, above n 10, 251-2.

21 Article 159 of the *Central Commercial Code* 1942, and Lê Tài Triển, above n 6, 120.

22 Article 159 of the *Central Commercial Code* 1942.

23 For example, about 95 per cent of commercial and industrial enterprises were owned by the French; see Pham Duy Nghia, above n 7, 33.

24 After the Democratic Republic of Vietnam (the D.R.V) (*Việt Nam Dân chủ Cộng hòa*) was established on 2 September 1945, President Hồ Chí Minh enacted the Decree No 47/SL dated 10 October 1945 to allow temporary implementation of the former laws enacted both by French rulers and the Nguyễn dynasty if they did not oppose the independence of the democratic republic institution of Vietnam. See Lê Minh Tâm, *Building and Improving the Vietnamese Legal System: Issues of Theory and Practice (Xây dựng và hoàn thiện hệ thống pháp luật Việt Nam: Những vấn đề lý luận và thực tiễn)* (2003) 87.

In the North, the Labour Party of Vietnam became the leading political party. A centrally planned economy based on socialist ownership was gradually introduced to replace the private economic sectors. Capitalist business entities were converted to socialist economic organisations.<sup>25</sup> Thus, from the beginning of the 1960s, the North's economy became a command economy dominated by state-owned organisations and cooperatives without private business entities. Without a market economy and business freedom, as a key cause, company forms as well as company law did not exist in North Vietnam.

However, in the South, a market economy was encouraged to develop. The government of the South had continued to implement company legislation enacted before independence until a significant company law reform was introduced in 1972. The Southern government promulgated the *Commercial Code* 1972 (*Bộ Thương luật*) by upgrading the former law to provide for five business forms (the so-called 'hội').<sup>26</sup> These were: (1) partnerships (*hội hợp danh*); (2) simple share capital associations (*hội hợp tư đơn thường*); (3) joint capital associations (*hội dự phân*); (4) limited liability associations (LLA) (*hội trách nhiệm hữu hạn*), and, (5) shareholding associations (SA) (*hội công tư* or *hội cổ phân*). The last company type consisted of two types: *hội hợp tư cổ phân* and *hội nặc danh* (as a shareholding company).

A corporate governance regime was developed from the colonisation and based on French modelsthat existed during the colonial period.<sup>27</sup> Article 219 of the *Commercial Code* 1972 provided that an LLA must be governed by one or more manager(s) who could be a shareholder or non-shareholder. If an LLA had more than 20 members, the company must have a supervisory board (*ban kiểm soát*) consisting of at least three supervisors.<sup>28</sup> As a shareholding company, an SA must have a board of management (*hội đồng quản trị*) consisting of at least three and no more than 12 members who must be shareholders of the company and elected by the shareholders' meeting, and the shares held by these managers could not be

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25 The aim to build a centrally planned economy was stated in the Constitution 1959, which was considered the first socialist Constitution of Vietnam; see Articles 9, 10, and 12 of the Constitution 1959.

26 The *Commercial Code* 1972 consisted of 1051 articles in five books (*quyển*). As to the enactment of the Code, see Mẫu, *Lectures of Law, Vol. I (Pháp luật điển giảng)* (1973) 36 -7.

27 As to corporate governance structures of LLAs and SAs, see Chapter V, and VI of Volume II of the *Commercial Code* 1972.

28 Article 233 of the *Commercial Code* 1972. It should be noted that the supervisory board was called '*Ban kiểm soát*' instead of '*ban giám sát*' under the former company laws in the colonial period. In Vietnamese language, the terms *kiểm soát* and *giám sát* are not the same, but similar.



transferred.<sup>29</sup> Then, the board elected a member as the chairperson, who was also the managing director (MD) and had power to manage the company.<sup>30</sup> Surprisingly, if the MD was not the chairperson of the board, he or she was merely considered as an assistant of, and directed by, the chairperson. In this way, corporate ownership and management were not separated.

Being enacted under the war-time conditions, the legislation probably did not provide appropriate rules for good corporate governance, but it was a further development of company law in Vietnam. However, for political reasons, the *Commercial Code* 1972 of the South was abolished when Vietnam reunified after the victory of the North in April 1975. As a result, corporate forms and company law were absent in the country after the re-unification.

After the reunification until 1990, due to the CPV's command economic policies, company law did not exist in Vietnam. A socialist Constitution was enacted in 1980, under which the CPV continued to be the sole party to lead the state and the country.<sup>31</sup> Building a centrally planned economy without private economic entities was a stated objective in the *Constitution* 1980.<sup>32</sup> The state owned most national property; a market economy and private commerce were 'officially discouraged'.<sup>33</sup> Business freedom and private economic forms were not recognised by laws and the CPV's policies.

Moreover, the private economic entities of the South were re-organised to model those of the North, as state-private cooperation enterprises or state-owned enterprises (SOEs). Hence, by early 1978, 1,500 private enterprises in South Vietnam, employing 130,000 workers, had been nationalised and converted into 650 SOEs.<sup>34</sup> As a consequence of the CPV's policies in the context of a damaged country after the war, a serious economic and social crisis occurred in the late 1970s and 1980s. This pushed the CPV to look for new economic policies and the introduction of economic reforms (*Đổi Mới*) in the late 1980s.

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29 Article 296, 297 of the *Commercial Code* 1972.

