

THE LONG ROAD TO REFORM: AN ANALYSIS OF FOREIGN INVESTMENT REFORM IN VIETNAM

NORMAN BROWN IV*

Abstract: In the mid-1980s, Vietnam opened its borders to international investment in hopes of improving its economic atmosphere. The Vietnamese government launched new initiatives and passed new laws to facilitate and encourage Foreign Direct Investment in its ailing economy. However, after an examination of recent changes, this Note concludes that further reform is still required in order to encourage the necessary Foreign Direct Investment that will help aid Vietnam's feeble economy and allow it to prosper as the next great Asian economic power.

INTRODUCTION

After the end of the Vietnam War in 1975, Vietnam isolated itself from countries existing outside the Soviet bloc.¹ In the 1980s, however, Vietnam once again opened its doors to the world and promised a reform that would create the largest investment opportunity for ambitious foreign investors since China.² In 1986, Vietnam launched the *doi moi*, or restructuring, a governmental initiative aimed at improving the country's ailing economic conditions.³

During the decade following the unveiling of the *doi moi*, the Vietnamese government implemented very few changes or economic reforms.⁴ Prior to the most recent economic reforms implemented by the Vietnamese government, the *doi moi* was merely a rhetorical initiative that resulted in little to no official action.⁵ Many foreign investors entered the Vietnamese economy with hopes of timely reform because the "large number of literate and entrepreneurial people, cou-

* Norman Brown IV is an Executive Editor for the *Boston College International & Comparative Law Review*.

¹ *Goodnight, Vietnam*, ECONOMIST, Jan. 8, 2000, at 65.

² *Id.*

³ *Pulling Teeth*, ECONOMIST, July 29, 2000, at 71.

⁴ See *Goodnight, Vietnam*, *supra* note 1, at 65.

⁵ *Id.*

pled with Vietnam's close proximity to China," made Vietnam the perfect Asian niche economy.⁶ However, the inactivity of government reform caused most foreign investors to leave Vietnam.⁷ Furthermore, the entry of China into the World Trade Organization provided a lucrative oasis for foreign investors seeking a strong Asian presence.⁸

The Asian crisis also cast doubt upon the wisdom of opening the Vietnamese markets to the West, causing the country to slow any on-going reform that would have eased foreign entry into its markets.⁹ Vietnamese leaders decided that stability and continuous communist governance was well worth the price of slower economic growth.¹⁰ This decision allowed only slow and modest reform.¹¹ Nevertheless, with growing world markets and the increased need for foreign investment, Vietnam soon had to revisit the *doi moi*.¹²

Part I of this Note provides a background of the *doi moi*. Specifically, Part I establishes a background of Foreign Direct Investment (FDI) and explains how the changes implemented by the Vietnamese government will further FDI. Part II of this Note discusses the changes in the two major investment laws of Vietnam: Vietnam's Foreign Investment Law and the Enterprise Law. It also demonstrates how the government is easing regulations in order to become more FDI friendly. Furthermore, Part II examines other factors that seek to encourage FDI in Vietnam, namely the Bilateral Investment Treaty (BIT) between Vietnam and the United States and the opening of a new Vietnamese Stock Exchange. Part III examines suggested remedies to bring about economic reform and increase FDI. This Note concludes by stating that although the current reform is a step in the right direction for the establishment of strong FDI in Vietnam, the ultimate fate of FDI infiltration into the Vietnamese economy is contingent on whether the Vietnamese government can see beyond its protectionist beliefs and fears that deregulation may lead to the fall of communism in Vietnam.

⁶ Tuyen Quang, *All Go Below, All Caution Above*, *ECONOMIST*, June 10, 2000, at 48.

⁷ *Id.* at 48.

⁸ *See id.*

⁹ *Goodnight, Vietnam*, *supra* note 1, at 65.

¹⁰ *See id.*

¹¹ *Id.*

¹² *See generally Pulling Teeth*, *supra* note 3, at 71-72.

