# ASSESSMENT OF THE DRAFT UNIFIED ENTERPRISE LAW FOR THE SOCIALIST REPUBLIC OF VIET NAM

**Compiled by the ABA-UNDP International Legal Resource Center (ILRC)**
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M. Douglass Bellis 27 April 2005

It is often difficult to comment on the effectiveness of a draft law without knowing what the goal of the drafters was in writing it. In this case, an accompanying document "Executive summary of the report on the review of legal documents on the establishment, organization and operation of enterprises with the guiding concepts of the Unified Enterprises Law and the Common Investment Law" sets forth a number of goals that seem to be the purposes of the legislation. For the purposes of this analysis they will be assumed to be the goals of the legislation. It was not clear what the source of this report was. If it was an official body, and the report was used in drafting the bill, the report would constitute a part of the travaux preparatoires and so be something courts might consult in construing the legislation. As such, the report might clarify what could otherwise be obscurities in the draft. Even with such help, though, a number of provisions remain a bit opaque, perhaps because of translations problems or perhaps because of hidden assumptions based on traditions and business practices peculiar to Viet Nam. Laws necessarily must reflect the cultural patterns and values of the particular society that adopts them, and ultimately cannot be completely effectively analyzed by someone not versed in those patterns. On the other hand, an external examination may help spot areas where internal and unexamined cultural assumptions stand in the way of needed legal reform, but are not inherently inconsistent with it. With luck, the following may reflect more that latter possibility than the former one:

Article 2. While it is not uncommon in a civil code country to have a hierarchy of laws provision that uses rather general terms, this article in its present form might undermine the certainty that is usually conducive to investment and economic development. If there are already specialized laws, laws of investment (and what are those?) and treaties whose provisions would conflict with this law, and supersede it, it would be better to make specific references to them, either in this article or elsewhere in this law. That would enable a prospective investor, whether foreign or domestic to determine which rules apply to his prospective enterprise, rather than relying on a provision of this law, only to find it is trumped by a provision of some other law the investor was totally unaware of and had no way of looking up, and perhaps could not have predicted would be interpreted so as to conflict. Here is a case where cross references, not much used in civil law systems, would be of advantage. Also, if future laws conflict with this law, those who write those laws should take that conflict into account and determine which law should prevail, making appropriate cross references as needed. If future treaties conflict with this law, this law should be amended to reflect how the treaties change it. In many countries a treaty does not go into force domestically anyway until implementing legislation is adopted, providing an occasion for just such amendment.

Article 3. Definitions can only be judged how they are used in the statute. However, some general observations can be made. Does something cease to be an enterprise because it does not have a "stable" transactional office? What if people sell their goods from their car or truck, moving from place to place depending on where demand for their goods

might arise? What are the consequences of failing this test? Would they cease to have the protection of Article 4, section 2? Making broad definitions at the beginning of a law is risky, since legal definitions have a different purpose from dictionary definitions. And what about "valid file"? Could some immaterial variation from a requirement, such as the use of the wrong color of ink or the failure to have a document stamped by the right official, result in an enterprise losing the protections of law?

Article 4. The generous provisions of section 3 of this article should certainly encourage businesspeople. It is not clear how they will be able to enforce their rights, though. Can they go into court and challenge a determination by the purchasing authority as to what the market value of their property is? Who has the duty to facilitate the relocation of their investment? Can they sue for that assistance? What are its limits? Perhaps the State does not have enough money to relocate everyone where they want to go. What then?

Article 6. Can the list declared by the Government under section 2 of this article be changed? If so, given the rather broad concepts of "good morals and good customs", how could anyone be sure their business will not be declared illegal with little or no notice or opportunity for appeal? In section 5, we are told that law and accounting businesses, among others, must (should?) be partnerships. What of sole practitioners? What about corporations? Why does it matter what form these businesses take? In section 6 we have another list. If it is already made, why not include it in the law? Many of the provisions of this law seem only hortatory, such as a requirement that licensing procedures must be defined clearly and in detail. What if they are not?

Article 8. Enterprises are obligated to observe regulations of laws on national defense, security, public order and security, protection of nature resources and environment, and protection of historical, cultural places, famous spots. Wouldn't a cross reference to those laws be helpful here? I am not sure the catch all "comply with other obligations as stipulate by laws" really adds much. In any case, what happens when an enterprise fails to do this? What penalties apply and who has standing to seek their imposition?

Article 12. What happens when a business registrar fails to process a business registration application within 15 days after its submission? Is it automatically approved? If so, what if it is seriously deficient? If not, what can the person seeking to register do?

Articles 14 and 15 require many very specific documents. It may be in some cases that some of these documents do not exist, such as (national?) ID numbers. Or what if there is an inaccuracy in reporting the proportion of capital contributions of a member of a limited liability company or partnership? Does it make a difference if the inaccuracy is completely trivial? It may well be that the rule of proportionality or other civil law doctrines will settle these questions, but lawyers and businesses from common law countries like the US and Britain may find them troubling.

Article 19. Changes in registration to reflect changes in company organization must be filed 10 days after the change reported takes place. What if a company misses the deadline?

Article 21. This publication rule requires publication in a number of newspapers by a deadline. What if the newspapers are not being published often enough? What if the deadline is missed?

Article 29. A specific right to sue is conferred on members, but does that mean that they cannot sue other parties for other violations of this law?

Article 33. The possibility of hereditary membership in the business organization is an intriguing one, and must be something arising out of special circumstances obtaining in Viet Nam.

Article 40a. There is an abrupt switch from “members” to “stockholders”. Is this a translation issue?

Article 49a. Is the company required to appoint a “supervisor”? Why must that person be paid only for days worked and not be salaried?

Article 49b. How do these qualifications fit in with the definition earlier in the draft? (Article 3, section 12a)

Article 49c. Why are the salaries and maybe the duties of officers and employees of private companies matters to be set by the law, which they appear to be here? Wouldn’t those normally be matters for the company to negotiate with its own employees?

Article 49d. This one seems lost in translation. Is it a conflict of interest rule? If so, what are the standards for a conflict, who decides when one exists, and what the remedies and who has standing to seek them? Why can’t the company buy out members, as it looks like it can’t under section 4?

Article 50. A one member limited company (?) cannot reduce, but can increase, his/her capital contribution. Does this include undistributed profits? Presumably not, but in any case a one-way rule is not likely to encourage increases. There is a countervailing issue about potential creditors who rely on financial assumptions about a company, but that might be dealt with in other ways, depending on the nature of the problems. And if this is a problem, why isn’t it also a problem in a two-member company. Maybe some sort of fraudulent distribution rule would be more a propos, but one cannot be sure without a clearer picture of the problem intended to be solved by this provision.

Article 52. What is the deal with the voting preference shares? Why, if they are useful, do they have to be limited to “founding shareholders” and why should they automatically convert to ordinary shares after 3 years? Possible discrimination against minority shareholders sounds like a concern, but this article, like many of the others, is difficult to analyze without a more detailed picture of the problem it is intended to solve. This is not the fault of the text of the draft law, of course. Too bad there was no commentary by the drafters that traces their thought processes in drafting. Then we would know more about

what concerns led to each provision and why they thought that provision would alleviate those concerns. If possible, such an approach might be desirable in future UNDP reviews.

Article 53, section 1dd. This seems like a rather broad delegation of power to create rights in the company charter. Presumably this could not be used to undermine other provisions of the law, but it does present that intriguing possibility to the creative. In section 2b1 we have additional time frame requirements, but no statement about what the penalties or remedies for failure to comply with the deadline might be, or a cross reference to where to find them if they exist. Perhaps c1 a little below suggests a shareholder can sue, but only if this is considered a "serious violation" of the shareholder's rights. The concepts of Board of Managers, Control Board, and Control committee are introduced in this article, but their details are as yet rather unclear. As a drafting matter, it is better to provide cross references to the sections creating the entity unless they are so close as to be obvious.

Article 54. Shareholders can sell their shares to "other persons". Does this mean that companies cannot buy back their own stock? (But see articles 64 and 65…)The fact that shareholders cannot withdraw capital from the company except by selling the stock to other persons looks like it might mean this. If so, why? Not clear on what the purpose might be of the shareholder's other obligations? Can a company "internal regulation" impose a duty on the shareholder? Of what sort?

Article 56. What is the difference between dividend preference shares and, say, debentures with an unusual computation of interest? If there is no minimum for the fixed dividend, could it be so small as to be in practice non existent. Must there always be a bonus dividend? Why couldn't much of these details be left to the corporation to determine based on market conditions? It seems oddly rigid, yet at the same time, without many real requirements.

Article 58. If one founding shareholder does not pay for their shares, all founding shareholders are held personally liable without limit to all debts of the company? An interesting application of collective responsibility, but one that might discourage persons from becoming "founding shareholders". Perhaps this whole concept is something unique to Viet Nam?

Article 59. Presumably shares are transferable, so why is it important to have the name and various identifying information about a shareholder written on any share, especially if mistakes don't affect the rights or benefits of the owner? Why would the chairman and director be responsible for such mistakes if they are typos? Why does it matter?

Article 68 sets forth a specify right to sue for recovery of unlawful payments for buybacks of shares or dividends. The implication is that shareholders may not be able to sue for other misdeeds. Will there be stockholders' derivative actions?

Article 69 tells us the structure of the company when there are 11 or more shareholders who are individuals or legal entities (including government agencies?), though the wording or the translation seems odd. What if there are fewer?

Article 70. The small addition of “unless other stipulated in the company’s charter” would seem to undo this rule. The term authorized representative seems to be used a bit differently here than in the earlier part of the law.

Article 74. What is the effect of a failure by the convener to send notice “no later than 7 days prior to the opening date” of the shareholders’ meeting? Will the meeting be “valid” under article 76 if the holders of 65% of the shares show up anyway?

Article 78. Why is it specified that the recording of minutes “should be in Vietnam(ese?) or in foreign languages”. What else could it be?

Article 79. Another specific right to sue. Does it preclude suits on other matters?

Article 80. Section 4 says that if resolutions adopted by the Board violate the law *and* cause loss to the company, members who voted for the resolutions are responsible (in proportion to their shareholdings?) for the losses. Are illegal actions that are profitable not actionable in any way?

Article 82. Members can vote at meetings by writing, but does this mean they get counted as a quorum? Any assumption that the deliberations that go on at a meeting are relevant to the decision, that is, that there is an advantage to having the people actually confer together, seems to be negated by this provision.

Article 85b. Maybe there are translation problems here. It talks about related “benefits” but then seemingly switches to asking for listings of other holdings?

Article 86. If the company is insolvent, they cannot increase anyone’s pay? In inflation adjusted terms or nominal terms? Mightn’t this backfire and create bad morale if even normal cost of living raises were not given, especially if the insolvency is not the employee’s fault. Could you hire new people at higher salaries than those who leave?

Article 88. Isn’t the requirement that members of the control committee be age 21 or higher duplicative of a provision earlier in the bill?

Article 89. Seems to specify what payments are to be made to members of the control committee or board. Why is this not left to company rules? Since they must have a control board if they have more than 11 stockholders, they might have to pay whatever the market will bear, but, conversely, someone might be willing to serve as a control committee member for a company that could not afford to pay so much in order to get the reputation of being connected with a major up and coming enterprise.

Article 90, leaving all the guts of this article to (later?) “regulations provided by laws” (which laws?) seems a bit of a cop out. What will the businesses do while they wait, keep everything? This is not exactly conducive to a positive business environment.

Article 95b. Does this mean that if property is in some other category, it cannot be property of the partnership? What is the article supposed to do?

Article 95c. So if any partners want to dump other partners they can. How will they divide the property of the partnership?

Article 96. A partner can “request” indemnity for losses from the company and information from other partners. Do the company and other partners have an obligation to provide those things? Later in this article, the role of limited partners does not seem recognized in the liability provisions.

Article 96a. A two member partnership with a “board of members”? The board determines “all issues and business operations” of the company. Hmmm….Looks like all the partners will want to be on it, except maybe limited partners. And how does this fit in with the idea that any partner may conduct the business of the company? What do they have in mind here?

Article 96d. To “fire” a partner, is the unanimous consent of all the others required as this implies? If so, how does that fit in with article 95c?

Article 100. What is the point of having a “capital” for an individual enterprise if the proprietor has unlimited liability for its operations, other than perhaps for the proprietor’s internal accounting purposes, and if only for the latter, why is this requirement in the law? Sounds like a business decision.

Article 104. So you can suspend business, but only with notice. What does it mean if you fail to give notice? Why can’t you just quit doing business whenever you want for however long you want or can stand to be without work?

Article 104b appears to be a mere description. What does it do substantively?

Article 104c can’t decide whether these folks will be allowed to set up their business as they want, or not. Things that are market oriented may not be “equal”. Later in the article, there is another case in which come people can “request” something but not clear whether they can get it. Is this a translations problem?

Chapter VII is rather hard to follow, and it is rather odd that all reorganizations and dissolutions are treated in the same heading as bankruptcies. How is a division different from a separation? A consolidation from a merger? Why do these need to be considered separately from the usual rules about changes in ownership? Bankruptcy is certainly given short shrift here, in that final article. Might as well have left it out. But the question about what happens in the case of insolvency is a reasonable one to ask.

Chapter VIII is similarly lacking sufficient context to understand by itself. The vague statements about state "management" seem broad enough to cover anything. I would be cautious about investing or creating a business under such circumstances.

Article 119. Commendation and reward? How about profits?

Articles 120 and 121. Breaches and remedies. All very vague. Article 121 section 1 starts with the phrase "depending on the nature and extent of the breach…." It asks the question we all might have, but does not in any secure way answer it. Article 124 seems to be the real answer: to be determined in the future. So what is the law about?

The drafters did think about how this new law would apply to existing businesses, which is good. Transitional provisions are clearly needed, but more would have to be known about the facts on the ground to comment on the sufficiency of those now included.

Overall, there are a number of questions about the draft law, even assuming that all of the goals contained in the accompanying executive summary were the goals of the legislation. It is interesting that one such goal may have been to eliminate tax and other inducements to foreign investors, placing them on a level playing field with domestic entrepreneurs. Depending on the stage of economic development in Viet Nam, this may or may not be desirable. Local businesspeople should not have to compete with foreigners who are subsidized to do the same thing the locals would do on their own (and perhaps better because of their superior knowledge of local conditions). But if there are types of businesses Viet Nam would like to see established, and either the capital or the know-how must come from abroad because they are not yet sufficiently available domestically, tax holidays (or lower tax rates) and similar inducements, on a temporary basis, may serve to get on the ground economic development that would come slowly if at all otherwise. Even the tax expenditures are minimal in such a case, because the enterprise would not exist otherwise and therefore would not be paying any taxes anyway. Presumably there is an ongoing professional analysis of the economic as well as the legal consequences of adopting this law.

Comments on Vietnam's Draft Enterprise Law

Paul H. Brietzke[1]

Thank you for the opportunity to comment on the Law. The Executive Summary is much more useful than similar documents I am familiar with, from Indonesia for example. The long list of discriminations to be removed indicates both the seriousness and the magnitude of the task. Ideally, each such discrimination will be measured against current Government policies, to determine which discriminations create needless inefficiencies and the excessive bureaucratic discretion possibly conducive to corruption. A major reason for removing discriminations is to comply with WTO requirements, and the Law takes important steps in this direction. The more technical policies and "public interests" are ably stated in the Summary, but the means of their concretization and certain other policies are presumably not for the Law's drafters to judge. A possible counter-example is the reference to a "natural" enterprising right in the Summary. This concept has Christian origins and has sometimes been used to protect private rights from public needs, in some countries.

While we were provided with many of the relevant laws, access to the Common Investment Law (read alongside a growing number of bilateral investment treaties) and the State-Owned Enterprises Law would enable a more complete assessment. The most important and useful directive in the Summary is the call for a compulsory "regulatory impact assessment," with a checklist of questions designed to avoid the proliferation of inconsistent requirements by various State agencies. (Such an assessment could add the impact of the regulation on labor and/or the environment, if this were thought desirable.) There are no explicit references to such an assessment in the Enterprise Law, but the assessment may be best incorporated into some general administrative law.

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*Art. 1* illustrates the approach of a *unified* Law covering four types of business organizations, plus state-owned enterprises and related—when transformed into a limited liability company or a share-holding company. Having these rules in the same Law facilitates comparisons and contrasts, and focuses on the common legal elements among some of the enterprises. As Vietnamese *jurisprudence* develops further, these common legal elements will likely expand in number and scope, to better focus on the differences made desirable by socio-economic differences among the enterprises.

*Art. 2*. It is necessary and desirable for investment laws and international agreements (¶¶ 3-4), to prevail over an inconsistent Enterprise Law, since the former laws likely reflect Government's more recent developmental and allocative policies. But this is not necessarily true of specialized laws prevailing over an inconsistent, general Enterprise Law (¶ 2). This rule is likely to perpetuate some of the "discriminations" that the Executive Summary seeks to eliminate as far as possible. These specialized laws *may* embody less advanced policies and legal theories and/or give less attention to a legal consistency and coherence. The ideal (but laborious) solution is the rule-by-rule examination of specialized the laws and policies, the results of which are embodied in a subsequent law.

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*Art. 3* definitions are useful for reducing administrative discretion: e.g., "You do not have a valid file," *perhaps* as part of a solicitation for a bribe. Art. 3(12) defines "Manager of the enterprise" as, e.g., "a general partner." The reader may have to refer to the partnership articles to understand that this is one of the "general partners" defined in 3(11), not all of whom are managing partners—presumably to distinguish them from the "limited {liability} partners" that are not defined in Art. 3. The reasons for Art. 3(14) are not altogether clear, especially with regard to 3(14)(dd) and (h). If the intention is to create parity between family enterprises and enterprises among unrelated persons, this should be made clear: *see* the 2002 amendment to Art. 21 of the Constitution.

*Art. 4* repays careful study, as the most direct statement of State policy. Unless defined elsewhere, "lawful profitability" and the consequences of unlawfulness are a bit unclear. How would making children work then they should be in school, or behavior by a foreign investor which is tolerated in his home country but not in Vietnam, be treated, for example? In the Art. 4(2) State protection of "ownership, and other lawful rights and interests", "lawful" arguably undercuts the "natural" enterprising right mentioned in the Executive Summary: *See also* Art. 4(3). A foreign investor might fear a legal change amounting to a (partial) confiscation of his investment, but such a fear is reduced by the relevant bilateral investment treaty and, in the future, by TRIMs, MIGA, and other WTO sideshows. The compulsory acquisition of enterprises for "reasons of national defense, security or national interest," to be compensated at "market price" (Art. 4(3)), has some vagueness which are largely cured by Vietnam's international undertakings and perhaps by the Common Investment Law. Domestic investors may have some worries, especially as the excellent "public interest" interpretive gloss in the Executive Summary is of uncertain legal effect. "National interest" potentially confers a great deal of discretion, as does "market price" — when a strong actor (the State) intervenes in relatively new, fragile, and fragmented markets.

*Art. 6(1)* is unclear: must the State register and issue certificates for legally-qualified enterprises in lines of business other than those in Art. 6(2)-(4)? Art. 6(2) is quite broad and thus confers much discretion, although Government will declare a concrete list—and inevitably change it from time to time. This list will reduce discretion. The fact that conditions can be imposed on enterprising by ordinance as well as law and decree, in Art. 6(3), may perpetuate or create anew the "discriminations" frowned upon by the Executive Summary. The same is true of the conditions expressed "in licenses or other regulations," in *Art. 6a(1),* some of which may reflect outmoded policies or legal theories.

The *Art. 7* rights of enterprises is excellent, although the "in conformity with law" language rebuts the assertion of "natural" rights in the Executive Summary. *Art. 8* obligations are a useful counterpoint to these rights.

*Art. 9.* Making the rights to capital contribution, establishment and management of enterprises "according to … this law" should reduce discriminations, and the enumerated exceptions are inevitable and useful in policy terms.

*Art. 12(2).* The Registrar cannot require documents other than those specified for the particular enterprise. This usefully reduces discretion, delay, and corruption opportunities. But unless there a problem with the translation of 12(3), the Registrar is not obliged to register and certify the enterprise within 15 days or some other drive home.

(Delays when the Law is first promulgated might be useful, since the Registrar is likely to be swamped with many applications initially.)

Similarly, *Art. 19* usefully reduces the Registar's discretion by stating that registration "shall be granted" if the enumerated conditions are fulfilled. But changes in the enterprise's file under *Art. 19,* some fairly minor, require that a new certificate be applied for within ten days. This will become quite burdensome for enterprises and for the Registrar, when business opportunities expand and markets become more flexible. There seems little reason for this requirement, especially since the Registrar *apparently* does not attest to the accuracy of the certificate or the business file: *see* Art. 12 and *infra*. An annual report, which the enterprise prepares for other purposes, can be filed for inspection by the Registrar and potential creditors, etc.—prominently listing the changes described in Art. 19. This would be sufficient notice for the Registrar's further inquiries if, e.g., he thinks that cancellation of the certificate might be appropriate.