30 Article 300, 301 of the *Commercial Code* 1972.

31 The *Constitution* of Vietnam was first enacted in 1946 but was repealed in 1959 (for North Vietnam). Then, the *Constitution* 1959 was replaced by the *Constitution* 1980. Currently, the *Constitution* 1992 is effective. The role of the CPV in leading the State and the country is stated in the *Constitution* 1992 (Article 4).

32 See Articles 15, 18, 25, 26, and 33 of the *Constitution*.

33 See also, John Gillespie, above n 2, 299.

34 World Bank, Vietnam Business: Vietnam Development Report 2006, 9.

## 1. Đổi Mới (Renovation) and the Company Statutes 1990, 1999, and 2005

In December 1986, the CPV and the government adopted sweeping economic reforms, the so-called *Đổi Mới* or ‘renovation’ policy.<sup>35</sup> Abandoning the centrally planned economy and building a multi-sectored market economy are the core of the *Đổi Mới* policy. The policy aimed to liberalise the economy, to increase the potential for economic development, and to encourage the development of private economic sectors. Since *Đổi Mới*, Vietnam’s transition economy has rapidly developed and the legal system, including company law, has strongly been reformed to create the legal foundations of a market economy and enhance business freedom.<sup>36</sup>

A multi-sector market economy and business freedom were stated objectives in the *Constitution* 1992.<sup>37</sup> In order to open up the economy, Vietnam passed the *Law on Foreign Investment in Vietnam* 1987 (*Luật Đầu tư nước ngoài tại Việt Nam*) in December 1987 to admit foreign investors into many areas of the economy. Similarly, to encourage the development of the private economic sectors, the *Companies Law* (*Luật Công ty*) and the *Law on Private Enterprises* (*Luật Doanh nghiệp tư nhân*) were enacted by the National Assembly in December 1990. The *Companies Law* 1990 provided for two popular company forms: limited liability companies (LLCs) (*công ty trách nhiệm hữu hạn*) and shareholding companies (*công ty cổ phần*) (SCs), which were based on French and German company models.<sup>38</sup>

Similarly to corporate governance models in the colonisation, the governance structure of an SC must have a shareholders’ meeting (*đại hội đồng cổ đông*), a board of management (*hội đồng quản trị*), and two supervisors (*kiểm soát viên*).<sup>39</sup>

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35 ‘*Đổi mới*’, the official term used in Vietnam, is often understood by foreign scholars as the ‘renovation’ or ‘renewal’ policy. See Vo Tri Nhan, *Vietnam’s Economic Policy since 1975* (1990) 186. As to the introduction of *đổi mới*, see generally, Brian Van Arkadie & Raymond Mallon, *Vietnam: A Transition Tiger?* (2003) 65-78.

36 As to this issue, see generally, Arkadie & Mallon, *ibid*; for the transition process of Vietnam, see generally, Adam Fforde and Stefan de Vylder, *From Plan to Market: The Economic Transition in Vietnam* (1996).

37 See Articles 15, 16, 21, 25, 57, and 58 of the *Constitution* 1992.

38 The first company statute of the Socialist Republic of Vietnam consisted of only 46 articles in six chapters, much less than the former company statutes enacted under French rule and that of South Vietnam. For definitions of an LLC and an SC, see Article 25 and 30 of this Law.

39 See Articles: 37, 38, 40, and 41 of the *Company Law* 1990.

VIETNAMESE COMPANY LAW:  
THE DEVELOPMENT AND CORPORATE GOVERNANCE ISSUES

The board of an SC selected the managing director (*giám đốc* or *tổng giám đốc*) of the company. An LLC had more than 11 members must have a governance structure similar to an SC. The other LLCs' governance structure must merely have a managing director (*giám đốc*), but without a board or a members' meeting. Nevertheless, the 1990 company legislation concentrated on state administration of companies but lacked rules of corporate governance. Although the *Company Law* 1990 had shortcomings, it was a significant development of company law in Vietnam after an absence period.

In order to enhance business freedom and create a convenient business environment for the private business sectors, the *Enterprises Law* 1999 (*Luật Doanh nghiệp*) was passed to replace the *Companies Law* 1990 and the *Law on Private Enterprises* 1990. This statute came into effect on the first day of 2000. The *Enterprises Law* 1999 provided for three company types: (1) limited liability companies (hereafter LLCs) (*công ty trách nhiệm hữu hạn*),<sup>40</sup> (2) shareholding companies (hereafter SCs) (*công ty cổ phần*), and, (3) partnerships (*công ty hợp danh*).<sup>41</sup> The implementation of the Law had been much more successful than the former laws as shown by the increased number of companies registered.<sup>42</sup> Between 2000 and September 2003, 72,601 enterprises were registered compared with only about 45,000 in nine years (1991-1999) under the two former Laws.<sup>43</sup>

In November 2005, in order to create a favourable business environment for investors, to support the international economic integration and economic reforms, the National Assembly of Vietnam enacted the new *Enterprise Law*.<sup>44</sup>

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40 According to this Law, limited liability companies (LLCs) were divided into two forms: (1) LLCs having two or more members (*công ty trách nhiệm hữu hạn có hai thành viên trở lên*), and (2) one-member LLCs (*công ty trách nhiệm hữu hạn một thành viên*), see Chapter III of the Law.

41 As to conceptions of these company types, see Articles: 26, 46, 51, and 95 of the *Enterprise Law* 1999.

42 See The Unit for Implementing the Enterprises Law (UFIEL) (Tổ công tác thi hành Luật Doanh nghiệp), Some Common Disputes in the Implementing the Enterprises Law (Một số tình huống tranh chấp điển hình phát sinh trong quá trình thực hiện Luật Doanh nghiệp) (2003) 5.