I. BACKGROUND OF THE *DOI MOI*

A. *Background on Foreign Direct Investment*

One of the primary objectives of the renewed *doi moi* efforts is to create an economic atmosphere that will attract more FDI to Vietnam.¹³ FDI is a term used to describe the process by which private business enterprises purchase capital assets, transfer capital, or reinvest profits into the economy of another country.¹⁴ FDI can improve an ailing economy substantially by yielding increases in the capital available for investment, revenues, and employment, and by introducing new skills and technologies into an economy.¹⁵ The existence of a sound economic and financial framework is vital to a country seeking foreign investment.¹⁶ Unfortunately, Vietnam's economic and financial framework remains "weak and underdeveloped."¹⁷

Government attitudes play a crucial role in facilitating or discouraging foreign investment, and to date, the Vietnamese government has discouraged the infusion of capital.¹⁸ The Vietnamese government has done virtually nothing to help clear the way for foreign investment and, in fact, has done much to hamper this investment.¹⁹ A campaign against "social evils," established in 1996, discouraged many foreign investors by prohibiting them from placing foreign names on their shops.²⁰ Furthermore, foreign companies were faced with burdensome tariffs that made production in Vietnam relatively expensive.²¹ 3M, for example, faced a 40% duty tariff on "office products" rather than the less burdensome 10% duty placed on "adhesive backed paper."²²

Such burdensome restrictions and red tape have caused many foreign enterprises to leave Vietnam.²³ As a result, the Vietnamese

¹³ See *id.*

¹⁴ A.J. EASSON, *TAXATION OF FOREIGN DIRECT INVESTMENT* 2 (1999).

¹⁵ IBRAHIM F.I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* 11 (1993).

¹⁶ *Id.* at 20.

¹⁷ *Country Forecast Vietnam September 2000 Main Report: Policy/Bus. Outlook: Financing*, in THE ECONOMIST INTELLIGENCE UNIT LTD., Sept. 6, 2000, available at 2000 WL 23804920. [hereinafter *Policy/Bus. Outlook*].

¹⁸ See SHIHATA, *supra* note 15, at 22; see also *Goodnight, Vietnam*, *supra* note 1, at 65.

¹⁹ See *Goodnight, Vietnam*, *supra* note 1, at 65.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Quang, *supra* note 6, at 48.

government realized that changes were needed to retain the remaining foreign enterprises, and to aid the influx of other foreign enterprises in order to boost foreign investment in the Vietnamese economy.²⁴

B. *Recent Doi Moi Initiatives*

Since 1999, the Vietnamese government has initiated a period of reform that seeks to aid the ailing Vietnamese economy by opening the country once again to foreign investment.²⁵ It appears that Vietnam has tempered the fears of western influence with the more important need for a stronger global and domestic economy.²⁶ Most of the economic reformation is geared at creating a more favorable atmosphere for foreign investors in the hopes of increasing FDI in Vietnam.²⁷ The four major steps taken by the Vietnamese government to increase FDI were to: (1) amend the Law on Foreign Investment;²⁸ (2) create a new Enterprise Law to facilitate foreign business growth; (3) enter into a BIT with the United States; and 4) open a Vietnamese Stock Exchange.²⁹ An analysis of these recent changes in Vietnamese law and regulations highlights the trend of reform aimed at implementing the *doi moi* initiative.³⁰

II. CHANGES IN VIETNAMESE LAW

A. *Vietnam's Law on Foreign Investment*

The amended Law on Foreign Investment, effective July 1, 2000, aims to make Vietnam more attractive and friendly to FDI enterprises.³¹ The most important amendment grants foreign enterprises the right to mortgage their land-use rights.³² This power gives foreign enterprises the ability to borrow from foreign banks using the assets and property of their companies as collateral.³³ Previously, only Vietnamese banks had the statutory authority to foreclose on land and

²⁴ See generally *Pulling Teeth*, *supra* note 3.

²⁵ See *id.*

²⁶ Quang, *supra* note 6, at 48.

²⁷ See *Small Mercies*, BUS. ASIA, Sept. 4, 2000, available at 2000 WL 764729.

²⁸ See *Pulling Teeth*, *supra* note 3.

²⁹ See *id.*

³⁰ See *id.*

³¹ *Small Mercies*, *supra* note 27.

³² *Id.*

³³ *Id.*

property.³⁴ This change is important to foreign firms that wish to invest in the Vietnamese economy because it creates a new means of financing through which capital may be raised.³⁵

The government also sought to aid FDI enterprises by passing amendments to the Law on Foreign Investment that: (1) allow the government to provide loan guarantees; (2) allow FDI enterprises to decide for themselves whether to set up reserve funds and to determine their size; (3) reduce the profit-remittance tax; (4) allow the remaining value of land-use rights contributed by the joint Vietnamese business party to be subject to liquidation; and (5) allow FDI enterprises to determine for themselves the forms of their investments and the reorganization of their capital structures.³⁶