*Art. 41(3)(a)* reflects on incompleteness and lack of clarity variously seen in Art. 41(A)(1), 86(1), 89b(2), and 96(2). (The lack of clarity may result from the difficulties of translation.) In 41(3)(a), the (General) Director of a limited liability company (LLC) must, in "an honest and diligent manner … favor … the legal interests of the company …." Under 41A(1) the Chairman and the Meeting of the LLC must act "trustfully, in the best way, … to insure the legal maximum benefits of the company …." Under 86(1) the General Director, any other manager, and the Board of Management of a shareholding company must "[e]xercize, in an honest and diligent manner, all the rights and duties … like any normal person in the similar position and situation to protect the {company's} optimal interests …." Similarly under 89b(2), the Control Committee of a shareholding company must display "trustfulness" and "carefulness which owned {*sic*} by any normal person with the similar position and expertise …." Under 96(2), partners' obligations are those of "any normal persons and in the same situations." I would argue that, especially allowing for translation difficulties, each of these obligations is identical in effect. They *could* thus be consolidated into a single Article, titled Enterprise Officials' Obligations perhaps — with the officials defined, so as to exclude individual proprietorships (private enterprises). The obligation that is apparently intended comes very close to what is called a "fiduciary" obligation in some countries. This obligation would have the official do for the enterprise what others with an interest in the enterprise (shareholders, other partners, etc.) would do if they had the official's information and expertise. (There is an imbalance in information within enterprises other than an individual proprietorship: one or a few persons know things that most do not, and this additional information heavily influences which decisions are in the enterprise's best interests. Expertise is a combination of training and experience and, ideally, persons in the chief decision-making positions have this expertise.) All of these officials' obligations *could* thus be defined as follows: "Act in the lawful interests of the company in an honest and diligent manner, as would a person who has similar, information and expertise." In particular, any reference to a "normal" person should be deleted, since such a person does not have information and expertise comparable to the officials'. (This may have been the drafters' intent that got altered in translation.)

*Art. 53(f).* Vietnam adopts the common civil law structure of two Boards for shareholding companies, the Board of Management and the Control Committee. There is a lively and extensive literature about the pros and cons of such a structure. Vietnam

attempts to avoid the main disadvantage, the burden on small companies, by requiring a Control Committee only when there are 11or more shareholders (Art. 69). But a burden may still remain: some of the 11 and shareholders may own only a few shares — minor employees receiving a kind of profit-sharing in the company, for example. Further, the demanding qualifications for Control Committee members (*see Art. 88(4)(1)),* may make the members (and their sustained attention) quite expensive to recruit. Many smaller companies may thus opt for a limited-liability structure, at least initially. This may be a good thing, fostering a "march through the institutions" as enterprises grow and develop.

*Art. 54(1).* The obligations of ordinary shareholders are quite demanding. This may forestall or at least make more cumbersome the creation of a securities market. (*But see Art. 61(1)(C),* providing for share allotments to brokers and guarantors.) If so, this may be a good thing, at least at this stage, given the problems that some of Vietnam's neighbors have had with premature capital market liberalizations.

*Art. 55.* Voting preference shares offer a potential control at the expense of liquidity. Being thus locked into the company will be attractive only if you have enough share-votes to control matters, but it may help insure the continued loyalty of the founders: *compare* Art. 58. Without the right to transfer shares, does a deceased shareholder's heirs receive the shares, and can the heirs force the company to buy the shares back?

*Art. 56.* Similarly, the attractiveness of dividend preference shares will turn on the company's bonus dividend policy, and the position of these shareholders compared with the company's other creditors—their priority for payment, in the event of bankruptcy.

*Art. 57.* Similarly, the attractiveness of redeemable preference shares will turn on the redeemer's priority relative to other creditors in the event of bankruptcy. Also, can the company redeem the shares even if the shareholder does not want to sell? In sum, the costs and benefits of Art. 55-57 shares make their attractiveness to different types of people somewhat uncertain, in a country without a long history of shareholding.

*Art. 65.* Share buy-back by the Board, of up to 30% of ordinary shares and potentially all of preferential shares. Time will tell whether such powers can result in a company becoming "too highly leveraged" —possessing too little capital for its purposes because this capital has been retired through payments which deplete the company's treasury. Under 65(2) and with exceptions, the Board sets a buy-back price which "shall not exceed the market price." Unless the company's shares are traded with some regularity, there may be no "market price" or it may be fundamentally disrupted by rumors of the Board's buy-back action. 65(3) is a bit unclear: "The company is entitled to buy back … from every shareholder." (¶ 1), while ¶ 2 begins — "Shareholders who agree to resell their shares …." It would seem that shareholders are free to not sell their shares, but this should be clarified.

*Art. 70(3):* "Shareholders as a legal entity shall appoint one or more authorized representatives to exercise the their rights … {*sic*}." Does "legal entity" refer to shareholders as a whole? If so, is the appointment to be by majority vote? Can a shareholder who votes against appointing the representatives continue to exercise rights for himself? Who prevails if the representatives disagree with Board or Meeting resolutions?

*Art. 77(2).* Requiring the approval of Meeting resolutions by 65% of shareholding votes, and 75% for certain types of resolutions, dilutes the "shareholder democracy" that some commentators see as valuable — especially as the Charter may increase these percentages even further. It would thus be relatively difficult to change company management or policy. This is a good idea if stability rather than flexibility is sought.

*Art. 77a.* Are the written "shareholders' opinions" subject to (or supplemental to) the 65% and 75% requirements of 77(2)? Is the drafters' intent to allow absent shareholders to defeat the will of shareholders at the Meeting, to build on even clearer consensus, or both aims? Intent should be clarified here.

*Art. 80a and 88.* Board/Committee members' "regular term is less than three years …." This should be clarified: is the intention one of a two year term, unless the election cycle is disrupted by additional meetings? Art. 80a(4) appears to contradict Art. 80b(1); this should be clarified. Does 80b(1) refer to biological persons, "legal persons" (other companies for example), or both?

*Art. 82(2):* A Board quorum of ¾ is so high that a minority of members, persons who would thus lose in a vote over a resolution, could nonetheless defeat that resolution by staying away from the meeting—which would then lack a quorum.

*Art. 85(3)* represents a difficult policy balance: assuming that "the above regulations" incorporate all that comes before it, making the (General) Director broadly liable to reimburse the company will encourage his care, but it may discourage some talented people from trying to run a company because they do not wish to incur such broad liability. A better balance might be achieved by adding a final sentence: "It shall be a defense to the (General) Director's responsibility that he tried to comply with the above regulations in good faith." A similar good faith defense could be given managers in Art. 86(2) ¶ 2.

*Art. 96a(1):* "All members create the board of members." Does this mean all partners? Including limited {liability} partners? Unless the Charter provides to the contrary, *all* members "should" approve major decisions under 96a(3). Is this a translation problem: "should" is not mandatory; "must" is. There are similar "must" rules in some jurisdictions, where they are criticized as creating "deadlock" within the partnership. *E.g.*, partner A votes against what B and C want; this leads B and C to vote against what A wants; A then votes against what C wants. Such possibilities illustrate an underlying weakness of partnerships, a weakness that often fosters the evolution of partnerships into companies:

Under 96C(1) and 3(c), it is unclear how, if at all, a "legal representative" or "representative" is chosen.

Subject to the Charter and under *Art. 96d(2),* a partner can withdraw capital if all partners agree. This can prejudice creditors, and notice to creditors and some restrictions should be required, even though the partner remains liable for two years (86d(6)).

Does the deletion of *Art. 97* mean that limited partners can participate in management: *see 96a* and *96c*? This runs counter to the practice in some other countries, but that is no problem if a conscious policy decision has been made.

*Art. 99-104.* The private enterprise is the most common and arguably the most important of enterprises from the standpoint of development. As

the typical first step beyond a subsistence lifestyle, the private enterprise should be as cheap and simple as possible — even if this means the loss of some State control. If this is not the case, an "informal" (unregistered, wholly unregulated) business emerges, to become the prey of police, etc. soliciting bribes. This is because the business is thought "illegal," even though "{e}ach individual is entitled to establish a private enterprise" (Art. 99). (Does this include crazy people, people convicted of fraud, etc.?) Vietnam's laws fare quite well under these criteria, but attention should be given to the Registrar implementing Art. 99-104 in the simplest and cheapest manner, and to administrators helping the enterpriser to fill out the relevant forms.

*Art. 104(c)(2).* Unless the Enterprise Law or Contracts Law stipulates to the contrary, it is doubtful whether a parent and subsidiary can contract with each other: they are not two separate "persons" in law. (It is like contracting with yourself.) In any event, it is difficult to imagine a "market-oriented" contract, since no arm's-length bargaining is occurring.

Under Art. 105-09, creditors and laborers are notified of an enterprise's division, separation, consolidation, merger or transformation. But nothing in the Enterprise Law outlines or even permits means by which creditors or laborers can vindicate such interests as may be jeopardized by these re-organizations. Perhaps these means are offered in some other laws. If so, references to such laws in Art. 105-09 would be helpful. Since Art. 105-09 are so similar in purpose and effect, they can be consolidated so as to focus on differences that are made necessary by the different socio-economic functions of the enterprises.

*Art. 111(2).* Among other things, a partnership can be dissolved by consent of all general partners. This can potentially disadvantage limited {liability} partners: e.g., the partnership that includes them can be dissolved, and a new one excluding them can then be created. Under 111(4), dissolution can occur when withdrawal of the registration certificate occurs. Presumably, this can occur only under the circumstances defined in Art. 121(3), but this should be clarified so as to reduce corruption opportunities.

*Art 112(2):* notice of dissolution must be posted publicly and published in newspapers. This requirement could also be added for division, separation, consolidation, merger or transformation under Art. 105-09; the cost is reasonable.

*Art. 114-15 could* give rise to the discriminations among enterprises that are frowned upon by the Executive summary and will often be prohibited by the WTO in the future. This might be a good place to incorporate the Executive Summary's "regulatory impact assessment" (hinted at in Art. 115(2)(c)), and to warn of the dangers of creating new discriminations. Provincial and district people's committees have performed valuable political services in the past, but consideration should be given to whether they can formulate appropriate enterprise policies in the future—so as to justify empowering them under Art. 115(3).

*Art. 117* does not specify who carries out inspections of business operations. This could be clarified, to reduce corruption opportunities: the 117(3) "authorized person" is the Registrar, except as he delegates some of his power to a particular State body for a particular purpose: *see* Art. 116(4). Art. 116-17 do not stipulate whether the registration file and certificate are for purposes of notice only or (as in some systems of civil law) the Registrar attests to their accuracy. The former is to be preferred (*see* Art. 12) because the latter unduly burdens the Registrar, delays the process, and creates corruption

opportunities. In any event, the Registrar cannot be sued for mistakes, and his attestations of accuracy thus have no meaningful effect in law.


# ASSESSMENT OF THE DRAFT UNIFIED ENTERPRISE LAW OF THE SOCIALIST REPUBLIC OF VIETNAM

AMERICAN BAR ASSOCIATION/UNITED NATIONS DEVELOPMENT PROGRAMME
INTERNATIONAL LEGAL RESOURCE CENTER

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It is our pleasure to review the draft Unified Enterprise Law (the "Law") for the American Bar Association/United Nations Development Programme International Legal Resource Center and the Government of the Socialist Republic of Vietnam. Overall, this Law represents a significant achievement in Vietnam's *doi moi* process and improves on the 1990 version of the Enterprise Law. Overall, this Law succeeds in lowering business costs for domestic and foreign investors, but could do more. Also, this Law should succeed in reducing the informal sector of Vietnam's economy and broaden the enterprise tax base, but could do more.

Outside of this Law, the Vietnamese government should consider other reforms to foster growth in the enterprise sector. Marketing and related expenses should be made tax-deductible. The increased tax rates on an enterprise's growth in excess of 20% should be ended. Clarify the roles and responsibilities of the government agencies with oversight over Vietnam's enterprise sector, as many agencies have overlapping jurisdictions. As indicated in recent amendments to Vietnam's Constitution, regulations including this Law should shift from a "positive list" posture to a "negative list" posture wherein activities not specifically prohibited should be considered permissible.

The Government should consider rolling out the "one-stop-shops" found in Ho Chi Minh City enabling fast and efficient enterprise registration. In addition, the Government should cease insisting on the use of the rigid form contracts used in many economic sectors. The Government may consider curtailing the powers of enterprise inspectors, limiting the number of licenses needed to operate an enterprise in specific economic sectors, and providing recourse for enterprises to appeal certain administrative decisions.

Our comments are divided into two parts: (1) general principles applicable to company law; and (2) comments specific to Version 1 draft. We are ready and eager to continue assisting the Vietnamese government in this process, and thank you for this opportunity.

## I. GENERAL PRINCIPLES OF DRAFTING AN ENTERPRISE LAW

Based on recent experiences around the world, the Vietnamese government should remain mindful of certain trends and principles in drafting an Enterprise law. This list is illustrative, not exhaustive.

1. *Maintain Low Barriers to Entry*. Entrepreneurs should face low burdens on entry, in terms of (1) the number of steps required to form an Enterprise; and (2) the information required to be produced for the Government in the formation process. In general, entry should consist of two procedures only: (1) notification of existence; and (2) registration for tax/social security authorities.

Much of the growth in Vietnam's economy since the adoption of the *doi moi* program has been in what economists call small and medium sized enterprises ("SMEs"). Entry requirements should balance the informational and regulatory needs of the Government but not impose a significant transaction cost on SME founders. Among other reforms, the Vietnamese government should leverage information technology to maintain Enterprise records and filing and provide a "one stop" location (as it does currently in Ho Chi Minh City) for the filing of required information. At some point in the future, the Government may consider placing Internet kiosks in certain Government offices to allow entrepreneurs to file required formation documents online, such as France's *Centre de*

*Formalite des Enterprises*, and similar offices in El Salvador, Egypt, and Thailand. In the meantime, the Government should consider enabling filing of formation documents and related items at the provincial level but enable access at various points around Vietnam. For example, the Venezuelan has website setting forth in a graphic the steps to forming a business. The more cumbersome the incorporation process, the less likely an entrepreneur is to register an Enterprise.

Experience from the operation of China's Company Law indicates that more regulation, with the effect of more steps to form an Enterprise, is generally associated with more inefficiency in public institutions, longer delays and higher costs of forming an Enterprise, more unemployment, higher levels of corruption, and less productivity and investment. Experience in India indicates that posting fee schedules for enterprise registration can be beneficial.

Further, recent experience from some of the member states of the European Union suggest that a government should use a single business identification number for an Enterprise in all of the Enterprise's dealings with the Government.

2. *Be Flexible*. Experience from the United Kingdom and other European Union Member States suggests that enterprise statutes should not treat all enterprises as if they were of the same size. Obligations that may be appropriate for larger enterprises, such as having a specialized audit committee within the Board of Management, may not be appropriate to impose on smaller enterprises, such as Private Enterprises. Consider the possibility that certain obligations should "scale-up," in the sense such responsibilities and obligations expand in scope and size as an Enterprise increases in size. Large, publicly traded companies may be subject to broader and compulsory rules, while small enterprises may be given more autonomy.

3. *Do Away With Certain Capital Requirements*. Experience from China and elsewhere in Asia and Africa indicates that the concept of "legal capital" is not an effective means to protect an enterprise's creditors. Intended to serve as protection for shareholders and creditors of an enterprise, legal capital often does not accomplish such protection and may present an inaccurate picture of an enterprise's financial health. In some circumstances, enterprises (such as financial institutions) should maintain risk-weighed levels of capital so as to fund their risks. However, "legal capital" requirements may not be appropriate in other circumstances.

4. *Do Away With Certain Formalities*. The rationales behind certain formalities, such as notarization or use of company seals are no longer valid. In such cases, these formalities should be ended.

5. *Make Regulators Accountable*. The Business Registrar, as envisioned in this Law, should be obligated to serve the best interests of Vietnam's economy. Making regulators accountable to their enterprise constituents has benefited economies in Africa and other jurisdictions. Elements of such accountability include strict response times for regulatory filings, and enabling entrepreneurs to appeal certain administrative decisions. At some point, the Government may want to have the Business Registrar conduct cost-benefit analyses of proposed regulations. Further, regulations might require in the future a

notice and comment period, so that Enterprises are made aware of, and can comment on, proposed regulations. In addition, any business registration should be conspicuously developed and publicized, and the Business Registrar should conduct its activities in a transparent manner. Consider creating a registration system instead of a registration and approval system.

6. *Treat All Shareholders Equally*. Any enterprise regulation should enforce the concept that all enterprises should treat all of their shareholders equally, including minority shareholders. Recent evidence from Russia indicates that augmented minority shareholder rights are beneficial to enterprise development.

7. *Role of Directors*. Directors and other persons with management authority should be held to the highest standards of integrity. Directors' responsibilities should focus on maximizing the value of the Enterprise they serve. Consider at what point an enterprise should have some number of independent directors and committees to oversee issues such as financial audits.

8. *Audits and Disclosure*. Larger enterprises should have their financial statements audited and should publicly disclose such results. Auditors should remain liable for poor audits.

9. *National Treatment*. As Vietnam continues its World Trade Organization accession process, remember that all enterprises, domestic and foreign, should be treated equally. Understand that business and investment decisions increasingly are determined by global conditions. Therefore, businesses have some flexibility in terms of where they choose to do business. A more welcoming regulatory structure means increased business.

10. *Carefully Tax*. Only use company tax for company-related regulatory purposes. If using company tax for other purposes, one risks distorting the market.

## II. COMMENTS ON SPECIFIC SECTIONS OF THE DRAFT UNIFIED ENTERPRISES LAW

### CHAPTER I: GENERAL PROVISIONS

Article 1: Scope of Application
Consider inserting a national treatment principle in Article 1 that the rights and obligations for an Enterprise apply equally for a Vietnamese Enterprise and a Foreign Enterprise. Further, in the drafting process capitalize defined terms and consistently use such terms. In this Article 1, specify what government authority has the power to amend or modify this Law.

Article 2: Application of the Law on Enterprises and Related Laws
Consider specifying, to the extent possible, those laws to which the Enterprise Law will be subject. In the event of a conflict between this Law and another law or treaty, is this Law to be regarded as automatically amended to conform for such law or treaty? Consider the extent to which this law could be affected by Vietnam's World Trade Organization commitments.

Article 3: Interpretation of Terminology
See comment for Article 1, above, about capitalization and consistent use of defined terms. When defining terms, instead of using the phrase "…as required by the provisions hereof…" make a specific reference to the actual section of the Enterprise Law. Further, consider inserting an article in each relevant Chapter of this Law containing definitions relevant for each type of Enterprise.
What does the phrase "…in compliance with requirements of laws…" intended to mean in the definition of "Enterprise"? The only law that should be referenced in that definition is this Law. Also clarify what the meaning is of "stable transactional office."
What is the requirement of "continuous conduct" in the definition of "Business"?
Delete definition 2a, "Company," as it is confusing with reference to the definition of "Enterprise." If intending to break down the definition of Enterprise into limited liability company, private enterprise, partnership or shareholding company, use those terms instead of a generic catch-all such as "Company."
In the definition of "Valid file," change the "shall" to "has been" and add "by the Business Registrar" to the end of the definition.
Consider modifying the definition of "making capital contribution" to include those capital contributions and investments made by passive investors or other non-owners of an Enterprise.
Combine the definitions of "Founding Member" and "Founding Shareholder" into a definition of "Founder," meaning a person (natural or legal) who forms an Enterprise.
"Manager of the enterprise" should be clarified to refer only to a manager of a limited liability company. Use "General Partner," "Chairman," and "Proprietor" to refer to the persons managing a Partnership, Shareholding Company, and Private Enterprise, respectively.
Is the concept of "Authorized Representatives" intended to be the designated point of contact between the Government and an Enterprise? Consider editing this definition so that it does not seem to include a partner in a partnership.

The definition of "related person" is very good. Consider expanding the definition to include, more specifically, members of the Board of Management and their relations. Further, include concepts such as being a trust or estate beneficiary within the definition of "related."
Consider how well the definitions at 15 and 16 work together, and consider combining them into one definition of "state capital." Further, is this definition needed in this Law if the law governing state-owned enterprises and their privatization is separate?
Consider changing the term "permanent address" to be "registered address."
If all Enterprises are to be treated equally, why have the definition of "foreign enterprise"?

Article 4: Guaranty by the State to Enterprises and Their Owners
No comment.

Article 5: Ground Unit of the Communist Party of Vietnam, the Trade Union and Other Socio-Political Organizations in Enterprises
No comment.

Article 6: Business Lines
Given the recent changes to Vietnam's Constitution, it may be more appropriate to edit this clause to provide that an Enterprise may engage in any lawful activity, except for those business lines specifically covered by another piece of regulation. For purposes of registration pursuant to Article 13, consider whether it would be sufficient for an Enterprise's founders to state that the Enterprise may engage in "any lawful activity," and leave it to the Enterprise's founders as to whether to provide more specificity.
Designate a central government agency responsible for determining and publicizing those business lines that would not be permitted, instead of relying on a vague concept of denying Enterprises who may have "harmful effects." The Vietnamese government has an obligation to ensure that Enterprises benefiting from the corporate form do not engage in illegal activity, but it should so regulate pursuant to transparent and public definitions. As currently drafted, the concepts of "harmful effects, "good customs," and similar items are not specific enough and are too subjective. As such, they are not transparent terms that could harm business development and add to the transaction cost of doing business in Vietnam.
As indicated in the discussion, above, in Section I of this assessment, the concept of "legal capital" is losing favor around the world. "Legal capital" does not protect against enterprise insolvency or bankruptcy, and may in fact be an unnecessary hurdle preventing entrepreneurs from starting business activity.
Clause 6 should be reworked, and consider whether it would be more effective for the clause to provide that foreigners may participate in the same kinds of business lines as Vietnamese persons, except those business lines restricted by the Government. Consider further, and more explicitly, linking the restrictions in Clause 6 to Vietnam's WTO commitments, so that implementation of such commitments is self-executing.