43 Ministry of Planning and Investment of Vietnam (MPI), The Assessment Report on the Implementation of the Enterprises Law (unpublished) (Báo cáo tóm tắt đánh giá tình hình thi hành Luật Doanh nghiệp), (2003).

44 As to the necessity to enact the new Enterprise Law, see generally, Bui Xuan Hai and Gordon Walker, 'Transitional Adjustments Problems in Contemporary Vietnamese Company Law' (2005) 20 (11) *Journal of International Banking Law and Regulation*, 567, 569- 576.

This statute took effect on 1 July 2006, and replaced the *Enterprise Law* 1999, the *State Enterprise Law* 2003, and the *Law on Foreign Investment in Vietnam* 1996.<sup>45</sup> The Law contains 171 articles and is the most complex company statute ever to have been enacted in Vietnam. This statute is expected by both local and foreign investors to strengthen Vietnamese legal capacity for international economic integration and especially accession to the WTO.

By the introduction of the *Enterprises Law* 2005, Vietnamese company law or, in other words, law on business organisations has significantly improved. Implementing the national treatment principle, discrimination between economic sectors, domestic and foreign investors, at least in the law, is abandoned. Different from the former laws on enterprises, now, every individual (Vietnamese and foreigner) and organisation has rights to set up companies under common simplified procedures. From 1 July 2006, the *Enterprise Law* 2005 has applied to all company forms regardless of their ownership and economic sectors; and, a company that can be set up in Vietnam must be one of the company types under the new Law. These corporate forms are popular around the world: limited liability companies (private or close company) (*cong ty trach nhiem huu han*) and shareholding companies (public company) (*cong ty co phan*).

Next, all state-owned companies (SOCs) must be converted to a company form under the *Enterprise Law* 2005 by 1 July 2010; this is a significant reform of SOCs. Further, different from the former law regimes on enterprises, according to the *Enterprise Law* 2005, company types regardless of ownership all are governed by common rules of establishment, operation, governance, and termination. The above matters can be seen as the most significant improvement of the introduction of the *Enterprise Law* 2005.

## **Corporate Governance: A New Concept in Vietnam**

### **Definitions of Corporate Governance**

In recent times, corporate governance has become a central issue for company and securities lawyers after the collapses of large companies in the U.S and the financial crisis in the East Asia region in the late 1990s.<sup>46</sup> Not only national

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45 See article 171 of the Law.

46 Seven of 12 biggest bankruptcies in the U.S history occurred in 2002 when large corporations such as Enron, Tyco, Adelphia, WorldCom, and Global Crossing collapsed. See Robert A.G. Monks and Nell Minow, *Corporate Governance* (2004, 3rd) 1. For example, in August 2000, Enron's stocks peaked at about US \$ 90. It was then the seventh largest corporation by market capitalization in the U.S. When it collapsed, in November 2001, its share price was at US \$ 0.60. See generally William W. Bratton, 'Enron and the Dark Side of Shareholder Value' in Thomas W. Joo (ed.)

regulators but also international institutions such as the World Bank (WB), the United Nations Development Programme (UNDP), and the Organisation for Economic Co-operation and Development (OECD) are concerned with corporate governance. Hence, precisely how corporate governance should be understood is an issue of interest to a range of scholars in various fields.

Professor John Farrar argues that the term 'corporate governance' was used for the first time about four decades ago. He traces the root of the term 'governance' and notes that it comes from the Latin words *gubernare* and *gubernator*, 'which refer to steering a ship and to the steerer or captain of a ship'.<sup>47</sup> Professor Ford, Ramsay, and Austin note that 'corporate governance is a very broad topic'.<sup>48</sup> Hence, unsurprisingly, there are numerous definitions of corporate governance in literature; nevertheless, none of them is a globally applicable definition.<sup>49</sup>

The term 'corporate governance' can be defined in a narrow or a broad sense. A narrow definition is often concerned with (i) corporate management structure issues: the board's issues and relationships between the board and managers, shareholders; and (ii) interest or objectives of a corporate participant group. According to Professor Shleifer and Professor Vishny, 'corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment'.<sup>50</sup> This concept is concerned with objectives

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*Corporate Governance: Law, Theory and Policy* (2004) 17-30. Such scandals were the reason for the enactment of the *Sarbanes-Oxley Act* (SOX) in summer 2002. See Bengt Holmstrom and Steven N. Kaplan, 'The State of U.S Corporate Governance: What's Right and What's Wrong?' in Donald H. Chew Jr. and Stuart L. Gillan (eds), *Corporate Governance at the Crossroads: a Book of Readings* (2005) 71. As to the financial crisis in East Asia in 1996 - 97 and upgrading corporate governance in this region, see Gordon Walker, 'Corporate Governance in East Asia: Prospects for Reform' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (2002) 570.