Other amendments to the Law on Foreign Investment seek to minimize much of the red tape that burdens enterprises, such as governmental restrictions and procedures that are more burdensome in Vietnam than in other foreign investment areas.³⁷ For example, the statute no longer requires unanimous approval by the joint venture's management board for changes affecting the corporation, but rather, it merely requires consensus decision-making.³⁸ Moreover, some categories of FDI enterprises, especially those that export over half of their production, no longer will be required to obtain investment licenses but will only be required to register the enterprise.³⁹ Thus, private firms do not have to secure "onerous government approvals" before they are able to invest legally as foreign companies in the Vietnamese market.⁴⁰ An additional amendment allows enterprises to purchase foreign currencies from commercial banks to cover their current transactions.⁴¹ Finally, whereas in the past an enterprise usually bore the burden and expense of site work and obtaining land-use rights, it is now the responsibility of either the Vietnamese partner in the joint venture or the local people's committee to complete these tasks.⁴² While the FDI enterprises welcome these changes, many argue

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Small Mercies*, *supra* note 27.

³⁷ See Nguyen Thang, *Grant us a Clear Role*, VIETNAM INVESTMENT REV., June 26, 2000, available at <http://www.vir-vietnam.com/454vir/454hom00.htm>.

³⁸ *Small Mercies*, *supra* note 27.

³⁹ *Id.*

⁴⁰ Margot Cohen, *A Glimmer of Hope*, FAR E. ECON. REV., June 8, 2000, at 76.

⁴¹ *Small Mercies*, *supra* note 27.

⁴² *Id.*

that the changes are diluted and insubstantial,⁴³ especially considering that only twenty-three of the seventy-five proposed amendments were passed.⁴⁴

Foreign investors view these changes as a positive step toward alleviating the day-to-day headaches faced by all foreign businesses in Vietnam.⁴⁵ Furthermore, these changes help reduce the burdensome taxes that foreign investors must pay in order to maintain a presence in Vietnam.⁴⁶

B. *The Enterprise Law*

Another change implemented by the Vietnamese government aimed at improving foreign investment was the enactment of the Enterprise Law, which took effect on January 1, 2000.⁴⁷ One of the Enterprise Law's major effects is that it allows businesses to register without waiting for government approval.⁴⁸ During the four months following the Enterprise Law's enactment, registrations for private firms more than doubled compared to the same period in 1999.⁴⁹ This increase in registration stems from the reduced cost of registering a new business from ten to thirty million Vietnamese *dong* (VND) to only VND 100,000.⁵⁰ Moreover, businesses are able to receive their registrations in only one week, as opposed to the six months previously required.⁵¹

The Enterprise Law is a positive step toward job creation and streamlined regulations.⁵² As with the Law on Foreign Investment,⁵³ however, enterprises desire a far more sweeping change.⁵⁴ For example, while eighty-four licenses were removed, 300 such licenses still remain.⁵⁵ Despite the fact that enterprises are enjoying the new-found freedom that the Enterprise Law gives them, due to its weak imple-

⁴³ Cohen, *supra* note 40, at 76.

⁴⁴ *Small Mercies*, *supra* note 27.

⁴⁵ *Id.*

⁴⁶ *Donors, Vietnamese Officials Review Economic Development*, ASIAN ECON. NEWS, June 26, 2000, available at 2000 WL 23765615.

⁴⁷ Cohen, *supra* note 40, at 76.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Thang, *supra* note 37.

⁵¹ *Id.*

⁵² Cohen, *supra* note 40, at 76.

⁵³ See *Small Mercies*, *supra* note 27.

⁵⁴ See Cohen, *supra* note 40, at 76.

⁵⁵ *Id.*

mentation by Vietnamese officials, it alone does not create the economic and regulatory atmosphere that FDI enterprises need to prosper.⁵⁶

C. *The Bilateral Investment Treaties Between Vietnam and the United States*

In the growing global economy, BITs are often used in unstable political and economic areas to provide some security for enterprises investing in those areas.⁵⁷ BITs, a new aspect of international law governing foreign investments, are designed to protect against noncommercial risks accompanying FDI in questionable economic and political regimes.⁵⁸

BITs to which the United States is a party differ slightly from those of other countries in that they seek not only to create protection for enterprises, but also seek to create free access for investments in the economy of the other contracting party.⁵⁹ By entering into a BIT with Vietnam, the United States hoped to promote far-reaching changes in the Vietnamese economy.⁶⁰ Specifically, as a result of this BIT, the Vietnamese government “has agreed to protect intellectual property rights, to accept foreign investment cheerfully, and, as far as is possible for a communist dictatorship, to introduce new economic and commercial transparency.”⁶¹

The central purpose of the BIT between Vietnam and the United States is to increase FDI in Vietnam through the attraction of access to the U.S. markets.⁶² The BIT looks to lower both tariff and non-tariff barriers to the Vietnamese economy.⁶³ The agreement drastically lowers tariffs on exports from 40% to less than 3%.⁶⁴ The parties hope that such a decrease will spark investments by easing economic barriers to the U.S. markets.⁶⁵ Some analysts hypothesize that this reduction could double the already \$600 million of exports to the United

⁵⁶ Thang, *supra* note 37.