Article 6a: Business Conditions and the Management of Business Conditions
Generally, this Article 6a is well drafted. Consider limiting business conditions to licenses, in the sense that any condition to business activity may be satisfied by obtaining a relevant license. Further provide that a license, if required, must be obtained before business promoters may submit an application to the Business Registrar for formation. Clarify that liability for acts undertaken by an Enterprise without a needed license attach to the Enterprise's founders, not just their managers. Consider whether a biennial review of licensing requirements is frequent enough and whether consideration should be given to cross-referencing any relevant WTO commitments, so to make them self-executing. As a separate issue, consider implementing some sort of administrative regulation that provides real time limits and consequences on licensing applications. Further consider whether there should be some form of delegation of authority to the Business Registrar to promulgate and enforce some forms of business regulation.

Article 7: Rights of Enterprises
Consider dividing this Article 7 into a general statement of Enterprises' rights and a more specific, but non-exhaustive, listing of the specific rights enjoyed by Enterprises. Enterprises should be enabled, broadly, to conduct any business activity that is allowed under this Law, exercise all powers and obligations conferred by this Law and in the Enterprise's formation documents.
Further, this Article should specifically empower Enterprises to exercise all powers incidental to its general powers and obligations, as well as those powers and obligations necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its formation documents.
More specifically, an Enterprise should have specific rights, such as (1) exist in perpetuity or for a shorter, more specific time, as the Enterprise's founders may choose; (2) being a plaintiff or defendant in any legal action, arbitration or mediation; (3) purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated; (4) appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation; (5) adopt, amend and repeal the company's formation contract; (6) wind up and dissolve itself in the manner provided in this Law and in the Bankruptcy Law; (7) be an incorporator, promoter or manager of other Enterprise; (8) participate with others in any joint venture-type Enterprise; (9) make contracts; and (10) lend money for its corporate purposes, invest and reinvest its funds, and take, hold and deal with real and personal property as security for the payment of funds so loaned or invested.

Article 8: Obligations of Enterprises
This Article 8 is well drafted. Consider a broader statement that an Enterprise may be organized to conduct or promote any lawful business or purposes, except as may otherwise be provided by the law.

CHAPTER II: ESTABLISHMENT AND BUSINESS REGISTRATION

Article 9: The Right to Establish, Make Capital Contributions, and Manage Enterprises

This Article 9 is well drafted. Consider what kinds of persons or entities may form an Enterprise; generally, any individual or Enterprise should be able to form an Enterprise. Also provide in this Article that the only requirement for forming an Enterprise is to make the filing required in Article 13 and a filing with the tax authorities.

Article 10: [Deleted]

Article 11: Contracts Signed Prior to Business Registration of Enterprises

Consider whether clause 1 of this Article 11 is in the right place. The clause 1 seems to be discussing a formation contract, whereas the rest of this Article 11 seems to be discussing circumstances in which a third party enters into an agreement with an Enterprise prior to the Enterprise's official formation.

This Article 11 should clarify that any founding member or incorporator is jointly and severably liable for the contract until such time that the Enterprise ratifies the contract. Ratification of the contract by the Enterprise should be a simple procedure, and should only require the consent of the Enterprise's Board of Management or other person or entity with management authority. A person who enters into such a contract knowing that there will be no Enterprise formed should be held personally liable for performance of the contract. One may want to consider whether a founding member should be relieved of liability for the contract at the time the Enterprise ratifies the contract.

Article 12: Procedures to Establish Enterprises and Register Businesses

In general, it should take two (2) steps to form an Enterprise: (1) filing relevant formation documents with the Business Registrar; and (2) filing relevant notices with the taxation and social security authorities. The Government should consider using one (1) file number per Enterprise, so that the Business Registrar and the taxation/social security authorities use the same number to refer to the same Enterprise. Consider whether the Government should task the Business Registrar with making required filings with the taxation and social security authorities on behalf of a newly-formed Enterprise, once the Enterprise is registered.

Otherwise, this Article 12 is well-drafted, and correctly limits the powers of the Business Registrar. It may be appropriate to further clarify in this Article 12 that the establishment process described in this Law is a registration process, not an approval process, and that the Business Registrar's scope of review is limited to ensuring that the Enterprise's formation documents are complete and that the Enterprise has satisfied any business line-specific licensing requirements. Consider shortening the Business Registrar's fifteen (15) day turn around time requirement to five (5) or ten (10) days. Further consider what would be the effect of the Business Registrar not reviewing a registration filing within such time period. The requirement that the Business Registrar describe the reasons for rejection of registration is well drafted. At some point in the future, the Government may want to consider implementing a process by which entrepreneurs whose registration filings are rejected may appeal the Business Registrar's decision.

Article 13: File for Business Registration

This section will include comments applicable to Articles 13, 13a, 13b, and 13c.
Consider whether the business registration file should consist of (1) required items; and (2) optional items. The description of business file is appropriate, although consider better defining "member" for purposes of the business registration file for limited liability companies. While it is appropriate to identify the founding members of a limited liability company, it may be burdensome to continually update such member roster with the government from time to time. Consider asking for a written certification from founders instead of actual copies of identity papers or passport. Instead of asking for the actual formation documents, consider using a modified single-sheet form, perhaps a check-the-box form, for use with enterprise registration.
Delete the requirements for a $100,000 savings account for foreign invested enterprises, as such requirement seems to be counter to the WTO's national treatment requirement. Further, as stated above, a legal capital requirement may not be appropriate in each context, especially for Enterprises outside so-called "regulated industries."
Consider whether the business registration file should include copies of an Enterprises' charter. Relevant information may be obtained through the application form instead of requiring submission of the Enterprise's charter.
As a general concept, the business file should require only that information needed by the regulatory authorities, such as the taxation and social security authorities, and nothing more. Too broad a filing requirement may create too high a barrier to entry. For example, consider whether the Government wants to have an entrepreneur identify every member or shareholder of an Enterprise but instead require an entrepreneur to file the name and contact information of the Enterprise's founder(s).

Article 13a: Business Registration File for Private Enterprises
See above.

Article 13b: Business Registration File for Partnerships
See above.

Article 13c: Business Registration File for Limited Liability Companies and Shareholding Companies
See above.

Article 14: Contents of an Application for Business Registration
As with the comments to Article 13, consider whether the business registration application should consist of information required to be disclosed and information whose disclosure is optional. Consider whether clause (c) is necessary, in the sense that Enterprises should be allowed to engage in any lawful activity. It may be more appropriate for the Enterprise's founders to state whether their proposed business line is in an area requiring a special license or other permit. If the Enterprise's business line is so regulated, have the founder(s) include copies of relevant licenses/permits with their application. If the Enterprise's business line is not so regulated, consider whether the Government wants the entrepreneur to disclose its precise business line, and whether a secondary filing might be needed if the Enterprise changes business lines.

Also, consider whether an Enterprise may issue "no par value" shares or equity. "No par value" equity is common in many jurisdictions.

Article 15: Contents of a Company Charter
As stated above in the comments to Article 14, many nations have moved away from requiring that Enterprises specifically state a purpose for which the Enterprise is formed. It may be more appropriate to state that an Enterprise is formed to pursue any legal purpose, and allow an Enterprise's founder(s) to select a more narrow purpose if they so choose. Further provide that licensure should be done prior to application.
Many of the issues discussed in this draft of Article 15 should be left to the Enterprise's founders to determine through contract. Further, see the comments to Articles 13 and 14 regarding disclosure of an Enterprise's objectives and legal capital. Also, consider whether it is desirable to have the home addresses of Enterprise founders and managers a matter of public record and whether such public record might dissuade qualified persons from registering an Enterprise or serve as a manager.
It may be appropriate to divide this Article 15 into four subsections, one for each form of Enterprise. Further, this Article 15 should not describe requirements or procedures that are specified elsewhere in this Law, as multiple citations may create confusion.

Article 16: List of Members of Limited Liability Companies, Partnerships; List of Founding Shareholders of Shareholding Companies
It may be appropriate to divide this Article 15 into four subsections, one for each form of Enterprise. In addition, as discussed in the comments to Article 15, it may be better to leave many of the issues in clause 2 of Article 16 to be addressed by the formation contract between the founders. Further, it is unclear what the term "basic characteristics" as used in clause 1 of Article 16 is meant to mean.

Article 17: Conditions for Being Granted the Certificate of Business Registration and Business Starting Time
This Article 17 should not provide the Business Registrar with any discretion to reject a business filing, except on the grounds that the filing is incomplete, uses a name that is similar to a name already in use or has not paid the relevant filings fees. Also consider requiring the Business Registrar to list its fees in advance, and limit increases in such fees to once per year and upon sixty (60) days' notice of the new fee structure. As indicated in some of the above comments, if a certain business line requires a specific license, an entrepreneur should obtain such license before making a filing with the Business Registrar, so that such Enterprise may commence operations upon notice from the Business Registrar. The effective date of formation should be the date on which the Business Registrar has verified that the file is complete. Further consider the evidentiary value of the Certificate of Business Registration, in that the Certificate should be considered evidence that the Enterprise has met the requirements for obtaining the Certificate.

Article 18: Contents of the Certificate of Business Registration
See comments for Articles 13-15, above. Consider amending the definition of "Certificate of Business Registration" to include the original certificate but any

modifications made in the form of subsequent filings. Further consider whether the Certificate of Business Registration should contain the same amount of information as the application file; it may be more appropriate for the Certificate to contain less information than the application file.

Article 19: Alterations in Contents of the File for Business Registration
This Article 19 should clarify that Enterprises only should notify the Business Registrar of specific changes to the Enterprise. As indicated in some of the above comments, consider whether an Enterprise should have to report a large amount of information in its initial file for business registration, causing it to have to notify the Business Registrar for a broad range of changes. Further clarify that alternations are only to be notified to the Business Registrar and should not be ordinarily subject to approval. Consider what should happen if an alteration in the content of a business registration file causes an Enterprise to move from an unregulated industry to an industry that requires a specific license.

Article 20: Notification of Information with Respect to the File for Business Registration
Clarify that the further notices envisioned by this Article 20, from the Business Registrar to other government entities, shall not affect (1) the turn-around time frame for the Business Registrar to review a registration file; or (2) the commencement date of the Enterprise's operations. Related to certain of the above comments, consider what type of information about an Enterprise or its founders should be made available to the public. A certain level of information should be made available to any interested party, but there may exist certain information that may not be appropriate for public dissemination. Consider further stating that the Business Registrar can share certain information with other government entities, instead of limiting such sharing to a list of entities.

Article 21: Announcement of the Contents of Business Registration
Consider whether the announcement requirement acts as an entry burden for entrepreneurs. Consider further whether the Business Registrar should publish an official gazette every month with the previous month's registrations. See above comments regarding the type of information that should be made publicly available.

Article 22: Transfer of Property Ownership
Clarify whether any asset transfers are to be subject to any tax. Generally, it would be preferable to have asset transfers used to form Enterprises not be subject to any registration fees or taxes. Consider whether an entrepreneur can transfer assets to an Enterprise before the Enterprise's formal formation, and then have the Enterprise ratify or adopt the transfer after formation. It may be preferable to leave the terms and conditions of an asset transfer to the parties to the transfer: the donor and the Enterprise. The only requirements in this Law should be that the asset transfer is correctly entered in the Enterprise's accounting records; and that the transfer be evidenced by some form of simple transfer document.

Article 23: Appraisal of Assets Used for Capital Contribution

Consider whether a formal appraisal requirement is necessary for all Enterprises. Further consider whether it may be appropriate to allow the donors and the Enterprise to decide upon valuations. Clause 3 of this Article 23 should be deleted, as it would be preferable to leave the valuation of any asset used for capital contribution to agreement between the donor and the Enterprise. Such valuation should be presumed to be accurate, unless there is some indication of illegality in the valuation process.

Article 23a: Names
The comments to this Article 23a are intended to cover Articles 23b, 23c, and 23d. As drafted, these Articles are very good. We note, however, that in certain circumstances that the insertion of a "&" or other punctuation may not be sufficient to distinguish between two similarly-named entities. It may be better to provide, in the Enterprise Law, that two entities may not have "similar" names without describing all the various possibilities of how "similar" names may be construed. Also consider allowing entrepreneurs to reserve an Enterprise name for a specific period (perhaps 60 days) and for a very small fee before such entrepreneur files the Enterprise's formation documents.
Article 23c is a bit confusing as currently drafted. It is intended to allow foreign enterprises the option of translating their names into Vietnamese or using their foreign-language name in Vietnam? Also, is it intended that Vietnamese Enterprises may translate their Enterprise names into a foreign language and use such translated name within Vietnam?
Article 23d should be amended and instead of stating that a confusing name must be "totally the same" as an existing registered name, consider whether the confusing name shall be "substantially similar" to an existing registered name.

Article 23 [sic]: Rights of Business Registrars in Naming Enterprises
Generally, this Article 23 is well drafted. Consider, at some point in the future, whether an entrepreneur should have the right to appeal the Business Registrar's decision rejecting use of a specific name. Consider further whether it may be better to state that the Business Registrar's decision is to be based on its evaluation of a proposed Enterprise name against the requirements of Articles 23a-23d, above. In addition, consider whether the refusal to allow the use of a specific name should be (1) subject to the 15-day turn-around commitment for review of an applicant's business file; and (2) subject to the requirements on a Business Registrar as to an explicit explanation, in writing, of any rejection of any part of an Enterprise's business file.

Article 24: Head Offices of Enterprises
Consider whether clause 1 of this Article 24 should be modified for foreign enterprises. It is appropriate for a foreign enterprise doing business in Vietnam to have some form of office within Vietnam's territory. However, clause 1, as currently drafted, seems to require any business enterprise to have its overall headquarters in Vietnam, not just their "Vietnam head office." Further consider deleting clause 2 of this Article 24. The head office should be available to receive notices from the government and inquiries from equity holders and interested parties. But consider whether it would be a burden on small Enterprises to remain open for four hours per day. In addition, it may be more appropriate

for the Enterprise to notify their equity and debt holders of their business hours instead of a notification to the Business Registrar.

Article 24a: The Seal of Enterprises
While Enterprises should obtain a seal if they so choose, there should be no formal requirement for an Enterprise to purchase or adopt a seal. The requirement to obtain and use a seal may delay the commencement of business operations and may be unduly burdensome on entrepreneurs.

Article 25: Representative Offices and Branches of Enterprises
Clarify whether representative offices are allowed to engage in profit-making business activities. In general, especially in the foreign invested enterprise context, representative offices are only allowed to conduct market research and other non-profit making activities and may not engage in full-fledged business operations. Enterprises should maintain accurate records of their branch and representative offices. Consider whether separate regulation is needed for the establishment of a representative office or branch office. A decision to operate such an office should be left to the Enterprise itself, and there should be no approval process imposed in this context. At most, the Enterprise should notify relevant tax authorities of an opening of a representative office or branch, so that tax liabilities are allocated correctly. Consider further whether clause 2c is necessary, as it seems internally inconsistent. On the one hand, it seems to limit investment in subsidiaries to under 50% but the definition of a subsidiary, above, seems to require an equity interest above 50%. It may be more appropriate to incorporate an Enterprise's power to form and operate representative offices, branches, and subsidiaries into the general powers of an Enterprise discussed above at Article 7.

CHAPTER III: LIMITED LIABILITY COMPANY
PART I: LIMITED LIABILITY COMPANY WITH 2 OR MORE MEMBERS

As a general matter, it would be better to regulate all limited liability companies in a single chapter of this Law instead of two parts of one chapter. This can easily be accomplished by defining a limited liability company as having one or more members. We expected to find discussion of a few issues in this Part I, but these Articles are silent on such concepts. Consider what events should cause a Member's disassociation with a limited liability company and the effect of such disassociation. Further consider the effect of a Member's disassociation when the limited liability company's business is not wound up. In addition, consider providing Members with the power to initiate legal action in the name of the company (subject to certain requirements) against another Member or a manager of the company. It may be advisable to further clarify the process by which a limited liability company may wind up its business and/or convert into another form of Enterprise.

Article 26: Limited Liability Companies
Instead of "shares," allow limited liability companies to issue "certificates" evidencing a person's equity interest in the Enterprise. Clarify what is meant by "other liabilities" of the Enterprise in clause 1a of Article 26. Members of a limited liability company should

be responsible for all liabilities of the Enterprise up to the value of their contribution. Further clarify that a limited liability company is an entity distinct from its members.

Article 27: Making Capital Contribution and Issuing Certificate of Capital Contribution
Clarify that a member's contribution may consist of tangible or intangible property, money, services performed or other items as agreed upon in the limited liability company's operating agreement. Consider softening the liability on a member who does not make a timely capital contribution; it may be more appropriate to give the limited liability company the option to require a non-contributing member to make a capital contribution. Instead of a non-contributing member being responsible for all of the limited liability company's debts, such member should be responsible for all losses incurred by the company as a result of the non-contribution as well as for the contribution itself. In that circumstance, the amount owed to the limited liability company would become a debt owed to the Enterprise subject to a debtor-creditor relationship.
Further consider deleting the requirement that the limited liability company notify the Business Registrar of the status of contributions within 15 days. Such requirement may burden such limited liability companies.
Consider allowing a member to make a contribution in excess of their agreed-upon capital contribution, but require the limited liability company to reimburse such advance.
Enable the limited liability company, acting with the unanimous consent of its members to compromise as to a member's defective capital contribution.
Consider allowing "de-materialized" interests in a limited liability company. In such a circumstance, the limited liability company itself would hold the register of members, which register would be conclusive as to the identity of all the limited liability company's members.

Article 28: Register Book of Members
This Article 28 is well drafted.

Article 29: Rights of Members
In general, the rights of members should be those rights as specified in the limited liability company's operating agreement, except that such agreement should not limit a member's right to obtain or review information about or the records of the limited liability company. Further, the agreement should not eliminate the duties owed by a manager to the members and the limited liability company. Enable the members of the limited liability company to choose whether they wish to have a manager manage the entity or whether the members should retain management authority.
Consider whether the notice for a meeting of members should be discussed in a separate Article. Consider dropping the 25% requirement in clause 2 of Article 29 to 15%.
Further consider whether the members of a limited liability company should have the power to maintain an action against the company or another member to enforce such member's rights under this Law or under the operating agreement.

Article 30: Obligations of Members
It may be preferable to limit the discussion of rights and remedies for a defective capital contribution to Article 27. Consider whether the act of a member supporting the ordinary

course of the limited liability company's business should bind the entity or the members. Allow such agency to be modified in the operating agreement. Consider further whether the limited liability company itself should be liable for a member's or a manager's acts or omissions in the ordinary course of the entity's business.
Further specify that the liabilities and debts of the limited liability company belong entirely to the entity and not to any specific member personally.
Enable members of a limited liability company to withdraw or transfer their capital interests only pursuant to the terms of the limited liability company's operating agreement.
Further specify that a member is not a co-owner of the limited liability company's assets or property. Consider whether the interest in receiving a distribution from a limited liability company should be considered separate from the other rights of members in a limited liability company. It may be appropriate to allow members to transfer their rights to distributions, as personal property, but leave the question of whether the transferee should become a member of the limited liability company to the entity's operating agreement.

Article 31: Buy-Back of Capital Contributions
A limited liability company is a creature of contract, and imposing a put option on the entity through this Law may not be appropriate (even though it is appropriate for shareholding companies). Further, clarify that the item subject to a buy-back is a percentage interest in the limited liability company, not a specific capital contribution. It may be better to have this issue decided by the limited liability company members as provided in the operating agreement.

Article 32: Transfer of Capital Contributions
As stated above, clarify that the item subject to a transfer is a percentage interest in the limited liability company, not a specific capital contribution. Further consider whether an interest in the limited liability company's distributions should be considered separate from being a member of the limited liability company. The right to transfer an interest in a limited liability company should be left to the operating agreement.

Article 33: Resolution of Capital Contributions in Other Circumstances
Consider whether an interest in a limited liability company should be delivered back to the company instead of delivered to the state treasury, as indicated in clause 4 to this Article 33. Consider further whether an heir, guardian or other, as the case may be, should sign the limited liability company's operating agreement to become a member or whether the interest to be transferred is just and interest in any possible distributions. Further, clarify that the interest discussed in this Article 33 is a percentage interest in the company and not an interest in any specific capital contribution or asset.

Article 34: Organization of Management of Limited Liability Companies
Management of a limited liability company should be left to its members. The requirements in this Article 34 may not be appropriate for all limited liability companies of all sizes. Provide the option for the limited liability company's members to select the option of a member-managed entity (wherein each member has equal rights in the

management and conduct of the company's business) or a manager-managed entity (wherein management and conduct of the company's business is delegated to one or more managers). In the member-managed context, decisions are subject to a majority vote. In the manager-managed context, the manager is appointed by a majority of members and the manager serves until he/she dies, resigns or is replaced pursuant to the terms of the operating agreement. Consider that certain company decisions should be subject to a unanimous vote of the members, such as admission of new members and other large, material transactions. Also consider deleting any residency/citizenship requirements on limited liability company managers.