- 47 See John Farrar, *Corporate Governance: Theories, Principles, and Practice* (2005, 2nd ed.) 3. Farrar notes that the word 'governance' comes from the old French word '*gouvernanace*', meaning control and the state of being governed. In the *Oxford English Dictionary* (2002), 'governance' means the activity of governing a country or controlling a company or an organisation; the way in which a country is governed or a company or institution is controlled.
- 48 See H A J Ford, P R Austin and I M Ramsay, *Ford's Principles of Corporations Law* (12ed, 2005) 175.
- 49 See also R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 7; Standards Australia, *Australian Standards: Good Corporate Governance (AS 8000-2003)* (2003) 8.
- 50 See Andrei Shleifer and Robert W Vishny, *A Survey of Corporate Governance* (1996), NBER Working Paper 5554, April 1996, available at <http://ssrn.com/abstract=10182>; visited 25 July 2005.

of investors and how the company management works to meet expectations of financiers. Professor Ford, Austin J, and Professor Ramsay briefly describe corporate governance as the management of corporations and ‘mechanisms by which managers are supervised’.<sup>51</sup> This notion emphasizes how to run a company and supervise the company officers’ activities in the interest of the company. However, a broad approach often views corporate governance in complex relationships with various company participants and a range of objectives of corporate governance.<sup>52</sup>

In 1992, a U.K committee chaired by Sir Adrian Cadbury developed a significant concept of corporate governance. The committee’s report described corporate governance as ‘the system or process by which companies are directed and controlled’.<sup>53</sup> Therein, corporate governance is viewed in a systematic perspective with links between company participants. The definition of the Cadbury Committee is supported by the Australian Standards of Good Corporate Governance (AS 8000-2003) when it asserts that corporate governance is ‘the system by which entities are directed and controlled’.<sup>54</sup> Another broad definition of corporate governance is by the OECD in the *OECD Principles of Corporate Governance* (revised 2004). The OECD states that:

Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.<sup>55</sup>

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51 See Ford et al., above n 48, 175.

52 Such a view was also argued by Blair in 1990s, see Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (1995) 19.

53 This is the Committee on the Financial Aspects of Corporate Governance, but it can be called as ‘the Cadbury Committee’, see The *Report*, p.2; see more at Austin et al., above n 49, 14 -5.

54 Standards Australia, above n 49, 8. Therein, the Standards Australia also notes that ‘definitions of corporate governance are many and varied. There is no one global applicable definition’, see *ibid*. However, to make the definition of corporate governance clear, the Standards Australia also indicates a useful definition by the Investment and Financial Services Association (IFSA) that ‘Corporate governance is concerned with improving the performance of companies for the benefit of shareholders, stakeholders and economic growth. It focuses on the conduct of, and relationships between, the board of directors, managers and the company shareholders’. See, *ibid*.

55 OECD, *The OECD Principles of Corporate Governance* (2004) 11.

To sum up, the term ‘corporate governance’ can be described in various senses, and there are a number of definitions. Nevertheless, all notions of corporate governance are concerned with two key issues. First, how is a company controlled and directed, and second, for whose interests is a company directed and controlled? Thus, corporate governance can be understood as a system or process by which companies are directed and controlled to protect the interests of corporate stakeholders.

## 2. Corporate Governance: A New Concept in Vietnam

It seems to be impossible to find in the Vietnamese language an equivalent term to ‘corporate governance’ as understood in advanced economies.<sup>56</sup> Terms which refer to directing, controlling, and managing a company or an enterprise used in Vietnamese literature are often the so-called ‘*quản trị công ty*’, ‘*quản lý – điều hành công ty*’, ‘*quản trị doanh nghiệp*’, and ‘*quản trị kinh doanh*’. Nevertheless, literally, ‘*quản trị công ty*’ may be understood as company management, and the next Vietnamese terms as controlling and managing a company, enterprise management, and business management respectively. In other words, these terms in the Vietnamese language may be understood as a narrow conception of corporate governance, because they seem to refer to only corporate management. That is why a foreign scholar, N. Freeman, argues that ‘corporate governance can be roughly translated into Vietnamese as ‘*quản trị công ty*’, the term he also notes as administration of a company.<sup>57</sup>

In the traditional view, Vietnamese law-makers were usually concerned with only management structures of an enterprise, and the process for its operation. In some literature, scholars called the management structure of an enterprise under the law ‘the organisational model for corporate management’<sup>58</sup> or ‘management apparatus’.<sup>59</sup> In laws governing enterprises, the terms ‘*quản lý*’ and ‘*điều hành*’

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56 See, for example, Nguyen Ngoc Bich, *The Enterprises Law: Capital and Management in Shareholding Companies (Luật Doanh nghiệp: vốn và quản lý trong công ty cổ phần)* (2004).

57 See Nick J. Freeman, ‘Promoting Good Corporate Governance in Vietnam: a New Element in the Economic Reform Agenda’ in Ho Khai Leong (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (2005) 334.

58 See Le Dang Doanh, ‘Legal Consequences of State-Owned Enterprise Reform’ in Ng Chee Yuen, Nick J. Freeman, and Frank H. Huynh (eds), *State-owned Enterprise Reform in Vietnam: Lessons from Asia* (1996, reprinted) 71.