⁵⁷ LOUIS HENKIN ET AL., INTERNATIONAL LAW 759 (1993).

⁵⁸ *Id.*

⁵⁹ *Id.* at 765.

⁶⁰ *Policy/Bus. Outlook*, *supra* note 17.

⁶¹ *Pulling Teeth*, *supra* note 3.

⁶² *Country Forecast Vietnam September 2000 Main Report: Economic Forecast: Economic Growth*, THE ECON. INTELLIGENCE UNIT LTD., Sept. 6, 2000, available at 2000 WL 23804920 [hereinafter *Economic Forecast*].

⁶³ *Id.*

⁶⁴ *Pulling Teeth*, *supra* note 3.

⁶⁵ *Id.*

States⁶⁶ The result of this BIT should yield an influx of investment into the Vietnamese economy and cause a spill-over effect through the accompanying increase in employment, housing purchases, and the purchasing of other durable and non-durable goods.⁶⁷ With little doubt, this BIT is a key element in creating a more secure and attractive market for FDI.⁶⁸

D. *Creation of a Vietnamese Stock Exchange*

On July 20, 2000, Vietnam took another major step towards establishing a more attractive economy for FDI with the opening of its first functioning stock exchange.⁶⁹ After four years of preparation and numerous delays, the communist governmental regime of Vietnam finally fulfilled its commitment to the creation of a public securities market.⁷⁰

While the objectives of opening the stock exchange are admirable, the actual effect it has and will have on the economy, and especially on foreign investment, is questionable.⁷¹ Initial trading on the exchange has been minimal, mostly consisting of domestic companies.⁷² Furthermore, the number of companies listed, just over 400, is minimal.⁷³ This small quantity, combined with the ceiling that limits foreign investors to a combined holding of 20% of any single company's equity, will result, at least initially, in minimal foreign investment participation in the market.⁷⁴ Thus, foreign investment's interest in the stock exchange will be exercised on a "wait-and-see" basis.⁷⁵

However, it is important to realize that foreign investment in the stock exchange itself is not an immediate concern of the policy-makers.⁷⁶ Their major concern in creating the new Vietnamese Stock Exchange is encouraging domestic participation that will strengthen

⁶⁶ *Id.*

⁶⁷ HENKIN, *supra* note 57, at 765.

⁶⁸ See, e.g., *Pulling Teeth*, *supra* note 3.

⁶⁹ Ha Thang, *Vietnam Opens 1st Stock Exchange*, VIETNAM INVESTMENT REV., July 24, 2000, available at <http://www.vir-vietnam.com/458vir/458hom00.htm>.

⁷⁰ *Id.*

⁷¹ See generally Nick Freeman, *Viet Stock Exchange*, BUS. TIMES, Aug. 2, 2000, at 14.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*; see also *Strict Regulations to Limit Early Foreign Participation*, VIETNAM INVESTMENT REV., July 10, 2000, available at 2000 WL 9576048 [hereinafter *Strict Regulations*].

⁷⁵ *Strict Regulations*, *supra* note 74.

⁷⁶ Freeman, *supra* note 71.

the domestic economy of the country.⁷⁷ It is important to see the implementation of the stock exchange as one element in Vietnam's attempt to restructure its economic well being.⁷⁸

III. SUGGESTED REMEDIES FOR RESTRICTIONS, REGULATIONS, AND INFLUENCES THAT CONTINUE TO HINDER THE VIETNAMESE ECONOMY

While the recent reformation by the Vietnamese government has created a more attractive atmosphere for FDI, more must be done to create an ideal atmosphere for foreign investment in the Vietnamese economy.⁷⁹

A. Deregulation of the Phone Utility

One of the most important changes that must be implemented is the deregulation of the phone utility.⁸⁰ While the change itself seems simple, its effects would be substantial.⁸¹ International phone charges have contributed to relatively high business costs for FDI enterprises in Vietnam in comparison with other Asian countries.⁸² A three-minute phone call from Vietnam to Japan costs a business \$8.52, compared to \$2.23 that it costs to make the same three-minute phone call from Singapore to Japan.⁸³ Such a large discrepancy has led to a proposed ten to fifteen percent decrease in international phone charges by Vietnam officials.⁸⁴ This proposal is an important measure for Vietnamese officials to pursue because it will help minimize some of the unnecessarily high business costs that foreign investors wish to avoid.⁸⁵

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Pulling Teeth*, *supra* note 3.