Article 35: The Meeting of Members
Consider the role of the meeting of members in a manager-managed limited liability company. In such context, certain management decisions and day-to-day operations of the company are delegated to a manager. It may be more appropriate to state that the meeting of members oversees those matters as described in the company's operating agreement and those items requiring a members' vote as provided in this Law.
Consider whether action may be taken by the members outside of a meeting resolution, but in a written consent signed by all members.
Consider whether a one-meeting-per-quarter requirement is appropriate for all types and sizes of limited liability companies. It may be preferable to require an annual meeting and enable the members to specify more frequent meetings pursuant to the operating agreement.
Consider whether the percentage references, such as the reference to 50% in clauses c and d, accurately capture the concept of a material or significant transaction. There may be a situation where an investment by a company of under 50% of its assets could have a significant effect on the company.

Article 35a: Authorized Representative of Members as a Legal Entity
Notification of an authorized representative of an entity member of a limited liability company should be made to the company, not to the Business Registrar. Also, consider deleting clause 7 of this Article 35a. Otherwise, the processes and requirements in this Article 35a are well drafted.

Article 36: Chairman of the Meeting of Members
To avoid confusion with the role of a Chairman of a shareholding company, it may be better to designate this role as the Secretary of the Meeting of Members. This Law should require the Secretary to maintain accurate records of the meeting, including the specifics of any resolutions adopted, and take other actions as specified in the limited liability company's operating agreement. The Secretary should be appointed by the Members, acting with a majority, at least seven (7) days before the meeting; the Secretary's term should be for one specific meeting, unless the Members decide otherwise.

Article 37: Convocation of the Meeting of Members
Consider whether a Meeting of Members must take place inside Vietnam. It may be appropriate to allow such meetings to take place outside of Vietnam, if a substantial

number of members can still attend. Consider whether a one-meeting-per-quarter requirement is appropriate for all types and sizes of limited liability companies. It may be preferable to require an annual meeting and enable the members to specify more frequent meetings pursuant to the operating agreement.
Consider whether there should be a "record date," meaning that only members of a limited liability company who are members as of five (5) days prior to the Meeting of Members would be invited to participate in such meeting.
In clause 3 of this Article 37, consider empowering the members to hold a meeting on their own initiative if a meeting can't be convened through other means.

Article 38: Conditions and Formalities for Proceeding Meetings of the Meeting of Members
Consider lowering the quorum requirement in clause 1 of this Article 38 to 60% (or higher amount as specified in the operating agreement), so that companies can more easily plan and hold effective meetings. Delete clause 3 of this Article 38 because it may create an incentive for certain persons to seek a way around majority-vote requirements in this Law or in the operating agreement.
Further consider a process by which the members can make decisions outside of a meeting context, perhaps through a written unanimous consent. Also, consider the use of proxies as well as attending a meeting via telephone (as long as the parties can hear one another).
Clarify that actions taken at a meeting that does not have a quorum are invalid. Also clarify that a member may only object to a resolution or decision if such member specifically states his/her objection for the record. Otherwise, silence would be deemed consent, and consenting members would not have the right to challenge the validity of the specific resolution or decision.

Article 39: Resolutions of the Meeting of Members
This Section 39 is well drafted.

Article 40: Record of Meetings of the Meeting of Members
This Article 40 is well drafted.

Article 40a: Procedures for Approval of Decisions of the Shareholders' Meeting
This Article 40a should be moved, in its entirety, to the Chapter of this Law addressing shareholding companies.

Article 41: The (General) Director
Consider whether a Director is needed for member-managed companies. Further consider whether clause 3b should be amended to preclude a Director from using company assets for any person other than the company. In addition, consider whether the members should owe duties to the company and other members.

Article 41a: Obligations of Chairman

It is not clear whether this Article 41a is referring to the Chairman of a Meeting of Members or other position. As stated above, it may be better to specify, in one Article, the duties owed by and among managers, the company, and members.

Article 41b: Standards of the Director
Consider whether any member, not just members with a 10% or greater interest in the company, can become a Director/manager. It would be preferable to allow any person to become a Director/manager, subject to the majority consent of members.

Article 41c: Salary and Other Benefits of Members
It may be more appropriate to provide that the company should reimburse the reasonable expenses of those attending a Meeting of Members, subject to the terms of the company's operating agreement. Salary and other compensation to the Manager/Director should be left to the company's operating agreement.

Article 42: Contracts Subject to Approval of the Meeting of Members
This Article 42 is generally well drafted.

Article 43: Increase and Reduction of Charter Capital
It may be more appropriate to leave the decision of an increase or reduction of charter capital to the terms and conditions of the company's operating agreement.

Article 44: Conditions for Profit Distribution
This Article 44 is well drafted. Consider stating that no distribution could be made if it would cause the company's assets, after distribution, to be less than its debts.

Article 45: Collecting Back Returned Capital Contributions and Distributed Profits
Consider whether the repayment obligations imposed in this Article 45 should be enforced only against those members who voted for or otherwise facilitated the distribution in question. In any case, this obligation should be regarded as a personal liability of the person(s) against whom the repayment is sought.

PART II: LIMITED LIABILITY COMPANY WITH ONE MEMBER
As indicated in the introductory comment to Part I of this Chapter III, regulations covering a single-member limited liability company should be integrated into the regulations covering other limited liability companies. As such, we do not offer comments to the Articles in this Part II but refer to our comments in Part I of Chapter III, above.

Article 46: Limited Liability Companies with One Member

Article 47: Rights and Obligations of the Company Owner

Article 48: Restrictions Applied to the Company Owner's Rights

Article 49: Organization of Management of a One-Member Limited Liability Company

Article 49a: Supervisor

Article 49b: Standards of the Authorized Representative

Article 49c: Obligations of Authorized Representative

Article 49d: Resolution of Contracts

Article 50: Increase and Reduction of Charter Capital

CHAPTER IV: SHAREHOLDING COMPANY

Article 51: Shareholding Companies
This Article 51 is generally well drafted. Consider further clarifying that a shareholding company is an entity separate from its shareholders, and that a shareholding company may engage in any lawful activity. Further consider whether to allow a shareholding company's founders to restrict the transfer of any of the company's share pursuant to the shareholding company's formation documents.

Article 52: Types of Shares
This Article 52 is generally well drafted. Consider providing further power to a shareholding company's Board of Management to specify further types of shares without having to amend fully the entity's formation documents. In addition, the shareholding company should be allowed, in its own discretion, to issue preference shares to any recipient who is not otherwise disqualified by relevant Vietnamese law from holding such shares. Government approval should not be a pre-requisite to issuing preference shares to any party, especially strategic investors. Further consider deleting the three (3) year limit on founders' preference shares; such preferences should be left to the decisions of the entity. Also, consider whether preference shares should be convertible into ordinary shares pursuant to an agreement between the shareholding company and the shareholder, instead of requiring a form of shareholder approval in advance of any conversion.

Article 53: Rights of Ordinary Shareholders
Consider removing the requirement that shareholders hold at least 10% of a shareholding company's equity in order to nominate a Director. While only 10% holders should be able to call a shareholders meeting, the right to nominate a Director should be broader-based. Further consider whether all shareholders should enjoy the preemptive rights as provided in clause c of this Article 53. Instead of mandatory preemptive rights, it may be preferable for to leave this issue to the discretion of the Board of Management.
In addition, consider removing the requirements of "serious violation" and the like for requesting the convening of a shareholders meeting. Consider whether having a meeting called by a 10% holder is sufficient in and of itself.
As will be discussed in more detail, below, having a Board of Management and a Supervisory Board may not be appropriate for all shareholding companies. There are

indications that having such a dual board system does not result in better or more effective corporate governance.
Consider further whether legal action by a shareholder must be predicated on "serious" violations or whether a well-argued violation would be sufficient.

Article 54: Obligations of Ordinary Shareholders
This Article 54 is well drafted. Consider a specific statement that shareholders are only liable to the company for payment on shares, unless they become liable by own actions or conduct.

Article 55: Voting Preference Shares and Voting Preference Shareholders
This Article 55 is well drafted. Consider whether voting preference shareholders should be allowed to transfer such voting preference shares upon the consent of the shareholding company issuer.

Article 56: Dividend Preference Shares and Dividend Preference Shareholders
This Article 56 is well drafted. Consider whether dividend preference shareholders should be allowed to transfer such dividend preference shares upon the consent of the shareholding company issuer. Consider further whether the shareholding company issuer should be allowed to attach voting rights and other rights, equal to the rights of ordinary shareholders, to dividend preference shares.

Article 57: Redeemable Preference Shares and Rights of Redeemable Preference Shareholders
This Article 57 is well drafted. Consider whether redeemable preference shareholders should be allowed to transfer such redeemable preference shares upon the consent of the shareholding company issuer. Consider further whether the shareholding company issuer should be allowed to attach voting rights and other rights, equal to the rights of ordinary shareholders, to redeemable preference shares.

Article 58: Shares of Founding Shareholders
Consider whether an incorporator, the person who submits the business file to the Business Registrar, must also be a founder. It would be preferable to separate the role of incorporator from the role of founder, but to allow a founder to act as an incorporator. Consider further whether the founders should be made to purchase 20% of equity in a new shareholding company within three (3) years of formation. This requirement may not be appropriate for all shareholding companies, and may act as a disincentive to founders as to forming a shareholding company.
Consider limiting the exposure in the second paragraph so that only the shareholder who has not paid full consideration for his or her shares is liable to the shareholding company for any losses incurred by virtue of such nonpayment. It seems overly broad to impose joint and several liability on all shareholders for one's failure to promptly pay consideration.
Consider eliminating the notice requirements in clause 2 of this Article 58. The shareholding company's formation documents should disclose and discuss the types of shares available to the founders and other investors. Further, the shareholding company

should have to maintain accurate records as to its shareholders. However, it does not seem necessary to have the shareholding company make a filing as to matters already disclosed in formation documents.
Consider eliminating clause 3 of this Article 58, as it should be left to the shareholding company as to whether to pull back authorized but unissued shares.
Consider allowing founders' shares to be transferable to any investor pursuant to the terms of an agreement between the founder and the shareholding company issuer. It may not be preferable to impose a shareholder meeting consent prerequisite on the transfer of all founders' shares.
Alternatively, consider providing that any share subscriptions made prior to the formal formation of the shareholding company shall be irrevocable for six (6) months from the date of such agreement.

Article 59: Share Certificate
Consider whether share certificates should be required to evidence an investment in a shareholding company. Many jurisdictions are moving towards the concept of "dematerialized securities" and requiring a company to maintain accurate shareholding records. In such context, share certificates are allowed but not required to evidence ownership. Alternatively, allow the shareholding company issuer to hold all share certificates for the benefit of their shareholders.

Article 60: Register Book of Shareholders
This Article 60 is well drafted.

Article 61: Issuance and Transfer of Shares
Consider how a market price may be found for the shares of a company that is not publicly traded. Further, consider eliminating the requirement that any below-market price issuance be approved by 75% of shareholders; alternatively, allow the Board of Management to make the determination as to the level and sufficiency of consideration. If there is manifest error in such determination, a shareholder could bring action against the Directors who approved such issuance. Further consider allowing shareholders to restrict, by contract, the ability of shareholding company issuers to issue below-market price shares after the date on which such shareholders invest in the shareholding company issuer.
Consider eliminating the requirement that shareholders must vote to accept consideration other than cash as payment for any shares. Further consider leaving the determinations as to the form and value of such consideration to the Board of Management.
Consider how these Articles of this Law would interact with any Securities Law under consideration.
Consider whether a shareholder should be allowed to transfer their preemptive rights (the right to purchase a pro-rata share of any newly authorized shares). Instead of mandating that such a transfer is available, consider leaving such decision to the Board of Management. Further, instead of requiring such pre-emptive rights, allow the founders and/or the Board of Management to determine whether such rights should exist as to any issuance, pursuant to the terms of the shareholding company's formation documents.
Consider whether shareholding companies should be able to issue "no par value" shares.

Article 62: Issuance of Bonds

Consider eliminating the limitation that bonds may only be issued up to the value of net assets. Further consider increasing such limit to 200% of net assets, depending on the size of the shareholding company issuer.

It is not clear what the definition of "guaranteed bonds" is meant to accomplish. A bond is a contract between a creditor and a debtor/issuer that is to be treated as a debt of the debtor/issuer. Thus, bonds are automatically guaranteed. If this definition is meant to refer to a "guaranteed rate of return," then clarify this sentence.

It is not clear what clauses 1bb and 1bc are trying to accomplish. If there is any limit on the value of bond issuances, it should refer to the issuer's net assets.

Ensure that the tax treatment of bond issuance is the same as share issuance, as an imbalance (such as having share issuance tax-free and bond issuance taxable) can harm the development of a corporate bond market in Vietnam. A lack of an efficient corporate bond market can harm overall financial system development.

Article 63: Payment of Securities

Specify that the Board of Management is empowered to decide on the scope and sufficiency of consideration paid for specific shares, and that such determination shall be conclusive absent manifest error. Consider allowing services to be used as payment of securities.

It is not clear what the term "paid in full once" is meant to mean. Consider whether an investor could purchase shares on an installment basis, provided that such investor would not become a shareholder or enjoy any shareholders' rights until the shares are paid in full.

Article 64: Buy-Back of Shares at Requests of Shareholders

Consider how the shares of a non-publicly traded shareholding company issuer would be valued. Further consider adding more specificity to the circumstances pursuant to which a shareholder can request the buy-back of his or her shares.

Article 65: Buy-Back of Shares as a Result of Company Resolutions

Consider how the shares of a non-publicly traded shareholding company issuer would be valued. Further consider eliminating the limit on the amount of shares a company could buy-back as a result of a company resolution. It may be preferable to leave such decision to the company's Board. Further, consider enabling the company to buy-back any preference shares pursuant to the agreement reached when the preference shares were first issued. It is appropriate to subject large-scale share buy-backs to the approval of the company's shareholders.

Consider whether shares could be bought-back by the company on terms other than pro-rata from existing shareholders. Consider whether a company should be able to buy-back the shares of one shareholder without needing to buy-back the shares of other shareholders.

Further consider the effect of more shareholders responding to a buy-back offer than the company is prepared to accept.

Article 66: Conditions as to the Buy-Back of Shares and Settlement of Shares to be Bought Back
This Article 66 is well drafted. Consider whether a company should be able to buy-back shares pursuant to a promissory note or other company-issued indebtedness.

Article 67: Distribution of Dividend
Consider whether a company should be able to make a distribution in shares of the company. Further consider whether a dividend may be distributed more frequently than annually; perhaps leaving the timing of any distribution to the Board would be more appropriate.
Clarify that this Article 67 would not apply to distributions made in liquidation or winding up of a shareholding company.
Consider clarifying the tests for acceptable distributions. In general, U.S. law uses two (2) tests to determine whether a proposed distribution is acceptable: (1) the equity insolvency test (whether the company would be able to pay its debts as they become due after the distribution); and (2) the balance sheet test (whether the company's total assets less total liabilities would be able to satisfy all of the company's debts and obligations after the distribution).

Article 68: Recovery of Unlawful Payment for the Buy-Back of Shares or Dividend
Consider changing primary liability for unlawful payment to be placed on those Directors who approved such distribution or payment. Shareholders should be liable only to the extent they participated in or facilitated the company's decision to engage in the unlawful distribution.

Article 69: Organization and Management Structure of Shareholding Companies
In general, multiple-tiered management structures do not result in better, more efficient or more effective corporate governance. Instead, multiple-tiered management structures create confusion and weaken corporate oversight. Consider amending this Article 69 to provide that the Shareholders Meeting is the ultimate power of a company, but that certain powers and responsibilities may be delegated to a Board of Management pursuant to the company's formation documents.

Article 70: The Shareholders' Meeting
This Article 70 is well drafted. Consider whether the requirements for a Shareholders' Meeting are appropriate for small or medium sized enterprises. Further consider enabling shareholders to participate in Shareholders Meetings through a proxy or through some agreed-upon form of communications technology. Also consider whether the failure of a company to hold a timely Shareholders Meeting should invalidate any kinds of company action.

Article 71: Authority to Convene a Shareholders' Meeting
Consider whether the requirements for a Shareholders' Meeting are appropriate for small or medium sized enterprises. Further consider whether application may be made to a court to convene a Shareholders Meeting.

Article 72: List of Shareholders Entitled to Participate in Sessions of the Shareholders' Meeting
This Article 72 is well drafted. Clarify that these provisions apply both to regularly-scheduled Shareholders Meetings and special or ad hoc Shareholders Meetings.

Article 73: Agenda and Contents for Sessions of the Shareholders' Meeting
Consider whether the cut-off time for agenda items should be moved to five (5) or ten (10) days prior to the Shareholders Meeting. Further consider clarifying that the company itself (or its Secretary) is responsible for preparing the agenda for a regularly-scheduled Shareholders Meeting and that the shareholder(s) requesting a special or ad hoc meeting are responsible for preparing the agenda for such meeting.

Article 74: Invitation to Sessions of the Shareholders' Meeting
This Article 74 is well drafted. Consider whether the invitation requirement can be waived so that shareholders may take action outside of the Shareholders Meeting.

Article 75: Authorization to Participate in Sessions or the Shareholders' Meeting
This Article 75 is well drafted.

Article 76: As to the Validity and Formalities of the Shareholders' Meeting Sessions
Consider whether the 65% quorum requirement is too high. Further, specify that an action only needs a majority of those shares representing shareholders(s) participating in the Shareholders Meeting (a majority of those present), except for those matters specified in this Law or in the company's formation document as requiring a super-majority.

Article 76a: Procedure of Conducting Meeting and Voting at the Shareholders' Meeting
Consider whether a single person-perhaps the company's Secretary- should chair all of the company's Shareholder Meetings, as specified in the company's formation documents. Consider further whether voting ballots should be distributed the day prior to the Shareholders' Meeting and whether such distribution could enable voting inaccuracies. Further consider whether these procedures are appropriate or too burdensome for small and medium sized enterprises.

Article 77: Adoption of Resolutions by Shareholders' Meeting
Consider reducing the requirement for approval of resolutions made at a Shareholders Meeting to a majority for most resolutions and a super-majority (perhaps 67%) for material or major resolutions.
Consider expanding cumulative voting for directors to all shareholding companies, if such enterprises so elect in their formation documents.
Consider whether the voting requirement for resolutions adopted by correspondence should be a super-majority (perhaps 67%).

Article 77a: Powers and Getting Opinions from Shareholders
Consider whether this Article 77a conflicts with certain terms in Article 77, specifically Article 77(3). Further, consider making the shareholder list more broadly available to

company shareholders. Further consider whether the terms in this Article 77a conflict with certain terms in Article 76a.

Article 78: Record of Shareholders' Meeting
Consider whether the terms of this Article 78 conflicts with the terms of Article 77a and, specifically Article 77a(5).

Article 79: Rights as to the Request of Cancellation of Resolutions Adopted by the Shareholders' Meeting
This Article 79 is well drafted. Consider whether the request for cancellation can be made by a shareholder or other person on behalf of the Enterprise.

Article 80: The Board of Management
While equity-holders are the ultimate owners of an Enterprise and are the ultimate power of and for the Enterprise, the Board of Management is and should be the supreme authority for the Enterprise's regular business management. Consider whether cumulative voting should be used, either as a mandatory concept or an optional concept, by shareholding companies. Consider further whether the obligations on the Board of Management is appropriate for small or medium sized enterprises. Instead of a laundry list of powers, consider providing the Board will all powers to manage the shareholding company except for those powers reserved to the Shareholders Meeting under this Law or as provided in the shareholding company's formation documents. Consider changing the 50% statement in clause 2e to be oversight over material transactions.

Article 80a: Terms and Members of the Board of Management
Consider lowering the required number of Board members to one (1), so that the appropriate range is one (1) to (11). This may be appropriate in circumstances where the shareholding company is too small to support or justify having at least three (3) Board members. The exact number should be fixed by the Company's bylaws.
Consider specifying that the Board's powers are as provided in the formation documents, subject to this Law, instead of drafting a long list of possible powers.
Clarify that a member of the Board of Management's term ends upon death, resignation or removal. Further clarify that a Board member may be removed for cause, such as corruption or other action/inaction that questions that member's integrity.
Further clarify that members continue as members of the Board until their successor is appointed, instead of allowing a situation where a shareholding company has no Board.
Consider requiring at least one independent director for larger or publicly-traded shareholding companies.
Also consider enabling certain classes of shares to elect certain members of the Board and enabling a shareholding company to choose a staggered board in its formation documents.
Consider leaving the issue of compensation to the shareholding company's formation documents; reimbursement of costs may be appropriate, but more significant compensation raises concerns.

Article 80b: Standards of Members of the Board of Management

Allow any person or shareholder, not just 10% shareholders to become members of the Board. Consider allowing Board members to transfer their shares (to the extent they have any) subject to notice to the company and the other Board members and subject to any requirements in any securities-related law.

Article 81: Chairman of the Board of Management
This Article 81 is well drafted. Consider whether the Chairman should have those powers as provided in the shareholding company's formation documents, as opposed to listing all possible powers in this Article 81.

Article 82: The Meeting of the Board of Management
Consider whether the provisions in this Article 82 are appropriate for small or medium sized enterprises. Further consider having the person with the most votes of the other members of the Board be the convener of the meeting of the Board of Management. Also consider lowering the quorum requirement from 75%.
Consider whether members of the Board can participate in a meeting through agreed-upon communications equipment.
Further specify how the Board can act through a consent instead of through a meeting.
Consider whether actions outside a meeting should be pursuant to unanimous consent.
Consider whether it is appropriate for the Chairman of the Meeting to break any tied votes, whether this power, in essence, gives the Chairman two (2) votes.