59 See Nguyen Van Huy and Tran Van Nghia, ‘Government Policies and State-owned Enterprise Reform’ in Ng Chee Yuen, Nick J. Freeman, and Frank H. Huynh (eds), *State-owned Enterprise Reform in Vietnam: Lessons from Asia* (1996, reprinted) 58.

are differentiated, the former is used to describe activities of making enterprise-decisions, and the latter is used to describe activities of day-to-day management of an enterprise.<sup>60</sup>

Nevertheless, in a common Vietnamese view, the term 'corporate governance' is also often considered as '*quản trị công ty*'. For instance, such a way of using the term has been recognised by the Vietnam Chamber of Commerce and Industry (VCCI). '*Quản trị công ty*' is the term which is also formally translated from English at international conferences organised by Vietnamese authorities and international institutions, such as the UNDP, the OECD, the IFC, and the WB.<sup>61</sup>

It can be argued that Vietnam lacks debate on corporate governance.<sup>62</sup> There are noteworthy reasons why corporate governance has not been a significant topic in Vietnam, including: (i) in terms of the legal system, company law re-emerged only in 1990, after a period of abeyance; (ii) the private economic sectors are still so 'young' and relatively modest;<sup>63</sup> and (iii) the financial markets are less developed. Before the renovation policy was introduced in the late 1980s, business freedom and private economic sectors were not recognised by the law as a result of centrally planned economic policies of the CPV. Therefore, the private economic sectors of Vietnam have been relatively 'babyish', small and dispersed.

Therefore, it is understandable why corporate governance has not much been considered in Vietnam at this time. In a transition economy like Vietnam, understanding corporate governance mechanisms is a significant factor in

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60 These key terms of corporate governance, '*quản lý*' and '*điều hành*', are used in laws of enterprises in Vietnam, for example, see Articles 80 and 85 of the *Enterprises Law* 1999.

61 There have been several international conferences organized in Vietnam on issues of transition economies and corporate governance, under co-operation between Vietnamese authorities with international institutions. For example, (i) '*Corporate Governance Development in Vietnam*' in Hanoi, on 11-12 October 2001 by the Asian Development Bank (ADB); (ii) '*International Policy Conference on Transition Economies*' in Hanoi, on 31 May -01 June, 2004 by the UNDP; and (iii) '*IFC/OECD International Corporate Governance Meeting*', in Hanoi on 6 December, 2004 under the co-operation between the Ministry of Finance of Vietnam and the IFC, and the OECD. See websites of these organisations.

62 See the VCCI, The Draft Comprehensive Report on Researching and Assessing Legislation on Establishment, Organisational Structure and Operation of Enterprises with Oriented Thought to Make the Unified Enterprise Law and the Common Investment Law (Báo cáo tổng hợp Nghiên cứu ra soát các văn bản pháp luật về thành lập, tổ chức và hoạt động của doanh nghiệp với các tư tưởng chỉ đạo xây dựng Luật Doanh nghiệp thống nhất và Luật Đầu tư chung) (2005) (unpublished) 129.

63 As to these issues, see generally Bui Xuan Hai and Gordon Walker, above n 45, 572.



upgrading its law of corporate governance and encouraging good corporate governance to support the economic development and international integration process.

## V. Some Issues of the Contemporary Vietnamese Corporate Governance Law Regime

### 1. Corporate Governance Rules

Corporate governance involves a system of rules which are set up to administer corporate governance relationships. Professor Farrar describes the structure of corporate governance to include legal regulation; listing rules and accounting standards; codes of conduct, guidelines, and statement of best practice; and business ethics.<sup>64</sup> At a broad perspective, according to their binding level, corporate governance rules can be classified into three key groups: (i) hard law, including legislation (among them, corporate law is the most important) and case law (this depends on the legal tradition); (ii) hybrid law, comprising rules of securities regulators (such as listing rules), accounting and auditing standards, and the company constitution;<sup>65</sup> and (iii) soft law, for example, codes of ethics, codes of good corporate governance, business ethics, other professional codes, and even the role of market forces.<sup>66</sup>

In Vietnam, legislation, accounting and auditing standards, and the company constitution provide rules for corporate governance. Among corporate governance legislation, the *Enterprise Law 2005* is the most important. Some corporate governance rules in the *Enterprise Law 2005* are optional; so, a company can pass the constitution that is suitable with its conditions, but in accordance with the law. Hence, internal governance rules of a company consist of legal rules provided by legislation and rules provided by the company constitution. Different from advanced economies, until now, there is no corporate governance code of practice for companies in Vietnam.

Case law, as it is known in common law countries, does not exist in Vietnam; hence it is not a source of corporate governance rules as in common law countries. Precedents are not recognised as sources of law. In law education, legal professional trainings, and judicial practice, precedents are not viewed as a source

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64 See generally John Farrar, above 49, 3-4.

65 For this issue, Professor Farrar considers the listing rules of securities regulators of Australia and New Zealand, and Statements of Accounting Practice are hybrids or 'hard soft law'. See J. Farrar, *ibid* 4.

66 For discussion of these rules, see J. Farrar, *ibid* 3-4;

of law.<sup>67</sup> When adjudging, judges have to comply with laws, which mean legislation only.<sup>68</sup> Cases all must be decided in accordance with effective legislation. The Supreme People's Court often issues an annual report which presents opinions of the Supreme Court on several complicated particular legal matters and cases to induce courts to follow.<sup>69</sup> Nonetheless, judges are not required to follow a decision on the same dispute/case that has already been adjudged by a higher court of the system. For example, judges of a district court may differently decide on a similar dispute which has been adjudged by the Supreme People's Court. That means each judge has the right to interpret legislation independently. A decision on a case of the Supreme People's Court is not considered as the legislation interpretation and binding lower courts. The Supreme People's Court can only guide lower courts by forms of legislation (such as resolutions, decisions, and directives), but not by cases.

To enhance the Vietnamese corporate governance system, various efficient rules of corporate governance are essential for good corporate governance. It is also necessary for Vietnam to recognise the role of precedents in judiciary and to encourage codes of corporate governance practice.