⁸⁰ See *Vietnam to Reduce International Phone Charges by 10–15%*, VIETNAM INVESTMENT REV., Sept. 18, 2000, available at 2000 WL 23766004 [hereinafter *International Phone Charges*].

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Small Mercies*, *supra* note 27.

B. Deregulation of the Banks

Another major change that must be made in Vietnam in order to protect and encourage FDI is deregulation of bank activities.⁸⁶ Despite the fact that FDI investors have minimal access to foreign banks as a source of capital, regulation of these banks remains high.⁸⁷ The quality and strength of banking regulations have remained stagnant and are very difficult to change due to the unbalanced political power of the central banking authority vis-à-vis other powerful political interests.⁸⁸ Thus, extremely unfavorable regulations exist that burden both foreign banks and foreign business enterprises.⁸⁹

One of the major restrictions placed on both banks and enterprises seeking the backing of those banks are the restrictive interest regulations.⁹⁰ Even though the restrictions on *dong* lending rates have been removed and positive real rates have taken the place of negative ones, these positive changes subsequently have been replaced with interest rate bans that limit the banks' flexibility and prevent foreign banks from operating on an equal field with domestic banks.⁹¹ Despite the fact that there has been a significant increase in bank lending in 1999, further structural change is needed to free capital "frozen" in banks.⁹² Because of this situation, true market-determinative rates are not expected until 2004.⁹³

Finally, some facilitation is needed to aid foreign enterprises in their access to sources of capital.⁹⁴ Access to these markets is extremely limited and, because of the unyielding regulations, Vietnamese banks are not a viable source of capital.⁹⁵

C. Fewer Restrictions on Foreign Influence in the Stock Market

While the stock exchange is a positive addition to the Vietnamese economy and may eventually serve as a source of capital for foreign firms, further foreign participation must be encouraged in the near

⁸⁶ See *Policy/Bus. Outlook*, *supra* note 17.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ *Policy/Bus. Outlook*, *supra* note 17.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

future.⁹⁶ Therefore, there must be some relaxation of the restrictions placed on foreign investors seeking to invest in the economy.⁹⁷ Currently, foreign investors who seek approval to trade on the Vietnamese Stock Exchange must fill out numerous forms and supply many supporting documents.⁹⁸ These forms exist not only for foreign enterprises as they do in the United States, but also for private foreign investors wishing to purchase stock in separate companies.⁹⁹

Further restrictions on the trading capabilities of foreign investors also threaten to hinder foreign investment in the Vietnamese Stock Market.¹⁰⁰ Currently, existing rules do not allow foreign investors to sell shares for three years if they have taken part in the management of the company during that period.¹⁰¹ Many believe that the three-year period is overly burdensome, even by international standards, since many jurisdictions have similar restrictions that apply for a shorter time frame, usually six months to a year.¹⁰²

CONCLUSION

While the recent reformation in Vietnam has revived hope for the emergence of FDI in the country, further reform is necessary to establish a market that is suited to the needs of FDI enterprises. With growing deregulation throughout the Asian community, other countries are quickly becoming viable alternatives for FDI in Asia. The Vietnamese government must be careful not to revert to a period of isolation from the global economy as a result of infiltration of western thought and the decline of communism. While the apprehension is reasonable, the truth is that Vietnam's economy is clearly in distress.

The need for foreign investment is evident, and the suggested changes are necessary to aid Vietnam's failing economy. Changes such as the deregulation of the phone utility and banks will ease the burden of day-to-day business costs and activities. Lower business costs and easier access to capital will encourage more foreign companies to invest their capital in Vietnam's economy. Furthermore, access to Vietnam's Stock Exchange will be a major attraction to foreign businesses. While foreign access to the stock exchange is an eventual goal,

⁹⁶ See Freeman, *supra* note 71, at 14.

⁹⁷ *Id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *Strict Regulations*, *supra* note 74.

¹⁰¹ *Id.*

¹⁰² See *id.*

it is not a reality in the near future. Deregulation and encouragement of further foreign investment in the stock exchange will help strengthen its effect on the economy, produce a new source for foreign companies to raise capital, and allow Vietnam to become a global-market competitor.

With the increasing centralization of the global economy, FDI is an important factor to a successful economy. Vietnam must continue to reform its laws and regulations to encourage foreign investment, as it has over the past year, and it must not retreat from these reforms as it did in the early 1990s.