Article 82a: Minutes of the Board of Management
This Article 82a is well drafted.

Article 83: The Right to be Supplied Information of Members of the Board of Management
This Article 83 is well drafted.

Article 84: Exemption, Dismissal of, and Supplement to Members of the Board of Management
Consider limiting the Shareholders' right to remove a Director to "removal for cause," in the sense that the Director should have done (or omitted doing) something to warrant removal. It may not be appropriate to empower the Shareholders to remove a Director for convenience.

Article 85: (General) Directors of Shareholding Companies
It is unclear how this Article 85 differs from the provisions of Article 81. In general, the Board should have the power to appoint officers of a shareholding company, such as a President, Secretary, and Treasurer. It is not clear that this Article 85 is addressed to the appointment of non-Director officers.
Consider leaving the powers, obligations, and compensation of such officers to the formation documents.

Article 85b: Disclosure of Related Benefits

In addition, consider expanding the disclosure requirements in this Article 85b to include related party transactions or transactions between the shareholding company and a Director, officer or other party related to a Director or officer.

Article 86: Obligations of Managers of Shareholding Companies
This Article 86 is generally well drafted. Consider expanding these obligations to transactions in which a covered party may indirectly benefit.

Article 87: Transactions Subject to Approval by the Board of Management or Shareholders' Meeting
Consider lowering the 35% ownership requirement to determine "related" shareholders.

Article 88: The Control Committee
See the above comments regarding multiple management levels in a shareholding company. Consider whether the Board should form an audit committee and a compensation committee, assuming the shareholding company is of significant size.

Article 88b: Rights and Obligations of the Control Committee
This Article 88b is well drafted.

Article 89: Right to be Provided with Information of the Control Committee
This Article 89 is well drafted. Consider a specific statement that the control committee's request for information should be independent of any similar request by the whole of the Board of Management.

Article 89a: Allowance and Other Benefits for Members of the Control Committee
Consider leaving these issues to be decided in the shareholding company's formation documents.

Article 89b: Obligations of Members of the Control Committee
This Article 89b is well drafted.

Article 89c: Dismissal of Members of the Control Committee
This Article 89c is well drafted.

Article 90: [Deleted]

Article 91: [Deleted]

Article 92: Submission of the Financial Statement
Consider whether this requirement is appropriate for small or medium sized enterprises.

Article 93: Disclosure of Information as to Shareholding Companies
Consider whether this requirement is appropriate for small or medium sized enterprises.

Article 94: Retention of Documents of Shareholding Companies

This Article 94 is well drafted.

CHAPTER V: PARTNERSHIP

As a general concept, this Chapter V seems to be attempting to create two kinds of partnerships: (1) a general partnership; and (2) a limited partnership. In the United States, general partnerships and limited partnerships are two (2) distinct types of enterprise. A general partnership is an enterprise made of two (2) or more persons, either natural or legal persons, wherein each partner retains joint and several liability for the enterprise's debts. In a limited partnership, there are two (2) classes of partners: (1) general; and (2) limited, and there must be at least one (1) general and one (1) limited partner. In the limited partnership context, the general partner(s) retain joint and several liability for the full value of the enterprise's debts and the limited partner(s) retain liability for the enterprise's debts only up to the value of their investment. It may be simpler, and more appropriate, for this Chapter V to focus only upon the formation, operation, and dissolution of what would be called a general partnership in the United States. If entrepreneurs wish to form an enterprise with limited liability for investors, they may create a limited liability company or a shareholding company.

Article 95: Partnerships
This Article 95 should cross reference Article 13b and related sections about the form and content of a partnership's formation documents and filing requirements. This article should further refine the definition of a partnership to include the concepts that (1) the partnership as an enterprise is separate from its partners; (2) the partners are co-owners the enterprise; and (3) the partnership agreement governs the relationship between or among the partners.
In addition, specify that the acts of a partner in the ordinary course of business can bind the partnership. Further, a partnership may be sued for the actions or omissions of a partner who is acting in the ordinary course of business.

Article 95a: Making Capital Contribution and the Issuance of Capital Contribution Certificate
This Article 95a should use the term "partnership contribution" instead of "capital contribution." Article 95(2) states that a partnership shall not issue any type of securities. Using the phrase "capital" when describing contributions made to a partnership may confuse investors into thinking that their partnership interests are, in fact, securities.

Article 95b: Property of a Partnership
This Section 95b should clearly state that partnership property is property of the partnership and not the property of any individual partners. Consider expanding the definition of partnership property to include property acquired by a partner in the name of the partnership and assets purchased by the partnership.

Article 95c: Restrictions to Rights of Partners
This Section 95c may be overly broad and unnecessarily restrict the business activities of partners. It may be more appropriate to provide that the restrictions provided in this

Section 95c may be put in place by the partnership agreement. Nonetheless, partners should not be allowed to divert a business opportunity from the partnership to themselves or to an enterprise such partner controls, a concept named the "duty of loyalty."

Article 96: Rights and Obligations of Partnership Members
In addition to the duty of loyalty concept discussed for Article 95c, partners should be obligated to discharge their duties in a spirit of good faith and fair dealing. Further, the partners should discharge their partnership duties in a manner that does not include intentional misconduct or reckless or negligent behavior. It is not clear what Article 96(1)(d) is trying to accomplish—it is appropriate for a partnership to reimburse a partner for those losses a partner incurs in the course of the partnership's business or in trying to preserve or protect the partnership's assets or property. Also, consider adding the obligation that the partnership reimburse a partner for any amounts extended to the partnership in excess of the partner's capital contribution. Article 96(2)(c) should clarify that the partners may use the partnership's property only for partnership business. Articles 96(2)(dd) and (e) seem to envision limited partnerships, as discussed in the introductory comments to this Chapter V; as a concept, each partner should be liable for the full value of the partnership's debts and obligations, unless the parties agree otherwise in the partnership agreement. Consider whether the report required by Article 96(g) is appropriate for small partnerships.
This Article 96 should enable a partnership to initiate legal action against any partner for a breach of the partnership agreement or for an action or omission on the partner's part that causes harm to the partnership. Similarly, a partner should be enabled to initiate legal action against the partnership or another partner to enforce the first partner's rights under the partnership agreement.

Article 96a: Board of Members
In general, if all partners are co-owners of the partnership the partners, not a Board of Members should oversee the business activities of the enterprise. It may be more appropriate to leave the management of a partnership to the partners pursuant to the partnership agreement. Further, a Board of Members may be unduly burdensome on small partnerships.

Article 96b: Convene a Meeting of the Board of Members
See comments on Article 96a.

Article 96c: Business Management of a Partnership
See comments on Article 96a. Article 96c(2) should remain, in some form, in the final version of this Law. Clarify that "ordinary" business decisions require a majority of partners' consent but that decisions outside of the partnership's "ordinary course of business" should require the unanimous consent of the partners. The concept of a "Chairman of the Board of Members" does not belong in the partnership sections of this Law, but the partnership should be able to designate a "representative partner" for purposes of interacting with the Government. Such "representative partner" should be designated by the partnership agreement.

Article 96d: Termination of Partner Status

This Article 96d is generally acceptable. Consider enabling termination of partner status pursuant to an event as agreed-upon in the partnership agreement. Also, consider allowing a partnership to terminate a partner's status if that partner declares bankruptcy or becomes insolvent. Further, partners should be able to expel another partner from a partnership if it would be illegal to carry on the partnership with the partner to be expelled.

This Article 96d should differentiate between the termination of a partner's status and the partner's withdrawal or transfer of its partnership interest. In general, the only partnership interest that should be transferable is a partner's interest in the profits and losses of the partnership. The partnership agreement should specify the process by which a partner can transfer its interest to another party. The six-month notice requirement for a withdrawal may be too long. Notwithstanding anything in the partnership agreement, a partner should not be allowed to withdraw from a partnership if that withdrawal would cause the partnership to dissolve.

Clarify that the effect of a partner's withdrawal or termination is that, as of the date of termination or withdrawal, the partner's right to participate in the management of the partnership ceases.

Clarify the process by which a partner's partnership is to be valued and bought out in the event a partner is terminated.

Article 96dd: Enrolment of New Partners

See the comment for Article 95a, above, about the use of the term "capital contributions." It generally is appropriate to allow new partners to join the partnership pursuant to the terms of the partnership agreement. Consider whether the 15-day contribution deadline is appropriate—it may be better to not specify a time-frame in this Law, and defer to the requirements of the partnership agreement. Further, this Article 96dd should state that a new partner is not responsible for any partnership debts or obligations incurred prior to that partner joining the partnership.

Article 96e: Rights and Obligations of the Capital Contributors

This Article 96e is not needed, as Article 96 discusses the rights and obligations of partners in and to the partnership. This Article 96e may cause confusion as to the rights and obligations of partners.

Article 97: [Deleted]

Article 98: [Deleted]

CHAPTER VI: PRIVATE ENTERPRISE

Article 99: Private Enterprises

Clarify whether the definition of "individual" is meant to include a "legal person" such as an Enterprise or whether it is meant to include only "natural persons." Further, clarify whether a foreign person may establish a private enterprise in Vietnam.

Article 100: The Amount of Investment Capital of the Proprietor
Consider whether a registered capital requirement is necessary for a private enterprise, as it may unduly burden individual entrepreneurs. Management of a private enterprise should be left to the discretion of the entrepreneur, provided that the entrepreneur is not managing the private enterprise in a manner that breaks the law.

Article 101: Management of Private Enterprises
Consider enabling an entrepreneur to shift some liability for a private enterprises to the hired manager by contract. Further, as stated in the comments to Article 100, the management of a private enterprise should be left to the discretion of the entrepreneur, subject to the limitation that the private enterprise not break the law.

Article 102: Leasing of Private Enterprises
No comments.

Article 103: Sale of a Private Enterprise
No comments.

Article 104: Suspension of Business
No comments.

CHAPTER VI.A: PARENT COMPANIES, SUBSIDIARIES OR JOINT-VENTURE COMPANIES

Article 104a: Joint Venture Companies
No comments.

Article 104b. Parent Companies and Subsidiaries
Consider whether two (2) Enterprises may have a parent-subsidiary relationship even if the "parent" does not own a majority of the "subsidiary's" equity. Consider integrating the concept of "Affiliate" into this Article 104b.

Article 104c: Rights and Responsibilities of the Parent Company in Affiliation with its Subsidiaries
No comments.

Article 104d: Financial Statement of the Parent Company and its Subsidiary
No comments.

CHAPTER VII: REORGANIZATION, DISSOLUTION, AND BANKRUPTCY OF ENTERPRISES

Article 105: Division of Enterprises
Consider whether a resulting Enterprise must be of the same type as its "parent."

Article 106: Separation of Enterprises
No comments.

Article 107: Consolidation of Enterprises
Consider inserting a reference in this Article 106 to Chapter 1, Section 3 of Competition Law—"Economic Concentrations." Such reference should include the notification requirement of Article 20 of Competition Law in event of specific mergers

Article 108: Merger of Enterprises
No comments.

Article 109: Transformation of Enterprises
No comments.

Article 110: Transformation of a One-Member Limited Liability Company
Consider moving this Article 110 into the Chapter of this Law addressing limited liability companies.

Article 111: Circumstances Where Enterprises are Subject to Dissolution
No comments.

Article 112: Dissolution Procedure
No comments.

Article 113: Enterprise Bankruptcy
No comments.

CHAPTER VIII: STATE MANAGEMENT UPON ENTERPRISES

Article 114: Contents of State Management Upon Enterprises
This Article should provide that if the Business Registrar receives a filing that satisfies statutory requirements, it shall file it. Further provide that the formation certificate is evidence that the Enterprise is in existence and satisfied the formation requirements.

Article 115: State Management Body as to Enterprises
Clarify that there is only one, single, regulator for enterprise formation.

Article 116: Power and Responsibility of the Business Registrar
No comments.

Article 117: Inspection of Business Operations of Enterprises
Consider whether the thirty (30) day inspection period is too long.

Article 118: Financial Year, Accounting Books, and Financial Statements of Enterprises
No comments.

CHAPTER IX: COMMENDATION, REWARD, AND SETTLEMENT OF BREACHES

Article 119: Commendation and Reward

No comments.

Article 120: Behavior for Breaking the Enterprise Law
Consider including a “catch-all” making any violation of this Law actionable.

Article 121: Measures in Settlement of Breaches
No comments.

## CHAPTER X: MEASURES IN SETTLEMENT OF BREACHES

Article 122: Enforcement
No comments.

Article 123: Application as to Enterprises Established Prior to Enforcement of this Law
No comments.

Article 124: Enforcement Guides
No comments.

**MEMORANDUM**
**ASSESSMENT OF THE DRAFT UNIFIED ENTERPRISE LAW OF VIETNAM**

**To: UNDP - Vietnam**
**From: Eduard C. de Bouter, the Netherlands; e-mail: ecdebouter@home.uni-one.nl**
**Re: assessment of the Draft Unified Enterprise Law of Vietnam**
**Date: 30 April 2005**

## Introduction

Below follow my comments on the draft Unified Enterprise Law (version 1) (the "**UEL**") of Vietnam. The comments follow the sequence of the articles of the draft.
Clearly my comments are, willingly and unwillingly, inspired by my own (Dutch) legal background, i.e. by Netherlands corporate-commercial law most of which is found in Book 2 (legal entities) of the Dutch Civil Code and which in certain respects is based on EU Directives. For the comments on the limited liability company I am referring in my comments to the Dutch rules applicable to private limited liability companies and for the shareholding companies to the rules applicable to public limited liability companies. I do not refer to specific provisions or articles of Dutch law or EU Directives. However, I do send you herewith the general part of a report of an expert group "Simplification and Fexibilisation of Dutch law on private limited liability companies" dated May 2004 and a covering note of the Dutch Ministry of Economic Affairs. These documents may gave you an impression of current thinking in the Netherlands.

## Executive Summary

My main comments may be summarised as follows:

1. a number of definitions should be added to Art. 3 (in some cases possibly by reference to later Articles that contain a definition), of, e.g. parent, subsidiary, group, legal representative, limited partner, capital contributor, related person (in general)
2. the law should make the relation between legal capital and charter capital clear
3. for limited liability and shareholding companies, the law should make clear who (e.g. the director?) can represent and bind companies in any and all transactions with third parties ("externally"), either by himself or together with somebody else, and that internal approvals or resolutions, or the lack thereof, cannot be invoked by the company or the other party (to get out of a transaction); in this connection the functions of and relation between "legal representative" and "general director" should be clarified
4. the combination of the functions of chairman of the board and director (and chairman of the shareholders meeting) must be avoided to prevent the cumulation of too much power in one person and to acknowledge that a supervisor cannot supervise the "supervisee"
5. the general meetings of shareholders as a whole should appoint all members of the board of management instead of groups of shareholders appointing their

individual representatives on the board, and board members should be appointed on the basis of their expertise; the UEL should allow that members of the Board have office on a rotating basis and that not all resign simultaneously

6. must members or shareholders of a company that are legal entities themselves always have a separate "authorised representative"? Can such members or shareholders be represented by their director or legal representative who may represent them in other matters generally?
7. the provisions that members and shareholders are liable for the debts and obligations of the company for the amount of their shares do not seem consistent with the statement that companies are legal persons (with their own rights and obligations separate from the rights and obligations of their members and shareholders)
8. the law should state clearly how capital contributions, shares or partnership shares are sold and transferred (is a written contract required signed by transferor and transferee, also by the company?), and what the purpose and function of the register of members or shareholders and the share certificate is. Is amendment of the register or delivery of the certificate necessary for the validity of the transfer or does it constitute the transfer? Does the register or the certificate constitute complete proof (subject to proof of the contrary?) of ownership and entitlement to voting rights and dividends?
9. to protect the interests of creditors and to give comfort in respect of the "real value of the capital", the law should require that when shareholders pay for newly issued shares in foreign currency, the relevant bank should confirm receipt of payment and the value thereof in dong; if payment is paid in the form of assets other than money, the value thereof should be appraised by an independent registered accountant
10. back and cancellation of capital contributions and shares should focus on maintaining the capital of the company (so that the (legal) capital is maintained for the benefit of creditors) and indicate how the price payable by the company for the repurchased shares is determined; if the intention is that shares in shareholding companies cannot be cancelled, that should be stated expressly in the Law
11. the Articles regarding division, separation, merger and consolidation of companies are few and short and should be elaborated with a view to protection of the rights and interests of (minority) shareholders and creditors
12. become personally liable should be limited. Personal liability for damages or losses of the company or other parties exposes these persons to large debts and must be limited to extreme cases where, e.g., these persons have deliberately violated an important legal provision or harmed certain interests
13. where sanctions or penalties are threatened or imposed (such as withdrawal of registration, criminal prosecution, fines, etc) it should always be clear who can impose those sanctions and what the procedure is (including appeal).

Many of my comments are undoubtedly caused by the translation of the draft Law from Vietnamese to English. One example: many articles of the draft include the words "… are responsible jointly …". If the intention is that the relevant persons are each liable for the

total amount [of the damage], the correct wording would be "… liable, jointly and severally …". I realize that such translation problems are inevitable with this type of legal document.
Where my comments are made in the form of questions, the suggestion is mostly that the relevant Article of the UEL should be clarified.

*  *  *

**Comments by Article**

Please add a table of contents at the beginning of the text.

Chapter I

Art. 2, 1st par.: with respect to "enterprises on the territory of Vietnam", what rules will apply (i) to the foreign operations of, e.g., a company incorporated in Vietnam and wholly or partly owned by Vietnamese citizens, and (ii) to a foreign incorporated and/or owned company that has operations in Vietnam (through a branch office, a representative office, a participation in a Vietnamese limited liability or share company, a joint venture or otherwise)?

Art.2, 2nd par.: I assume that reference is made only to specialized laws adopted by the formal national legislature and not to decrees, ordinances, etc. Is an effort made to check all other relevant laws on consistency with the UEL?

Art.2, 3rd par.: change "laws on investment" to "the Unified Investment Law (the "UIL") without its implementing rules and regulations". I assume that all efforts will be made to ensure that the UEL and the UIL are consistent.

Art. 3, general comment: please put the defined terms in alphabetical order and print the first letter of each word of a defined term in upper case throughout the document (e.g. Limited Liability Company, etc.)

Art. 3.1 first line: after "organisation" insert ",with or without legal personality,". The words "have … assets, … office…" suggest that an Enterprise actually has or owns certain assets which is not true for Enterprises without legal personality. I suggest to substitute "use"  or "has at its disposal" for "has".

Art. 3.2a: please include the definitions of Limited Liability Company, Shareholding Company, Partnership and Private Enterprise, either by moving the text of Articles26, 46, 95 and 99 to Article 3 or by referring to those Articles.

Art. 3.3 second line, after "declared" add "by …".

Art. 3.4 first line, substitute "transferring" or "contributing" for "giving". In the fourth line, delete "value of", because the IP Rights themselves are transferred to the company.

Art. 3.5: the text should clarify that the amount committed but not yet paid or transferred by a member or shareholder is not included in “Proportion of capital contribution”.

Art. 3.6 and 7: if there is a relation between Charter Capital and Legal Capital, this should be made clear in paragraphs 6 and 7. Is the Charter Capital the portion of the Legal Capital that has actually been paid or committed, or is the Legal Capital the minimum that actually must be paid so that the Charter Capital must always be the same as or higher than the Legal capital? In my comments on paragraphs 6 and 7 I assume that the latter alternative applies.
Under Dutch law, all limited liability companies must have a minimum paid up capital of at least Euro 18,0000 and shareholding companies of at least Euro 45,000.

Art. 3.6: before “capital” insert “equity”, after “members” insert “or shareholders” and add at the end: “and that must always be at least equal to the Legal Capital of the Company”.

Art. 3.7: before “capital” insert “equity”; substitute “the UEL” or “this Law” for “laws”.

Art. 3.8: substitute “subject to the vote of” for “decided by”.

Art. 3.10, line 2, substitute ”of the Limited Liability Company” for “of the company” and make new definition: “Founding Shareholder” means a person that participates in approving the first Charter of the Shareholding Company.“

Art. 3, new par. 11a: add a definition of Limited Partner by moving the text of Art. 95.1.c to Art. 3 or by referring to Art. 95.1.c.

Art. 3.12: a member of the Meeting of Members (of a Limited Liability Company) should not be considered a Manager of an Enterprise.

Art. 3.12a: read lines 1-2 as follows: “… in writing by legal entities that are members or shareholders of … companies to exercise the respective rights of those members or shareholders in the Limited Liability Companies or Shareholding Companies …”.
The Law should clarify whether members and shareholders which themselves are legal persons must appoint an authorised representative or can act through their directors or Board members, and whether the authorisation can be revoked by the authorising entity or terminates in certain events, such as the death or bankruptcy of the authorising entity.

Art. 3.14: the definition is limited to “related persons of an enterprise” while several Articles of the draft refer to related persons of persons, people, etc. so that the definition does not apply in those cases. A new definition of related person should probably be added whereby the definition may be limited to “wife, husband, father, foster father, mother, foster mother, child, adopted child, any grandparent, grandchild.

Art. 13.4.a: It should be made clear whether the words “have the competency to appoint the managers [of the parent enterprise]” refer to anybody who together with one or more others (e.g. as shareholder in the shareholders meeting or on the basis of a contractual arrangement) can appoint a member of the Board or only to those persons who by themselves can appoint members of the Board (because they are the only shareholder). The word “managers” in the several paragraphs of this Article should probably be replaced by “[one or more] members of the Board of Management”. If this is not done, the word “managers” should be defined.