## 2. Corporate Governance Structures

The *Enterprise Law* 2005 provides corporate governance structures for each company type. The corporate governance structure of a company depends on the company type and the number of its shareholders. The *Enterprise Law* 2005 provides two types of companies: limited liability companies (LLC) and shareholding companies (SC). LLCs are classified into two forms: (i) LLC having two or more members, and (ii) LLC having only one member either an individual or an organisation.

The compulsory governance structure of an LLC having two and more members must consist of (1) the members' council (*Hội đồng thành viên*-MC) consisting of all company

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67 See for example, textbooks of law universities in Vietnam: Ha Noi Law University and Ho Chi Minh Law University.

68 See Article 130 of the Constitution, Article 5 of the *Law on Organisation and Operation of the People's Courts* 2002 (*Luật tổ chức và hoạt động của Tòa án nhân dân*) (*Law No. 33/2002/QH10*, dated 2 April 2002). As to the organisation of the court system, see Article 2 of the Law.

69 As to this issue, see also Phạm Duy Nghĩa, 'Vietnamese Commercial Law and Challenges of International Economic Integration Process' (*Pháp luật thương mại Việt Nam trước thách thức của quá trình hội nhập kinh tế quốc tế*) (2000) 6 *State and Law Journal (Tập chí Nhà nước và Pháp luật)* 9, 15; Nguyễn Đức Mai, 'About Case Law in Our Country at the Present' (*Về vấn đề án lệ ở nước ta hiện nay*) (1998) 3 *State and Law Journal (Tập chí Nhà nước và Pháp luật)* 46, 46.

members, (2) a chairperson of the MC, (3) a (general) director (CEO), and (4) a supervisory board (*ban kiểm soát*) (if more than 10 members).<sup>70</sup> In this governance structure, the members' council is the most important decision-making body. It has power to control the company, to select the chairperson of the council, the CEO, and supervisor(s) of the company. The CEO is the person who is responsible for the day-to-day management of the company. The chairperson of the MC can also be the CEO of the company.

Governance structure of an LLC having only one member depends on the member is an individual or an organisation. The *Enterprise Law* provides different models for LLCs owned by one organisation or individual. In other words, the governance structure of an LLC owned by an institutional member is different from those owned by an individual member. The governance structure of an LLC owned by only one organisation is regulated more minutely than those owned by one individual. It should be noted that according to the *Enterprise Law 2005*, most SOCs can be converted to the model of LLCs owned by one organisation, thus the governance structure is also designed for this purpose. There are two corporate governance models for LLCs owned by an organisation.<sup>71</sup> First, it consists of the members' council (*hội đồng thành viên*), the chairperson of the council, the CEO, and supervisor(s). The second model comprises the chairperson of the company (*chủ tịch công ty*), the CEO, and supervisor(s). The key difference between the above models is the number of representatives that the owner of the company appoints to control the company.

Unlike LLCs, the law provides that the governance structure of a shareholding company must have: (1) the shareholders' meeting (*đại hội đồng cổ đông*) which comprises all shareholders who have rights to vote, (2) a board of management (*hội đồng quản trị*) lead by a chairperson, (3) a (general) director (CEO), and (4) a supervisory board (if more than 10 shareholders).<sup>72</sup> In this model, the shareholders' meeting is the supreme decision-making body of the company. It selects members of the board of management and the supervisory board. The management power falls to the board of management. This body has rights to appoint the CEO and other senior managers of the company. Depending on the company constitution, the chairperson of the board can be elected by either the shareholders' meeting or the board. Supervisors have duties to monitor activities

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70 See Article 46, as to governance rules of this company type; see Article 46 to 59 of the *Enterprises Law 2005*.

71 Article 67 of the *Enterprise Law 2005*, as to governance rules of this company type; see Article 67 to 75 of the Law.

72 See Article 95, as to governance rules of this company type; see Article 95 to 127 of the *Enterprises Law 2005*.

of the management with an independent role to assure the company is properly managed. Thus, as in other jurisdictions, the governance structure of a shareholding company is more complicated than other company types. This corporate governance structure is different from the US single board and the German dual board models.

### 3. Investor Protection

It is widely accepted that investors, especially minority shareholders and creditors (the so-called 'outside investors'), need to be protected because outside investors may be expropriated by the company managers and controlling shareholders (the so-called 'the insiders').<sup>73</sup> Minority shareholder protection is essential, and 'enhancing corporate governance by protecting minority shareholders must be in the national interest'.<sup>74</sup> Good investor protection can also encourage investments and support the development of financial markets and the economy.

How to protect investors, especially outside investors, or in other words, how a corporate governance system (laws and practices) can offer effective mechanisms to protect investors, both shareholders and lenders, is a question that needs to be examined. In the context of the U.K, the importance of the law was stressed by Professor Gower over two decades ago. He argued that there are key ways to protect investors: (i) by regulating (a) 'the modus operandi of the body in which the investor invests', (b) 'the terms of the investments', (c) 'those who act as intermediaries', and (ii) 'by providing for full disclosure about what those terms are'.<sup>75</sup> In practice, when assessing the business environment of each economy, the World Bank is concerned with three dimensions of investor protection: (i) disclosure of ownership and financial information; (ii) legal protection of small investors; and (iii) enforcement capabilities in the courts or securities regulator.<sup>76</sup>

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73 As to a discussion on these issues, see generally, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny (hereinafter, LLSV), 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3.