Art. 3.14.a.1: after “Subsidiaries” insert: “and managers / members of the Board of Management of the Subsidiary enterprises” and add at the end: “in which case the Subsidiaries and their managers / the members of their Boards of Management are related persons of the parent enterprise as well as of each other”. [principle of common control].

Art. 3.14.b and c: is there a practical difference between the two categories mentioned in these paragraphs? It term “group of individuals” should be defined.

Art. 3.14.h: “person who lives in the same household” may have to be deleted because it is always difficult to prove if persons share the same household.

Art. 3.14.i: the text should make clear whether the words “the persons prescribed at points a-h” refer to all persons in those categories combined or to each category or each person by itself/himself. Does “dominate” mean: >50%? Does this paragraph refer only to decisions *of* management bodies are also to decisions to, e.g., appoint management bodies?

Art. 3, new par. 14a, 14b and 14.c: add new paragraphs for definitions of Subsidiary, Parent and Group of companies, either by moving the text of, or by referring to, Art. 104b. See also the definition of subsidiary under Dutch law in the comment on Art. 104b.

Art. 3.15: the text should clarify or define the term “authorized state agency”.

Art. 3.17: countries may not have a system where a business licence is registered or it may not be clear what the foreign equivalent of a business licence is, so that making the nationality of the enterprise dependent on the nation where the licence is registered may not lead to a clear conclusion. In Europe, there are two schools of thought: a company has the nationality of the country where (i) it is incorporated or (ii) its main office is (“siège social”). I prefer the first alternative because it is very clear and leaves no ambiguity. The Dutch Law on conflict rules for companies provides that “a company which according to its incorporation document has its seat or, in the absence thereof, its centre of external operations at the time of incorporation in the territory of the State according to whose law it is incorporated, is subject to the law of that State”. The same Law states that “The law applicable to a company governs, in addition to the incorporation, in particular the following matters: (i) the possession of legal personality or the authority to have rights and obligations and to sue and be sued, (ii) the internal structure of the company, (iii) the authority of organs and officers to represent the company, (iv) the liability of

directors and other officers in their capacity to the company, (v) the question who, in addition to the company is liable for the acts by which the company is bound, by virtue of some capacity such as incorporator, partner, director or other officer, (vi) the termination of the existence of the company."

Art. 3.19: in line with my comment on Art. 3.17, a foreign enterprise would be an enterprise (i.e. branch or representative office, etc.) in Vietnam owned by a foreign incorporated company; a company incorporated under Vietnamese law would be a Vietnamese company but it may be a foreign owned company.

Art. 4.3: "organisations" = companies? If this is not the case, please define the word "organisations"; if this is the case, please use the word "companies".
Second paragraph line 4: the article should state who will determine the market price and how. Does the word "facilitated" mean that the owner is free to pocket the money and do as (s)he deems fit?

Art. 5 first paragraph: if the "rules of the Party" are not part of national law, it is difficult to see how enterprises can or will be bound by those rules.

Art. 6.1: please add a definition of "industries" so as to make clear whether it includes, e.g. some or all agricultural activities (rubber or coffee plantations, keeping dairy cattle) or service industries.

Art. 6.2: the list of reasons why certain business lines would be prohibited seems too long; the words "order … good customs" can be replaced by "public order".. It must be clear which government body issues the rules and that both the applicable procedure and the substance of the list and rules are clear, and transparent and create a predictable business environment. Arbitrary changes must be avoided.

Art. 6.3: what type of conditions are at stake? Again, the conditions and applicable procedures, must be clear, transparent and create a predictable business environment.

Art. 6.4: under Vietnamese law, are professional certificates required from managers or employees of an enterprise or from the enterprise itself? Lines 3-4 could read: "after the specified minimum level of capital [=Legal Capital?] has been contributed to the enterprise or the enterprise or its relevant managers or employees, as the case may be, have acquired the professional certificates as required by applicable law".

Art. 6.5: is there a compelling reason that the professions referred to (and not, e.g., advertising and marketing firms, tax advisers, (investment) banks, etc) must conduct business as a partnership? What about hospitals? In the Netherlands and elsewhere, lawyers (law firms), accountants, tax advisers may use the legal form of incorporated companies or partnerships.

Art. 6.6: if the intention is to treat domestic and foreign parties alike, there will be no room for this provision. If the provision stays, the list should be adopted by formal law.

Art. 6a.1: are “business conditions” the same as “conditions” in Art. 6.3? Can words be added to explain who will determine/establish which conditions apply (the government ex Art. 6a.5?) and how the conditions are made public, in general and to the particular investor-enterprise?

Art. 6a.2: personal liability is a strong sanction/penalty, certainly if it were to include unwilling violations of minor conditions and certainly where reference is made to members of limited liability companies and if “partners” refers not only to general partners but also to limited partners of a partnership. Personal liability (in addition to liability of the enterprise) should be limited to gross or deliberate violations of certain defined conditions.

Art. 6a.3: the licensing procedure, including appeal to the court in the event of refusal of the licence, should be described in the UEL.

Art. 6a.5: Please add by which type of instrument (law, decree, etc.) the government or other institution will do so and how it will be made public.

Art. 7 and 8: both the titles of these Articles and the wording of their sections suggest that (all) enterprises can own assets and have rights and obligations. To the extent that enterprises are legal persons (the Companies) this is correct, for other types of enterprises, (branch offices, private enterprises) this is not correct. This could be remedied by reading the first sentence of Art. 7 as follows: “… a Company, and the owner(s) of an Enterprise that is not a Company, whose operations …”. The same language can be repeated at the beginning of Art. 8.

Art. 7.8: if this is an anti-corruption provision, please substitute “grant” for “supply” and insert after “laws” words like, e.g. “, or contract or that is not the price (in money or in kind) for any good or service legally delivered …”.

Art. 8.1: can a definition be added to explain the term “registered industries”? Does this refer to the [business] conditions mentioned in Art. 6a?

Art. 8.5: in line 2 insert after “information” the words “as required by this Law”.

Chapter II

Art. 9 first line: substitute “All natural persons and legal persons of …” for “All organisations and individuals …”.

Art. 9.6: “being sued” is not the right criterion to prohibit someone to establish an enterprise. Please replace these words by “having been convicted by a court of law …”

Art. 9.7: leaves too much discretion for further restrictions by regulations and is to be deleted.

Art. 11: other than this provision (which states that whatever contract is signed by founding members before the establishment of an enterprise is binding for the enterprise after it is established) Dutch law provides that "from acts performed in the name of a company to be incorporated, rights and obligations follow for the company only if it confirms those acts after its incorporation explicitly or tacitly or if it is bound by the inclusion of certain acts in the deed of incorporation. The persons who perform an act in the name of a company to be incorporated are - unless agreed expressly otherwise - liable jointly and severally for the act until the company has confirmed the act after its incorporation".
Side-comments: the text should be limited to Companies because an enterprise that is not a legal person (i.e. company) cannot be bound by a contract and receive rights and obligations.
In the last line "jointly" should be "jointly and severally".
It is important that the text makes clear when an enterprise is (considered to be) established - by and at the time of the grant of the certificate of business registration ex Art. 17?

Art. 12.2: meaning of last sentence is not clear.

Art. 12.3: the Article should refer to an appeal procedure from the decision of the Registrar to the court.

Art. 13: this Article should clarify to which type of enterprises Art. 13 applies.

Art. 13.4 last line: Dutch corporate law requires a statement from a bank to the extent that the issued shares are paid at incorporation in money and from a registered accountant to the extent that shares are paid in assets other than money (in kind), for both private limited liability companies and shareholding companies.

Art. 13a.2: see comment on Art. 13.4.

Art. 13a.4: does such requirement not apply to domestic owners? Please clarify in the text if the certification must be issued by the bank with which the deposit is kept, whether the savings account must be kept with a bank in Vietnam or may be with any bank anywhere and whether a certain period for the 6 month deposit is required, e.g. 6 months starting the date of filing the application for the business registration.

Art. 13b.3 second paragraph: see comment on Art. 13a.4.

Art. 13b.4 last line: see comment on Art. 13.4.

Art. 13c.3 first line: is there a reason not to refer to "founding members", similar to founding shareholders?

Art. 13c.3.b: add at the end: “or the foreign equivalent of any of the foregoing documents”.

Art. 13c.3.c: see comment on Art. 13a.4.

Art. 14.1 first line after “registration” insert “for any enterprise”.

Art. 14.1.d: please add definition of “investment capital” to Art. 3.

Art. 14.1.e second line: the text should be clarified so that it becomes clear whether the words “the number of shares registered ..” mean that the aggregate number of shares (e.g. 100) for all founding shareholders or that the registered numbers of the shares for each individual shareholder (e.g. 11 to 16 for A, 17 to 85 for B, etc.) must be mentioned.

Art. 14.1.f: see comment on Art. 13c.3.b.

Art. 14.2: it is important that the same format for the application applies in the entire country.

Art. 15 first line: add at the end: “, all subject to and within the restrictions of this Law”.

Art. 15.4: the term “basic characteristics” is too vague and should be specified (e.g. in case of natural persons: date and place of birth and profession/job), for legal persons: date of incorporation).

Art. 15.5: see comments on Art. 13.c.3 and Art. 14.1.e.

Art. 15.8: Does “the legal representative” mean: the person who can legally bind the company (e.g. sign contract whereby the company is bound)? A definition of legal representative should be added to Art. 3.
In this connection, it is important that the “external authority” be regulated and published in a clear and simple way so that a third party with whom the company does business can immediately check whether the person with whom it negotiates and signs a contract binds the company. Is the “external authority” of the legal representative in addition to or instead of the power of, e.g. members of the board of management or of the general director to represent and bind the company?
In the Netherlands and elsewhere in Europe (pursuant to EU Directive) the charter of the company must make clear whether one managing director by himself or more (in practice usually two) managing directors jointly can/must act in order to represent and bind the company on all matters. The names of the managing directors appointed by the shareholders and indication whether each managing director has sole or joint signing authority must be filed with the trade register (equivalent of the business registrar) which is open for public inspection so that everybody can see who has (sole or joint) authority to represent the company. Internal restrictions (provided for in the charter of the company such as the need of approval by the shareholders or supervisory directors for certain transactions) of the power of the director(s) to represent and bind the company can in

principle not be invoked by the company against third arties with whom a contract has been signed. This last aspect should also be provided for in relevant articles of the UEL.

Art. 15.9a: why are members of limited liability companies included and why are general partners of partnerships not included? Does “supervision board” refer to “control board”?

Art. 15.11: first line is not clear.

Art. 15.14: what is the role or importance of the “legal [authorized?] representative of the [some or all?] members / shareholders”?

Art. 16 first line: see comment on Art. 13c.3.

Art. 16.1: see comment on Art. 15.4.

Art. 16.2 lines 2 and 4: how is the value determined and by whom? In general the value of assets contributed to the company should be determined by an independent registered accountant because those assets determine the value of the company for its creditors and others.
The references to duration of the payment for the shares should be deleted. Such payments should be with the company for indefinite times, until the shares are repurchased by the company in accordance with the law.

Art. 16.3: please clarify in the text if reference is made to the legal representative of the company (in which case see comment on Art. 15.8) or of some or all members / shareholders (in which case see comment on Art. 15.14).

Art. 17.1.a: add at the end: “under Art. 6.2 of this Law”.

Art. 17.1.b: check cross-reference to Art. 24.

Art. 17.2: does the time of the grant of the certificate mean the establishment of the enterprise? – see last comment on Art.11. In line 3, insert “in accordance with Art. 6.3” after “industries”. Read last two lines as follows: “”from the later date of being granted the business licence and satisfying …”.

Art. 18.3: for valuation of contribution, see comment on Art. 16.2; for investment capital, see comment on Art. 14.1.d (to be added to definitions in Art. 3)..

Art. 18.4: the registration should also mention the power and authority of the representative to act for and represent and bind the company (on all matters?). See comment on Art. 15.8.

Art. 19.1: the difference between charter capital, shareholding capital and investment capital is not clear. The words “and other contents of the file” must be clarified and specified.

Art. 21.1: in order to have a maximum publication, it is more logical to require publication in three different newspapers with national circulation (including the national or government gazette, if any) instead of three publications in the same newspaper.

Art. 21.f: please add the scope of the authority of the legal representative (and of members, board of management and the director)!

Art. 22.1: I suggest that to the documents pertaining to the transfer of assets (other than money) a certificate must be attached with the required appraisal of the value of the assets.

Art. 22.1.a: second line read as follows: “implement the normal facilities for the transfer of registered assets …”.

Art. 22.b, fourth item, after “Total value” insert “appraised in accordance with Art. 23 as shown in the attached certificate …”.

Art. 22.c last line: substitute “Company” for “enterprise” (only legal entities can own assets).

Art. 22.2 substitute “enterprise other than a company” for “private enterprise”.

Art. 23: under Netherlands law any contribution in kind for shares, both at and after incorporation, must be described by the relevant shareholders and (subject to a minor exception) be appraised by a registered accountant. This would be a preferable solution for the UEL as well. However, there is some debate in the Netherlands whether this requirement should be maintained for limited liability companies.

Art. 23.2: If the current principle of the UEL, including appraisal by the founding members, is maintained, the wording for the appraising members (“must be responsible for the honesty and accuracy of the assets”) are inconclusive and the language that applies to the appraisers (“will be responsible for the company’s liabilities and other obligations .. is too broad. I suggest that the language for both the appraising members and the professional appraisers be made identical as follows: “shall each be liable, jointly and severally, for the correct appraisal of the value of the assets and for compensating the damage that anybody has suffered and has been caused by the inaccurate appraisal of such assets during a period of five years after the time of the appraisal”. However, I suggest that the value of the assets must always be appraised by a registered accountant.

Art. 23.3: see comment on Art. 23.2.

Art. 23a.3: I assume the text means that the name must be included in the letterhead of any letter issuing from the enterprise (as is required by Netherlands law). Is there a provision in another law requiring that certain other details such as the registration

number, address and charter capital or contributed capital, are included in the letterhead and other documents of each enterprise?

Art. 23b and 23d: are the reasons for refusing a name (coinciding and causing confusion) the same reasons mentioned in the relevant laws as breaching existing trade names, trade marks etc.?

New Art. 23: There should be appeal to the normal courts that also decide on complaints regarding breaches of IP rights (trade names, trade marks etc.).

Art. 24.1: the statement in the first line does not seem correct if the enterprise is a branch or representative office of a foreign company that has its head office outside Vietnam.

Art. 24.2: the requirement of a minimum amount of opening hours does not seem necessary.

Art. 24a: in continental Europe companies have no seal and it does not seem useful to require a seal.
In the last sentence, what does “authorised agency” mean?

Art. 25.1: can the text clarify what “authorised” means in line 2? Authorised by whom and how?

Art. 25.2c last line: what does “capital trading companies” mean?

Art. 25.3 last line: can words be added to indicate the type of instrument (decree, order, other?) with which the government will set out the procedures for establishing branches etc.?

Chapter III Part I

Art. 26.1.a and 3: a limited liability company has legal status (personality) and will therefore have its own rights and obligations, separate from the rights and obligations of its members. Why then does par. 1.a state that members are responsible for liabilities of the enterprise [should read: limited liability company] to the extent of their pledged [=committed?] capital contribution? Under Netherlands law and as far as I know other laws, the shareholder/member has no liability other than to pay for the nominal value of the shares (s)he acquires (and liability if, e.g., (s)he has committed tort against the company or another party).

Art. 26.1.b: “enterprises” would probably be more correct than “organisations”?

Art. 27.1 first par.: what does “pledged of each period” mean (which period?)?

Art. 27.1 second par.: can words be added to explain what “within such duration” means?

It seems unreasonable to hold both the non-paying member and the legal representative of the company jointly [and severally?] liable for all debts of the company. Under Netherlands law, only the non-paying shareholder is liable and then only for the amount yet to be paid on the share(s) or capital contribution.
The text should be elaborated and make clear what does a "written announcement as regulated" means.

Art. 27.1 third par.: again it seems unreasonable to hold the "representative and other relevant members" liable for all debts of the company.

Art. 27.2.e: as commented earlier, it is advised to have the value of capital contributions other than in money appraised by a registered accountant.

Art. 27 general: a paragraph could be added setting out the purpose or "power" of the certificate (e.g. does it constitute evidence that the person whose name is mentioned in it is member for the amount of the capital contribution or does it serve as identification for members?) and stating whether it can be transferred, and how.

Art. 28 general: also here a paragraph should be added setting out the purpose or "power" of the register: does it constitute evidence that the persons mentioned therein are members of the company and of their proportional capital contribution for allocating profits and dividends? What happens if there is a discrepancy between the data in the certificates and in the register? Moreover, a paragraph could be added that someone (the director?) has the obligation to keep the register up to date.

Art. 29.1.a: could read as follows: "Be distributed a proportional share, in accordance with his proportional capital contribution, of the profits of the company as determined by the meeting of members after deduction of the amount added by the meeting members to the retained earnings reserve and after due tax and other liabilities of the company have been paid".

Art. 29.1.e: insert after "company": "after all its obligations and liabilities have been fully and finally settled".

Art. 29.1.f: to be divided in two paragraphs.

Art. 29.1.g: it is not necessary to include this provision because if someone suffers damage caused by someone else's failure to meet a legal obligation, he should always be able to sue. With this provision doubt may be created if the member can file lawsuits for other reasons.

Art. 29.2: under Netherlands corporate law, the percentage is 10%.

Art. 29.5 line 2 and 4: the reference should be to the chairman of the meeting of members.

Art. 30.1 first sentence: this concerns the same matter as Art. 26.1.a, see my comment on that Article; according to the draft text, the member will be liable not only for his own debt, i.e. the unpaid (portion of the)capital contribution, but also for (all or part of) the debts of the company, even though the company is a separate legal entity. Is this the intention?
Last sentence: it does not seem fair to hold all other members liable (jointly and severally?!) for all debts of the company if one member withdraws. Moreover, it should be made clear that "withdraw" is different from the buy-back of Art.31 so that Art. 30 will not be triggered by a buy-back.

Art. 31 general: the buy-back of capital contributions seems the equivalent of the repurchase by a Dutch private company of its own shares followed by the cancellation of those shares by the company. (Cancellation of shares occurs when the repurchased shares are not held by the company itself as treasury stock but when the issued charter capital actually is reduced as seems inevitably to be the case in Art. 31. I discuss both the repurchase and the cancellation of shares in a limited company under Dutch law.)
Further to an EU Directive, Netherlands corporate law provides that a private company may only acquire shares (equivalent of capital contributions) in its own capital if, roughly speaking, (i) its equity capital minus the price payable for the buy-back is not smaller than the paid and committed capital contributions plus certain legally required reserves, and (ii) the total nominal amount of the capital contributions that are bought back and that are already held (i.e. bought back in the past) by the company, does not exceed 50% of the total contributed and committed capital contributions. Moreover the legal capital (Euro 18,000) must remain intact and outstanding. The purpose of these restrictions is to keep the capital of the company to some extent intact, for the benefit of the survival of the company and to protect creditors.
Netherlands law does not limit the buy-back to certain events such as mentioned in Art. 31.1.a-c. It seems to me that limiting the buy-back to such events may trigger "artificial behaviour", i.e. members who want their money back will vote against certain resolutions just to meet the criterion.
For reduction of the capital (as will happen if Art. 31 is applied), a procedure exists with the intention to protect creditors: the resolution to reduce the capital must be deposited with the business register and be published in a national newspaper; the company must give security for any creditor who so requests; during two months after publication in the newspaper any creditor can oppose the capital reduction at the court and demand security. The capital reduction does not become valid as long as opposition can be filed and until the opposition has been withdrawn or been rejected by the court.
See also my comment on Art. 43. If the conclusion is correct that a buy back of capital contribution inevitably leads to a reduction of the charter capital, Artt. 31 and 43 should be combined.

Art. 31.2: unless all parties agree on the price, determination of the price should preferably be done by an independent registered accountant.

Art. 32 general: please add how the transfer takes place legally. Will a written contract, signed by transferor, transferee and by the company(?) be required, and/or transfer (and

amendment?) of the certificate? What happens to the register? Will a transfer be valid without transfer or cancellation of the certificate and without amendment of the register? See (my comments on) Art. 27.2 and 28.

Art. 32.1: it should be added that if the members do not agree on the price, the price will be determined by an independent registered accountant.

Art.32.2: Suggested text: “The selling member will be free to transfer the capital contribution, to the extent that it is not purchased by other members at the price determined by an independent registered accountant, to one or more third parties at that same price”.

Art. 33 general: also for all the situations described the question arises how the transfer is effectuated and whether the certificate or register must be amended.

Art. 33.3: for the buy-back, see comment on Art.31.

Art. 33.6: it is to be doubted whether this provision - which creates a good opportunity to avoid the lock up nature of the limited liability company – is wise.

Art. 34: first line, after “2” insert “to and including 10”; line 3, after “have” insert “,in addition,”; last sentence add at the end: “except for temporary absence for business or holiday travels abroad” (or state that they must have their place of regular residence in Vietnam).

Art. 35.2.d: The first line (“Deciding resolutions … transfer through”) can be deleted because the acts of large borrowings, lendings etc are important enough to require members’ approval in any event; the purpose of the loans (marketing etc.) is irrelevant for the approval requirement.
To the borrowing, lending and sale of assets, please add, purchase of assets, issuing guarantees or surety or the creation of a security right over more than e.g. 25 or 50% of the assets, changing the normal business of the company and hiring or firing more than a certain percentage of the labour force. Please note that issuing a guarantee may have the same financial effect as borrowing.

Art. 35.2: before #distribute” insert “retain or”.

Art. 35a.1: the text could be elaborated so as to address the following questions: is the authorisation required or are members free (not) to appoint a representative so that they can exercise their rights as members in person? Do individual members/natural persons have to appoint an authorised representative or are they free to do so? If the member is a legal entity, the authority to represent the member in meetings etc could be part of the rights and duties of the director of the entity, as described in, e.g. Art.41.2.
This article should also clarify if the authorization of a representative is valid only for each individual meeting or may be made for meetings generally or may be included in a general authorization for many purposes.

Art. 35a.1.d: how much time would the representative be expected to spend on these duties? It seems unusual that a representative will be entitled to salary and allowances for participating in a meeting.

Art. 35a.1.dd: what does this wording mean?

Art. 35a.1.e first sentence: see Art. 35a.1.c and can be deleted.

Art. 35a.2 first line, in combination with par. a and b, is not clear.

Art. 35a.2.b: seems unnecessary, it may be left to the member to decide who its representative will be. If the person is not knowledgeable, voting instructions can be given.

Art. 35a.3.a: substitute “have been convicted” for “being sued”.

Art. 35a.3.b: if the prohibition applies to proprietors of any private enterprise, any partnerships, meeting of members of any company and board of directors of any company, it seems very broad and the reason herefor is not entirely clear to me. Could the language be limited to partnerships etc. that, e.g., are competing or have a conflicting interest with the company?

Art. 35a.3.c: see comment on Art. 3.14 for suggested definition of “related persons”. The words “of companies” are too broad; I guess the intention is “of this company”.

Art. 35a.4: can an employee of the state (agency) that contributes more than 50% to the capital of the company, be an authorised representative? (As an aside: can there be parent and subsidiary companies if the state contributes more than 50%? See the definitions in Art. 104b).

Art. 35a.5: at the end add “(including the company and the other members”).

Art. 36.1: The combination of the functions of chairman of the meeting of members and of general director does not seem fortunate: it leads top a cumulation of functions and responsibilities while these two functions should balance and check each other. How can or will a director be supervised if he is the chairman of the meeting of members? My advice is to insert the word “not” before the word “simultaneously”.

Art. 36.5: delete the words “… the chairman … is authorized” from the first to the third line. It should be the members who select a substitute for the incapacity of the chairman.

Art. 37.1 first line: please add by whom the meeting will be convened. Last sentence: there seems no reason why (all) meetings must be held at the head office. In principle, the members should be free to meet where they want to or at least at other offices of the

company. Words like “or other (branch) offices or sites of the company” or “at the places mentioned in the charter” could be added..

Art. 37.1a.d: the recommendations should be sent not one day but, e.g. [5] days, before the opening ceremony, and not only to the chairman but to all members. The term should in any case be longer than the term with which documents must be sent to members in accordance with Art. 37.2.

Art. 37.2: all documents (including recommendations and suggestions) for the meeting must be sent to all members at such time that they have the opportunity to study the documents; 2 days is too short, at least 5 working days before the meeting seems appropriate. In the Netherlands, agenda and documents must be sent at least 15 days in advance.

Art. 37.3 and 4: who will chair the meetings in these events?

Art. 38.1-3: it is to be expected that 1st, 2nd and 3rd meetings will be scheduled to take place consecutively on one day. If this is not the intention, a prohibition hereof must be included in these paragraphs.

Art. 39.1 second sentence: add at the end: “and not by consultations in writing” [at least, if this is the intention].

Art. 39.2.b: please consider other important matters for which 75% of the total capital is required, such as borrowing, lending, giving guarantees, surety or security for amounts of, e.g., 50% or more of total assets, the buy-back of the capital contribution of a member or the enlargement of the capital by contributions from existing members or from new members and admitting new members to the company.

Art 39.3: under Netherlands corporate law, resolutions may be adopted in writing (by consultation, outside a meeting) only if all members/shareholders vote in favour. The reason for this requirement is that if no meeting is held the member who is against a certain decision may find it difficult to present his view and convince other of his view.

Art. 40.2: usually minutes are reviewed and signed at the beginning of the next meeting. Passing of the minutes prior to the closing of the meeting may lead to delays.

Art. 40.2.r: items “invalid votes” and “abstain” may be added and a provision whether invalid votes and abstentions will be included in the count of the votes.

Art. 40a: see comment on Art. 39.3. In several sections, substitute “member” for “shareholder”.

Art. 41.2.i: after “distribution” insert “or retention”

Art. 41.3.c: this provision should be reconsidered. Informing people, particularly creditors, that a company cannot pay its debts, will undoubtedly cause creditors to demand immediate payment and lead to bankruptcy and demise of the company. I suggest to delete the obligation to advise creditors and the personal liability of the director if he fails to perform the obligations of this Article.

Art. 41a.3: please clarify in the text whether this provision means that the chairman, any member and the director must inform the other parties of any enterprise in which he owns a majority participation?

Art. 41a.4: this provision repeats Art. 41.3.c; either one (but preferably both) of these Articles should be deleted. See comment on Art. 41.3.c.

Art. 41a.6: this prohibition could be extended to all members.

Art. 41b.2.c: how is "related person" defined –by blood, marriage and adoption? To which degree? See comment on Art. 35a.3.c and suggested definition in comment on Art. 13.4.

Art. 41b.3: please define "related people" (see comment on Art. 35a.3.c) and "managers".

Art. 41c.1: it is surprising to see that members will be entitled to salary and bonus because they are the owners and not employees of the company and they will be entitled to the profits of the company (and those profits will actually be smaller if they receive salary).

Art. 41c.4: will the bonuses also be considered business expense?

Art. 42, general: this Article could be combined with Article 39 so that all acts, transactions and contracts that need approval by members with certain majority percentages are set out in one provision.

Art. 42.1.b+d: please define "related persons" (see comment on Art. 3.14).

Art. 42.1.d: is it ¾ of the members or of the votes cast?

Art. 42.2 lines 3-5: the text should clarify that only the persons who actually entered into the prohibited contract for the company and for the other party will be liable (jointly and severally?).

Art. 43.1.b: please add language as to who will appraise any increase in the value of assets. Creditors and other with whom the company does business will be protected better if the appraisal will be performed by a registered accountant.

Art. 43.3+4: see the comment on Art. 31, buy-back and cancellation of capital contributions/reduction of capital, and the procedure under Netherlands law for reduction

of capital, including the opposition that any creditor may file with the court during two months.
The words in par. 3.c “assure to discharge its due debts and other liabilities” do not offer protection to creditors whose debts are not yet due but may become so in the near or distant future. Moreover, how can it be ascertained that a complete list of due debts will be made when no statement by a registered accountant is required?
Furthermore, it seems that a reduction of capital will always accompany the buy-back of capital contributions referred to in Art. 31. If this is correct, it is suggested to combine these two Articles.
It should be added that the cancellation may not reduce the capital below the legal capital.

Art. 44: is the intention that profits may be distributed over any year only if the company has made a profit over that year? Would the company be permitted to distribute profits (made in previous years) from, e.g., accumulated retained profits over previous years? Under Netherlands law, a company may distribute profits only to the extent that its equity capital exceeds the amount of the paid and committed capital contributions plus certain reserves that companies must keep under Netherlands law (e.g. in case of revaluation of assets).
I have not seen any provision in the draft UEL regarding reserves (e.g. retained profits reserve but there may be other reserves) or regarding distribution from those reserves.

Chapter III Part II

Art. 46 general: a provision should be added that the Articles of the UEL governing the limited liability company are applicable to the single member limited liability company except as follows from this Part II of the UEL.

Art. 46.1: again, is the intention that the (only) member is liable for the debts and obligations of the company up to the amount of the charter capital or is the member liable for his own obligation, i.e. to pay the capital contribution so that only the company (a legal entity) is liable for its own debts (unless another party such as the member issues a guarantee for its obligations)?

Art. 46.2: how does the member make his capital contribution transferable? By a simple statement in writing?

Art.47.a2: add “and after all its liabilities have been fully and finally settled”.

Art. 47.1.c: does the second half of the text say the same as Art. 46.2? If that is the case, the text can be deleted.

Art. 47.1.e: amend “purchase or sale of assets”.

Art. 47.1.e1amend: “approve lending, borrowing, issuing guarantees, surety, creating security and other contracts …”.

Art. 47 1a.: see comment on Art. 35a - why should a (sole) member/individual natural person of the company appoint an authorised representative, why can he not exercise his own rights within his own company? If the member is a legal person (a company), its legal representative (director etc) could represent the member in the limited liability company; this authority should be included in, e.g., the description of the rights and duties of the director in Art. 41.

Art. 48: if the intention is that Art. 31 (buy-back) and Art. 43.3 (reduction of charter capital) do not apply to the single member company, that should be made clear. If this is the case, what is the reason?

Art. 48.2: how is the capital contribution transferred, what are the legal requirements? Simple contract in writing, signed by transferor, transferee (and company?)?

Art. 49.1: see comment on Art. 15.8 - the UEL should make clear if the function of "company's representative at law" entails that the representative has full power (alone or together with somebody else?) to represent and bind the company and if restrictions on his power in the charter (e.g. approval of member required) have effect towards third parties with whom the company (though the representative) enters into transactions.

Art. 49.2: is "supervisor" in line 3 the same as "controller" in Art. 49.1? Is it logical to provide for more authorised representatives if there is one member and is there no chairman if there is more than one authorised representatives?

Art. 49b: please add that legal persons cannot be authorised representative, director or supervisor (as seems the intention).

Art. 49.3: please define "related persons" (see comment on Art. 3.14).

Art. 49b.3.dd: amend first two lines: "Persons who have been convicted for a crime of corruption, embezzlement …". What do the words "individual whose prosecution has been cleared for less than 3 years mean" mean? I trust that the intention is not to restrict people who have been prosecuted but discharged less than 3 years ago.

Art. 49d: the text of this Article is not entirely clear but if its intention is to protect the owner of the company, that should be made clear and Art. 49d.2 should provide that the draft of the contract must be sent to the owner as well. It should also be provided that the draft must be approved by the owner (and possibly by the "supervisor") before it can be signed.

Art. 49d.1: define "related person" (see comment on Art. 3.14).

Art. 49d.2: what does "more favorables and less difficulties" mean? More favourable than what and for whom? What is the criterion and who determines that something is more favourable?

What is the purpose of sending the draft of a contract? If the draft is to be approved that should be stated.
Under Netherlands law, a private company with limited liability must notify the trade register (equivalent of the business register) of the (personal) data of its sole shareholder/member and transactions between the company and the sole shareholder must be confirmed in writing.

Art. 49d.4: why can the capital of a "normal" limited liability company be reduced while the capital of the single member company cannot?

Art. 50.2: please add a reference to Art. 110.1. Can a more-than-2-member company also change to a single member company?

Chapter IV

Art. 51.1.a: the implications of "equal portions" is that all (ordinary and preference or other) shares must have the same nominal (or par) value. Is this the intention?

Art. 51.1.b: see comment on Art. 26.1.a and 46.1: Netherlands corporate law expressly provides that the liability of the shareholder is limited to paying the nominal value of the shares subscribed by him. The company is liable for its own debts and obligations.

Art. 51.1.c: it would be clearer if the shares were freely transferable by law, and if that is the intention, that should be stated. If the intention is that shareholders can make their shares freely transferable, it should be stated what they have to do to achieve this. Some article in this chapter of the UEL should set out how the shares are transferred (written contract? Delivery of share certificate? Amendment of list of shareholders? Etc.).

Art. 51.1.d: "organisations" = "enterprises"? After "three" insert "or more".

Art. 52: while other provisions suggest that all shares must be registered shares, please add a paragraph stating explicitly that ordinary and/or preference shares shall be shares to bearer or registered shares. (In Dutch shareholding companies they can be both but ordinary shares in this type of company are usually bearer shares while preference shares are usually registered shares).

Art. 53.1.b: leaving the decision of what dividend amounts are distributed to which shareholders to the shareholders meeting may lead to decisions by a majority to the detriment of minority shareholders and should be avoided. The preferred solution is to provide (as does Netherlands corporate law) in this Art. 53.1.b that each ordinary share (assuming that all shares have the same nominal value and has been fully paid up, see comment on Art. 51.1.a) entitles the holder thereof to the same dividend amount. A second best solution would be to provide that the dividend shall be distributed as set out in the charter but also in this case a majority of shareholders will be able to deprive other

shareholders of a proportional share in the profits. Dutch law provides that no shareholder can be excluded from a share in the profits.

Art. 53.c1: this provision repeats Art. 51.1.c and either provision may be deleted. See also comment on Art. 51.1.c.

Art. 53.1.d: substitute “dividend preference shares” for “preference shares”.

Art. 53.1.dd: stipulation of the charter regarding shareholders rights should remain within the limits set out by the UEL. Therefore, after “Charter” add “subject to the provisions of this Law”.

Art. 53.2 line 1: if “within” means “during”, after “months” the words “preceding and including the date of the nomination or request referred to below” may be inserted.

Art. 53.2.a and Art. 53.3: under Netherlands law (and I would think that the law of most European countries is similar on this appoint) the Board of Management is appointed (with a couple of exceptions) by the shareholders meeting (sometimes upon the recommendation of holders of special (“priority”) shares or of the supervisory board) and not by a certain group or percentage of the ordinary shareholders. The system that the entire shareholders meeting appoints the entire Board promotes that both shareholders and Board members see themselves and each other as persons and organs that (have to) act in the interest of the entire company and not in the interest of some shareholders. The system of the current draft UEL may well lead to the formation of factions within the institutions of companies and that should be avoided. It may also lead to the appointment of Board members, not because of their expertise (e.g. finance, operations, sales, etc.) but because of factional or personal politics. I strongly suggest that the UEL of Vietnam provide that the number of members of the Board of Management be mentioned in the Charter and that all board members be appointed by the shareholders meeting. Moreover, in Art. 53.2.a, what does “nominate” mean exactly – propose or appoint? How many representatives may a group of 10% shareholders nominate?

Art. 53.2.b: Under Netherlands law shareholders holding at least 10% of the issued shares may convene a shareholders meeting for any reason and I don’t think that this right of shareholders should be curtailed by referring to certain limited reasons why the 10% shareholders may convene a meeting. Accordingly, I suggest that the specific reasons why shareholders may convene a meeting under this Art. 53.2.b (i.e. lines 2, 3 and 9-13) be removed. Among the detailed data required from each shareholder, the “time of registering shares” could be deleted.

Art. 53.2.c: does this provision add anything to Art. 53.1.c2?

Art. 53.2.c1: does this provision mean that law suits against (members of?) the Board of Management and the director cannot be filed for reasons other than mentioned here or by individual (or groups of) shareholders that own less 10% of the ordinary shares outstanding?

Art. 53.3: I find the rules governing the appointment of members of the Board rather convoluted and confusing. Who decides how many groups there will be, how big they are and how many Board members they may nominate? See also my comments on Artt. 53.2 and 53.3.

Art. 54.1 see comments on Art. 51.1.b and other Articles on the liability of shareholders for debts of the company. Is "withdrawing capital from the company" different from the buy-back of shares by the company under Artt. 64 and following?
Why should all members of the Board of Management be liable, jointly (and severally?), for all debts of the company if a shareholder withdraws all or part of his capital (i.e. if the company buys back some or all of his shares in accordance with the UEL)?

Art. 54.4, add at the end: "subject to the provisions of this Law".

Art. 56.1: under Netherlands law, payment of the preferred dividend is subject to the same restriction as dividend on normal shares, i.e. dividends may be paid only to the extent that the equity capital exceeds the amount of the issued share capital (plus certain reserves that a Dutch company may be required by law to keep). The charter of a Dutch company may provide that the preferred dividends that cannot be paid during one or more years because this criterion does not permit it, will be added to and be paid with the dividends in the first year when the company may again distribute dividends (shares that carry this right are called "cumulative preference shares").
The last line of Art. 56.1 should provide that the amount or percentage of the fixed and bonus preferred dividend shall be stated in the Charter and the share certificate.

Art. 56.2.b: the Charter must describe the formula according to which the "part of the remaining assets" that is paid to holders of preference shares, is calculated. Without such formula, nobody knows who will be paid how much. Moreover, Art. 53.1.d provides that ordinary shareholders shall receive part of the property … after the [dividend] preferential shareholders. Therefore, Art. 56.2b should state that dividend preference shareholders should receive part of the assets after all creditors have been paid but <u>before</u> (*not after*) other shareholders have been paid. Accordingly, Art. 56.2.b should read:
"If the company is dissolved and liquidated, receive, in proportion to the number of dividend preferential shares held by the shareholder, such amount of the assets of the company remaining after all creditors of the company have been fully and finally paid and before any payment is made to holders of ordinary shares".

Art. 56.2.c: is the intention that dividend preference shares are transferable (other than voting preference shares)? The text should clarify if this is the case or not.

Art. 57.1 the price or the formula for calculating the price at which the company shall buy back these shares should be stated in the Charter (and the certificate). The same applies to the circumstances under which these shares may be bought back.

Please note that these shares may be considered (e.g. by certain tax authorities or by accountants/ auditors) as debt of the company because the (nominal?) amount of the shares is repayable at request to the holder thereof.

Art. 57.2: see comment on Art. 56.2.c.

Art. 58.1: what does the 3 year period refer to? It seems that the founders shares must be paid (immediately) after the business certificate has been granted.
Why should other founding shareholders be liable jointly (and severally?) if one shareholder does not perform his obligation? It would seem preferable to hold only the defaulting shareholder liable.

Art. 58.4: the text should explain if the limitation on the transferability of shares of founding shareholders applies at all times or only as long as those founding shares have not been fully paid.

Art. 59: the initial paragraph suggests that share certificates constitute or prove ownership of the shares to which they relate, but according to Art.61.2+3 this is not always the case. There should be one Article that states clearly what the purpose and legal effect of share certificates and shareholders register are, when a certificate is issued and when the register exists and is updated (upon submission of documentation, payment of price, etc.), whether one or both constitutes or proves ownership and whether the certificate or registration entitles the person holding the certificate or being registered to all shareholders rights, including the right to vote and dividends. Is (delivery of) the certificate necessary to transfer the shares to which it refers or does it identify the holder of the certificate as shareholder?
What does “nominal or non-nominal” mean? See also Art. 59.5 last word.

Art. 59.6: I assume that the certificate will contain a summary of the rules regarding the transfer of shares as set out in the UEL itself (Art. 61.4) and in further detail in the Charter of the Company.

Art. 60: this Article should refer to or be combined with Art. 61.2 that provides that by the registration in the register the person to whom shares are issued and transferred becomes shareholder, unless certificates are issued. See also comments on Art. 59 and 61.3.
A paragraph should be added stating who is responsible (the director?) for keeping the register up to date (in case of transfers of shares or other changes of shareholders).

Art. 60.1.c: value = nominal value?

Art. 61.1: The words “ the Board of Management has the right to decide on the time and types of the offer price of the shares to be offered as stipulated in the company’s charter” are not clear to me. The only thing that will be stated in the Charter is the types of shares (ordinary and preference shares). The time and price (and the amount or number) of the shares to be issued will not be stated in the Charter. With respect to the time and amount

of the shares to be issued, reference should be made to Art. 70.2.a which states that the shareholders meeting shall decide the types and total amount of shares of each type the company is authorised to issue. The system thus appears to be: the Charter states the total amount of the [charter] capital for which shares may be issued and which types of shares exist; the shareholders meeting decides up to which amount and of which type shares may or (must?) be issued (within a period to be determined by the shareholders meeting?). Thereafter, the Board of Management may implement this decision and decide the specifics of the issuance (timing, amount, type, price).Please amend Art. 60.1 accordingly.
Under Netherlands law, the authority to issue shares, including the determination of the amount, price, time and type, is with the shareholders meeting. However, the Charter or the shareholders meeting (or if there are several types of shares, the meetings of the types of shares that are affected by the issue) may delegate this authority to another corporate body (mostly managing board, sometimes subject to approval by the supervisory board) for renewable periods of 5 years.

Art. 61.1.c: this article should clarify whether the second sentence "Where this is the case … of the market price." refers to each of paragraphs a, b and c or only to c. Please add that shares may not be issued below their nominal value.

Art. 61.1.c second paragraph: substitute "the value of the shares" for "the company's value".

Art. 61.2a.a: one announcement in 3 different nationwide newspaper is better that 3 announcements in 1 newspaper.

Art. 61.2a.c: the text should clarify whether the buyer to whom a shareholder transfers his priority rights must already be a shareholder or may be an outsider.

Art. 61.2a.d lines 4 and 5: the words "the remaining [shares] will be managed by the Board of Management [which] can distribute these shares … under conditions not better than the previous conditions …" leave room for uncertainty; e.g. what will be the status of shares that are issued but cannot be distributed during a certain period because there are no buyers, will they be held as treasury stock by the company itself for issuance at a future date? Will such shares be included for the vote in meeting and be entitled to dividends? Substitute "not more favourable for the buyer(s) than …" for "not better".