74 See Gordon Walker, 'Corporate Governance in East Asia: Prospects for Reform' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (2002) 570, 586.

75 See L C B Gower, *Review of Investor Protection* (1982) 7-8.

76 See The World Bank (WB), *Protecting Investors* (2004), available at <http://www.doingbusiness.org/Methodology/ProtectingInvestors.aspx>, visited 15 August 2005.

Therefore, it can be argued that the laws, their enforcement, and disclosure are key ways to protect investors.<sup>77</sup>

Since *Đổi mới*, in order to attract direct investments and portfolios, especially from foreign investors, the Vietnamese government attempted to improve the legal system and adopted legal principles to assure that legal assets of investors are protected and are not nationalised. Investor protection is also stated in the *Constitution* 1992 and laws of investments as well as those of enterprises.<sup>78</sup> In 2004, the Central Institute of Economic Management (CIEM) in co-operation with the UNDP and *Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* of Germany produced significant research into the *Enterprise Law* 1999 to support the enactment of a new law of enterprises. This paper reveals the weaknesses of the contemporary regulations of minority shareholder and creditor protection.<sup>79</sup>

The situation of investor protection in Vietnam probably exhibits through a survey conducted by the World Bank in 2005. According to this research, with the investor protection index ranges from 0 to 10, Vietnam achieved only a score of 2.3, compared with a region average of 5.3, an OECD's members' average of 5.9, and a score of 8.3 for the US.<sup>80</sup> This showed a significant different level of investor protection in Vietnam and other jurisdictions. Nonetheless, by the introduction of the *Enterprise Law* 2005, investor protection in Vietnam can be improved.<sup>81</sup> Under this Law, minority shareholder protection is enhanced through

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77 For a discussion on minority investor protection measures, see J. M. Mobius, 'Issues in Global Corporate Governance' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (2002) 44-5.

78 See, for example, Articles 22, 23, and 25 of the *Constitution* 1992; the *Law on Encouragement of Domestic Investment* 1998 (Luật Khuyến khích đầu tư trong nước); the *Enterprise Law* 1999 (Luật Doanh nghiệp); and the *Law on Foreign Investment in Vietnam* 1996 (Luật Đầu tư nước ngoài tại Việt Nam).

79 See, for example, the CIEM, the GTZ, and the UNDP, '*High Time for Another Breakthrough?: Review of the Enterprise Law and Recommendations for Change*', November 2004, 21, 27, 43, 45; available at the website of the UNDP, at <http://www.undp.org.vn/ehome.htm>.

80 WB, *Doing Business* 2006, at <http://www.doingbusiness.org/ExploreTopics/ProtectingInvestors/>, visited 10 January 2006.

81 For a discussion on these issues, see generally, the VCCI, *The Draft Comprehensive Report on Researching and Assessing Legislation on Establishment, Organisational Structure and Operation of Enterprises with Oriented Thought to Make the Unified Enterprises Law and the Common Investment Law* (Báo cáo tổng hợp Nghiên cứu rà soát các văn bản pháp luật về thành lập, tổ chức và hoạt động của doanh nghiệp voi

regulations on rights of minority shareholders (for example Articles 41, 43, and 79). Company managers' duties such as loyalty, good faith, care, and diligence are also regulated as the US corporate law model.

#### 4. Lack of Disclosure

Disclosure is also a key way to protect investors. The disclosure obligations of a company and its managers should be provided for by the law, codes of practices, and the company constitution. In both developed and developing countries, in order to ensure their interests, investors 'must have access to information and the ability to influence and control management, through both internal governance procedures and external legal and regulatory mechanisms.'<sup>82</sup> By disclosure measures, investors can monitor company management and, perhaps limit the expropriation of investors, specifically outside investors, by the insiders of the company.

Disclosure and transparency are also an important way to protect investors and achieve good corporate governance; nevertheless, it is not effective yet in Vietnam. The World Bank's survey in 2004 of investor protection around the world through the disclosure index found that Vietnam had a low score of investor protection with a score of only 1 (within a range of 0-7) compared with a region average of 2.6, an OECD members' average of 5.6, and a score of 6 for Australia.<sup>83</sup> In practice, cases of listed companies, such as BIBICA (Bien Hoa Confectionary Corporation), CANFOCO (Ha Long Canned Food Stock Corporation),<sup>84</sup> REE Corporation, and GILIMEX (Binh Thanh Import-Export Production and Trade Joint Stock Company) are examples of the lack of transparency and disclosure in

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cac tu tuong chi dao xay dung Luat Doanh nghiep thong nhat va Luat Dau tu chung) (2005) (unpublished) 129 -169.

82 See See Nick Bradley, 'How to Measure and Analyze Corporate Governance' in the International Financial Law Review, *Corporate Governance 2003* (2003) 41. See also G Dallas and Nick Bradley, 'Calibrating Corporate Governance Practices: Corporate Governance Scores' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (2002) 78.

83 This survey conducted by the World Bank in 2004, and this disclosure index ranges from zero to 7, and the score of 7 is the best. See, the World Bank, above n 76.

84 In this case, the CEO of CANFOCO, Le Dinh Liem, was charged with tax fraud in January 2003. However, until July 2003, he reported it to the Board of Management, and then the Board reported to the Securities Trading Center and the public. That means, investors were not informed of the situation in the company in time, and they seemed to be fraudulent. For details, see Stock Investment (*Dau tu Chung khoan*), [www.vir.com.vn](http://www.vir.com.vn).

listed corporations of Vietnam.<sup>85</sup> Nevertheless, the transparency of Vietnamese companies was improved in 2005. A survey of the World Bank conducted in 2005 showed that Vietnam's disclosure index was a score of 4, compared with an average of 5.6 of East Asia - Pacific region, and 7 for the US.<sup>86</sup>

Therefore, in order to protect investors and achieve good corporate governance, Vietnam should encourage corporate disclosures by appropriate mechanisms. Disclosure requirements can be provided by corporate and securities laws, as well as codes of practices and the company constitution. Disclosure can be done in a number of ways: registration; submission of accounting and auditing reports; and informing shareholders (in accordance with the internal rules), creditors (according to credit agreements), and the public as the listing rules require.

## 5. Corporate Governance in SOCs

As a transition economy, state-owned companies (SOCs) still dominates the economy. In the beginning of the 21<sup>st</sup> century, SOCs still account for about 38 – 39 per cent of the GDP. Nevertheless, managers of SOCs often lack of qualifications of a company manager in a market economy.<sup>87</sup> Further, in some cases, an official who was not trained in business can be appointed as a CEO or a chairperson of the board of an SOC. Some senior officials of the government are also concurrently appointed as CEOs or chairpersons of management boards of large SOCs. Hence, these people, sometimes, do not distinguish properly between state administration and company management. Several vice ministers of ministries are also chairpersons of management boards of large state general corporations, for example a Vice Minister of the Ministry of Transport, a Vice Minister of the Ministry of Fishery were also appointed as the chairperson of the board of state general corporations.<sup>88</sup>

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85 For details, see websites: [www.vnn.vn](http://www.vnn.vn); [www.sgtt.com.vn](http://www.sgtt.com.vn); [www.vir.com.vn](http://www.vir.com.vn); and [www.vneconomy.com.vn](http://www.vneconomy.com.vn). As to these cases in short, see also Nguyen Van Thang, 'Corporate Governance in Vietnam's Equitized Companies' in Ho Khai Leong (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (2005) 367-70;

86 World Bank, above n 80.

87 See also, Vũ Quốc Tuấn, *Enterprises and Entrepreneurs in the Market Economy (Doanh Nghiệp và Doanh nhân trong nền Kinh tế thị trường)* (2001) 248. In the command economy before *đổi mới*, duties/ objectives of SOC managers were to complete plans and directions ordered by authorities, but not a profit.

88 Vice Minister of the Ministry of Transport Pham Duy Anh is also the Chairperson of the Board of Management of Vietnam Maritime General Corporation, and Vice Minister of the Ministry of Fishery Nguyen Ngoc Hong was also appointed by the Minister as the Chairperson of the Board of the Vietnam Seafood General Corporation (Seaprodex).

The governance structures and management staff of SOCs appear to be more bulky and less effective than those of private companies having the same size and business areas. The power, functions, and duties of corporate bodies of an SOC, especially in large SOCs, expose shortcomings. Because of reasons: mechanisms, personnel, and governance methods, it can be said that SOCs are poorly-governed. For example, according to the Ministry of Public Security of Vietnam, seven out of the ten most serious corruption cases in 1994 -2004 period were related to governance of SOCs: Nam Đ□nh Textile Company, Tamexco, Investment Promotion Company (the Lā Th□ Kim Oanh case), Bān C□ Hotel, Vinh Phú Battery Company, Traffic Projects Construction Company, and Construction Company No. 2.<sup>89</sup>

Poor corporate governance of SOCs also resulted in serious debts between SOCs and with other businesses. According to statements of the Governor of the State Bank of Vietnam Le Duc Thuy, at the meeting with the Standing Committee of the National Assembly on 14 April 2005, the debts between SOCs were VND 31,935 billion (about US \$ 2 billion), but surprisingly, many of them lack files and evidence.<sup>90</sup>

## VI. Conclusions

This paper has examined the development history of Vietnamese company law and its corporate governance regime. It has shown that company law, including the corporate governance law regime, of Vietnam was derived from French law in the colonisation and its development has been influenced by local factors, especially economic policies of the CPV. The introduction of the *Enterprise Law* 2005 is a significant development of Vietnamese company law and the corporate governance regime. It enhances the economic reforms, especially SOCs reforms, and supports the international economic integration of Vietnam.

As a transition economy, corporate governance as known in advanced economies is a new topic in Vietnam. The corporate governance regime has developed since *Đổi Mới* nonetheless, it exposes weaknesses that need to be removed. In order to enhance the corporate governance system, further law reforms are necessary by borrowing appropriate experiences from advanced economies and other transitional countries. Along with legal rules, law enforcement needs to be enhanced to resolve efficiently corporate governance disputes to protect investors and other corporate participants. Besides that, codes of corporate governance

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89 See [http://www.bbc.co.uk/vietnamese/regionalnews/story/2004/12/041227\\_corruptionreport.shtml](http://www.bbc.co.uk/vietnamese/regionalnews/story/2004/12/041227_corruptionreport.shtml), visited 15 June 2005.

90 See <http://www.vnn.vn/chinhtri/doingoai/2005/04/410292/>, visited 10 January 2006.



VIETNAMESE COMPANY LAW:  
THE DEVELOPMENT AND CORPORATE GOVERNANCE ISSUES

practice should be encouraged to improve governance practice of companies. Accounting and auditing standards need to be raised to meet international standards. Improving corporate governance should be considered by not only the regulators, but also companies themselves.