Art. 61.2: with respect to newly issued shares, is payment of the issue price and recordation in the register all that is required to make the subscribing shareholder or buyer of the shares shareholder? Does the act of issuing new shares not require any form or documentation? I assume that the issuance needs to be described in a formal shareholders resolution and a resolution of the board of management; does there have to be a "deed of issuance" signed by the company and the subscribing shareholder or buyer? See also the comment on Art. 60.1 and the issue of who is responsible (the director?) to keep the register up to date.

With respect to the transfer of existing shares: the provision that (existing) shares shall be deemed transferred when they are paid in full and recorded does not seem correct; these shares must already have been paid when they were issued so that only recordation in the register would make the transferee of shares shareholder without other formality (documentation) being required. This does not seem consistent with Art. 61.4 (see comment below).

Art. 61.3: the system that the company may decide that share certificates may or may not be issued, is ambiguous and may be a source of disputes in view of the important consequences this may have for being considered a shareholder. It is preferable that this Article provide unequivocally that all shareholding companies either must or must not issue share certificates. If the current system is maintained, Art. 61.3 must make clear who (preferably the Charter, otherwise the board of management or shareholders meeting) will decide on the issue of share certificates and that this decision will apply to all shares issued by the particular company.
It must also be made clear what the purpose of the share certificates is. The implication of Art. 61.3 seems that if there are no certificates, the entry in the register constitutes and proves ownership while if there are certificates, the certificates constitute and prove ownership.
Furthermore, a provision must clarify whether someone who is not registered or does not have a certificate, may argue (in court) based on transfer documentation, witness statements etc. that he really is the shareholder.

Art. 61.4 end of first sentence: substitute “at cost” for “upon a fee quoted by the company”.

Art. 61.4.d: insert after “if any,” the words “and shall hold the company fully indemnified and harmless from and against any damage,”

Next Art. 61.4: the English translation (particularly the words “in writing as usual or by hand lending”) does not make clear how exactly ownership of shares is transferred. I suggest that a written contract always be required, to be signed by transferor and transferee. It should also be provided that upon submission of a notarised copy of the contract to the company and [if there are certificates:] of the original of the share certificate, if any , the company represented by its director shall amend the shareholders register, [cancel the returned certificate and issue a new certificate to the transferee (and to the transferor if he has sold only some of his shares)].
With respect to the words “freely convertible” [=transferable?]: the text should clarify if the transfer of shares may be restricted in the Charter.

Art. 62.1a: this article should clarify if the new bonds must be included in “all debts and other obligations” that must be deducted.
This article should clarify the meaning of “guaranteed bonds”.

Art. 62.1b.a: does this paragraph mean that a company may not issue bonds if during the previous 3 years it has not been able to repay its debt under and pay interest on other bonds issued in the past or has not been able to pay other debts during such period?

Art. 62.1b.b: the text should clarify how many previous consecutive years are at stake.

Art. 63: Netherlands law provides explicitly that the right of the company on work or services (to be performed by somebody) cannot be used as payment for shares.
This Article should clarify if shares can be paid by set-off against a debt of the company to the buyer of the shares or by the transfer to the company of a receivable (i.e. the debt of a third party).
It should be added that any payment in (Vietnamese or foreign convertible) currency must be confirmed in writing by the bank in whose account the money received for the company and that the value of any payment other than in money must be appraised by an independent registered accountant.

Art. 64-65: see the comments on buy-back and cancellation of shares of limited liability companies, Art. 31, which apply with some modifications as follows: the buy-back of capital contributions seems the equivalent of the repurchase by a Dutch company of its own shares, but not followed by the cancellation of those shares by the company (see Art. 66.2).
Further to an EU Directive, Netherlands corporate law provides that a company may only acquire shares in its own capital if, roughly speaking, (i) its equity capital minus the price payable for the buy-back is not smaller than the issued share capital plus certain legally required reserves, and (ii) the total nominal amount of the capital contributions that are bought back and that are already held (i.e. bought back in the past) by the company, does not exceed 10% (different from the 50% for private companies) of the total issued share capital. Moreover the legal capital must remain intact and outstanding, the Charter must allow the repurchase and the shareholders meeting must authorize the board of management to actually repurchase shares. The purpose of these restrictions is to keep the capital of the company to some extent intact, for the benefit of the survival of the company and to protect creditors.
Netherlands law does not limit the buy-back to certain events such as mentioned in Art. 64.1. It seems to me that limiting the buy-back to such events may trigger “artificial behaviour”, i.e. members who want their money back will vote against certain resolutions just to meet the criterion.

Art. 64.2: determination of the price could always be done by an independent registered accountant.. The alternative is to refer disputes to the accountant instead of the court. In both cases court proceedings could be avoided.

Art. 65: Under the current wording, successive buy backs may take place up to 30% of those issued shares each time until the amount of the issued shares is reduced to nil. If this is not the intention, the words should be changed.

In the first sentence, the text should clarify if the shares bought back under Art. 64 are included in the 30% maximum. If this is the case, the amount of issued ordinary shares is reduced each time shares are bought back.

Art. 65.2: it could be added that the price can be determined by an independent registered accountant.

Art. 65.3: according to the words “is entitled to” the company may buy back shares either in the same proportion from each shareholder or in any other way (e.g., all shares from one shareholder, none from the others). Is this the intention?

Art. 66.2: please clarify whether the provision that shares bought back by the company are not included in “issued shares” means that they are not included in counting the votes at shareholders meetings and not entitled to cast the vote and to profits. Please also clarify if the Board may (re-)issue any such shares anytime in accordance with the rules applicable to the issue of new shares.
Moreover, if the intention is that shares (that have or have not been bought back) cannot be cancelled, this should be stated expressly.

Art. 66.2a: this provision may imply that the person whose shares have been bought back but who has not yet received the purchase price can still exercise “his” shareholders rights. Is this intended?

Art. 66.3: the risk of warning creditors is always that they all scramble for money and cause liquidity problems for the debtor/company. I suggest to delete this paragraph.<

Art. 67.1: see comment on Art. 44. is the intention that profits may be distributed over any year only if the company has made a profit over that year? Would the company be permitted to distribute profits (over previous years) from, e.g., accumulated retained profits over previous years?
Under Netherlands law, a company may distribute profits only to the extent that its equity capital exceeds the amount of (more or less) the issued share capital plus certain reserves that companies must keep under Netherlands law (e.g. in case of revaluation of assets).
I have not seen any provision in the draft UEL regarding reserves (e.g. retained profits reserve but there may be other reserves) or regarding distribution from those reserves.
In the first paragraph of Art. 67.1, what does “contribution to the company public funds” mean?
Last paragraph of Art. 67.1, add at the end: “according to the semi-annual accounts of the company”.

Art. 67.1b line 2: substitute “in the form of shares” for “by” before issued.

Art. 67.2 line 2: The words “management shall make a list of shareholders” do not seem right: dividend must simply be paid to whoever is identified as shareholder.

Art 68: if the intention is that each individual member of the Board of Management is liable jointly and severally for all debts of the company, that penalty is much too strong. I would even consider liability of the members of the Board together for only the amount paid to (and to be repaid by) the shareholder not entirely appropriate.

Art. 70.3.dd: what does "time of authorization" mean? Period for which authorization is valid?

Art.70.3.e: what is the difference here between the authorised representative and the legal representative?

Art. 71.1a: is the experience in Vietnam that the annual accounts are audited and ready for submission to and approval by shareholders meeting within 4 months after the end of the financial year? Under Netherlands corporate law, the period within which the accounts must be submitted equals 5 months after the end of the financial year which period may be extended by the shareholders meeting by no more than 6 months. See also the comment on Art. 93.

Art. 71.1a.a: after "report" add "and the financial accounts consisting of the balance sheet and the profit and loss account".

Art. 71.3 line 3: change the cross reference from Section 1 to Section 2.

Art. 71.3: last two paragraphs are inconsistent. Either one should be deleted.

Art. 71.4: see comment on Art. 67.2: it must be clear "automatically" who the shareholders are and can attend the shareholders meeting.

Art. 72.1: see also Artt. 59 and 61.3 and comments thereon, and clarify what the purpose and role is of share certificates and shareholders register to confirm or create shareholders rights, including right to attend and vote at meetings.

Art. 73.1: repeats, and should be combined with, Art. 71.4.

Art. 73.2 line 4: three days prior to the meeting is too short; the period should be such that the proposals can and will be included in the invitations for the meeting referred to in Art. 74.1.

Art. 74.1: the notice period (the number of days that invitations must be sent prior to meetings) should be the same for listed and unlisted companies; it should be made clear whether working days or calendar days are concerned and whether the day when the invitation is mailed and the day of the meeting are included in the number of days mentioned. Under Netherlands law the invitation must take place no later than the 15$^{th}$ day before the date of the meeting. The invitation should include the agenda of the meeting and relevant documents. Netherlands law provides that if the period has in fact

been shorter or no invitation has been sent, valid resolutions can only be adopted unanimously in a meeting where the entire issued share capital is represented.

Art. 74.2 and 75.1: the articles should clarify what happens if the invitations or the appointment of a representative do not follow the sample of the company.

Art. 75.1a: this article should clarify whether the shareholder (or the authorised representative) who has issued the authorisation can revoke (cancel) the authorisation or can come to the meeting and vote in person. Please also clarify what subparagraphs b (the appointer refuses the appointment) and b (the appointer refuses the authority) mean.

Art. 75.1b: what does it mean that section 1a will not be applicable: will the authorised person then lose the authority to vote, and why is this the case?

Art. 75.2: is the different approach with Art. 67.3 (dividends for transferor, vote for transferee) deliberate?

Art. 76.1+2+3: it may be expected that the first, second and third meeting will all be scheduled and held on the same day. This seems practical but if the intention is not to allow this, paragraphs 2 and 3 should state that the next meeting must be held at least [X] days after the previous meeting.

Art. 76.4: with respect to changes of the agenda of the meeting, Netherlands law provides that matters that were not included in the agenda may only be decided upon unanimously in a meeting where the entire issued share capital is represented. This is to protect shareholders who are not able to attend or, based on the original agenda, decided not to attend.

Art. 76a.2a line 2: should “Management Board” read “shareholders meeting”? In line 4, the text should clarify whether “members” refers to members of the Management Board or to shareholders.

Art. 76a.2b: this article should clarify what “In other cases” means here and who the person is who signs the decision to convene the meeting. Does this apply when 10% of the shareholders request that a meeting shall be held?

Art. 76a.3: it seems rather unusual that the meeting must approve its agenda; normally all items of the agenda are discussed. It is also highly unusual that the agenda mentions the timing for each issue – meetings last as long as they last.

Art. 76a.5: the text should clarify whether voting must or may take place orally (in public) or in writing (by secret ballot) In the Netherlands “matters” (like approval of the accounts etc) are usually voted upon orally, publicly, but voting on persons (appointments etc.) in writing, by ballot.

Art. 76a.7.b+8.b: these provisions can be deleted.

Art. 77.1.d: add “and the financial accounts”.

Art. 77.1.dd: add “and a petition for bankruptcy”.

Art. 77.2: this article should clarify whether the required approval percentages apply to any resolutions adopted in any meeting or only to resolutions on the matters set out in Art. 77.1.

Art. 77.2.a+b: the text should clarify if “participating shareholders” means all shareholders of the company or all shareholders attending that meeting. In both meanings, abstentions, blank votes and invalid votes actually have the effect of no-votes. Only if a “normal majority” of the votes cast were required, the question if invalid votes, blank votes, and abstention are included in the count, becomes relevant.

Art. 77.1.c: what does “by accumulated calculation of votes” mean?

Art. 77.3: Netherlands law provides that resolutions can be adopted outside a meeting, by correspondence, only unanimously with the approving vote of all shareholders. The reason is that, the adoption of resolutions other than in a meeting, may make it more difficult for (minority) shareholders to express their opinions and convince other shareholders.

Art. 77a: the text should clarify whether this Article applies only to resolutions adopted by correspondence. If that is the case, Art. 77.3 can be moved to Art. 77a and Art. 77a.1 should make an exception for the matters referred to in Art. 77.1(a-dd).

Art. 77a.5.dd: add “by at least 75% of all votes held by all shareholders or a different percentage mentioned in the Charter.”

Art. 77a.5.e: how are the ballot counting supervisors elected if no meeting is held (see Art.76a.2.e)?

Art. 78.2: practice in the Netherlands is that considerable time is spent after meetings to finalize the minutes and that the minutes of a meeting are open for comments, changes and adoption as the first item on the agenda of the next meeting. Completion and adoption of minutes before closing the meeting may cause considerable delay.

Art. 78.3: there is no reason to hold the chair and secretary responsible for the contents of the minutes after and because those minutes are approved by the meeting.

Art. 79: please add a paragraph that Art. 78 does not limit anybody’s right to argue that a resolution should be cancelled or nullified at any time as a defence against legal action taken against him.

Art. 80 seems inconsistent; par. 1 provides that the Board of Management has all rights and power except those that are preserved (by and in the UEL?) to the shareholders meeting; this would make the enumeration of specific powers of the Board unnecessary. However, par. 2 mentions a number of specific rights of the Board, suggesting that the Board has no other rights than listed, and par. 4 states that the Board must comply with resolutions of the shareholders meeting.
The list of rights and powers of the Board does not include the power of the Board or any one or more of its members to represent and bind the company externally in dealings (contracts etc) with third parties. Therefore I assume that the Board and its members don't have this power.

Art. 80.2.f: see comment on Art. 85.2.e+f..

Art. 80.4 lines 5-6: it is preferable to substitute "will be jointly (and severally?) liable for the damage caused thereby to the company" for "jointly responsible for compensating the company's [entire?] losses".
In lines 5-6, substitute "Board meeting" for "shareholders meeting".
Last line: giving the right to request termination of the exercise to each shareholder may lead to unwanted numerous and possibly contrary requests that other shareholders do not agree with. The first sentence of this paragraph which gives the shareholders meeting the right to give instructions to the Board seems sufficient also for this purpose. Moreover, the last sentence does not mention how the request is to be made and what the sanction is if the Board does not comply with it.

Art. 80a: it is preferable that members of the Board are in office on a rotating basis so that not all members resign and their joint experience does not disappear at one moment. Therefore, the duration of the term of each member could and should be the same (e.g. 4 years with the possibility to be reappointed) but the start and end date of the terms of each (or several) members should be different. In practice this means that the duration of the first term of the members shall be different (member A one year, member B 2 years, member C 3 years, etc.)

Art. 80a.1: delete "less than". Three years already seems a short term.

Art. 80a.2: please reconsider the last sentence because the consequence is that a company will have no Board.

Art. 80b.1: it seems that anybody can be appointed member of the Board (except as provided in par. 2, 3 and of Art. 80b), so that it is not necessary to state that shareholders who own at least 10% of the ordinary shares can be elected to the Board.

Art. 80b.2: the meaning of the words "In other circumstances" should be clarified; if they have no meaning these words should be deleted.

Art. 80b.3: is the intention to refer to and apply the same criteria as for the authorised representative of a legal entity/member of a limited liability company? If that is the case,

according to the current numbering the cross reference should be to 35a.2 and 3. See the comments on those provisions.

Art. 81.1: if the Chairman of the Board (who is also chairman of the shareholders meeting) holds the post of general director at the same time, too much power will be concentrated in one person. It may be difficult to control this person and the exercise of this power and this may harm the interests of the company and interested parties (shareholders, employees, creditors, etc.). The functions of supervisor and "supervisee" should not be combined. Therefore, in line 2 of this paragraph, please insert "not" between "may" and "hold". This would be conform corporate practice in many European countries where there is a separation and distinction between "managing/executive directors [or board]" and "supervisory/outside directors [or board]" although the two may have joint meetings.

Art. 81.4 line 3: this article should clarify if any shareholder or only shareholders holding a certain percentage of the shares can file such request.

Art. 81.1 and 82.1a: the language suggests that members of the Board are elected and that their ranking is determined based on popularity. In the Netherlands and, as far as I know, also elsewhere, members of the Board and directors are appointed on the basis of expertise and experience in certain functions (president, finance, operations, sales, etc.).

Art. 82.3: under Netherlands law, there is no limitation that only board members who reside outside the country can authorise another person to attend the meeting; any member can do so. However, there is another limitation: a member of the Board can only authorise another member, not a third party.

Art. 82a: this Article overlaps and should be combined with Art. 82.4.

Art. 82.1.i: add at the end of the first sentence: "in evidence of their approval of the minutes". Delete the second sentence about personal liability.

Art. 84.1.d: the text should be clarified in the second sentence, particularly the words "will decide the exemption toward members".

Art. 84.3: the current text is not clear. This article should clarify if the text should say "is reduced <u>to no more</u> than 1/3", or "is reduced <u>by more</u> than 1/3".

Art. 85.1: see comment on Art. 81.1. It is to be preferred to separate functions and avoid accumulation of power. It is also difficult to see how the Board can supervise the director if the director is Chairman of the Board. Therefore I suggest that only outsiders (i.e. not members of the Board) may be appointed general director and insert in line 3 "not" after "may".

Is the intention of the second sentence that either the director or the chairman has full power by himself to represent and bind the company externally in its dealings with third

parties for all purposes? Would it be possible to provide in the charter that the company may be represented and bound only by the director and the chairman (or any other board member) jointly (this may protect the company against unwise acts of one person)? If this is the case, such limitation should be mentioned in the business registrar so that third parties can check how the company is bound. I suggest that language be added that any other internal limitations on the power of the director to represent the company (in the Charter of the company or otherwise), e.g. the requirement that certain transactions require approval of shareholders, cannot be invoked by the company against the third party that relied on the signing authority of the member(s), nor by the third party (who wants to get out of a contract).

Art. 85.1a: the provision that the director cannot at the same time be director of another company is rather broad and could be modified to the effect that a director cannot have a function (as board member, director, manager or employee) with an enterprise that competes with the company.

Art. 85.1b: if Art. 85.1a is not amended as set out above, an exemption could be that the director of a company can be director of subsidiary and parent companies (and other affiliates) of the company.

Art. 85.2.a: add at the end “as required by this Law or the Charter of the company.

Art. 85.2.e:+f: there seems to be no provision that the shareholders meeting can appoint certain managers, while Art. 80.2.f states that the Board appoints and dismisses the director and other key managerial positions and determines their salary. Therefore Art.. 80.2.f and 85.2.e+f must be fine tuned and in Art. 85.2.e “Board” must be substituted for “Shareholders Meeting”.

Art. 85a.1 last sentence: it is preferable that the remuneration (salary, bonus, allowance) of the members of the Board be determined by the shareholders meeting and not by the Board itself.

Art. 85a.4: why is the remuneration of the Board increased by the bonus in case of good performance but not reduced in case of bad performance? Please define “excess profits”.

Art. 85a.5: the text should clarify if the aggregate amount of all allowances, salary and bonuses or the individual amounts for each person separately must be recorded and reported.

Art. 85b.1.b: please define “their related people in person or in group”, I believe that a narrow definition would be justified here.

Art. 85b.4: I am not certain that this provision should apply to members of the Board. What happens if somebody is appointed to the Board by the shareholders meeting because he has useful experience (e.g. as Board member) in other companies but the other Board members do not approve of his other activities?

In the last line, substitute “paid to” for “withheld by”.

Art. 86.2 last sentence: consider to add at the end: “and he shall be liable for the damage caused thereby to the company”.

Art. 86.3: add (narrow) definition of “related persons” (see comment on Art. 3.14).

Art. 86.4.a: informing creditors that there is a financial/liquidity problem will lead to a stampede of creditors who will all insist to get paid. This must be avoided and this paragraph should be deleted.

Art. 86.4.b: please add the general director and the members of the Board. What happens if an increase of the salaries of employees has already been negotiated?

Art. 86.4.c: personal liability is a strong penalty and I suggest to delete this provision.

Art. 86.6: in the Netherlands (and I believe in other countries), if a member of the Board or a director exercises his corporate rights and obligations, he is in principle considered to act as corporate organ of the company and the act is deemed an act of the company. If by the act the rights of a third party are violated, the company will in general be held liable. Only in exceptional cases it is assumed that the director has violated also a personal duty of care (tort) and only in such case may he be held personally liable. I suggest that the UEL follow a similar rule and that members of the Board, directors and employees will only in exceptional situations be personally liable to third parties for acts committed in the exercise of their duties.

Art. 87.1.c, 2 and 3: the text should clarify which transactions and contracts must be approved by the Board and which by the shareholders meeting.

Art. 87.1.a., 3 and 4: add definition of “related people” and “related shareholders”.

Art. 87.3 modify the last line as follows :“when 65% of the votes cast by the other shareholders present or represented and entitled to vote (therefore excluding the related shareholders), vote in favour”.

Art. 88.1: why is there no control committee if the 11 or more shareholders hold less than 50% of the shares? What does “by accumulating votes” mean?

Art. 88.2: as with the members of the Board, I suggest that the members of the control committee serve for terms of the same duration but on a rotating basis so that not all of them resign at the same time.

Art. 88.2+3: please clarify whether the independent registered accountant of the company or someone working with the same accounting firm can be member of the control committee? Or does the control committee really have the function of outside accountant?

Art. 88.3.b: again, define the term “related persons” (see comment on Art. 3.14).

Art. 88b-89: see comment on Art. 88.2+3; the rights and duties of the control committee are very similar to those of an outside accountant. This raises the question what the relationship of the control committee with the outside accountant of the company is supposed to be. Can this be clarified in the text?

Art. 89b.5: only the member who has caused damage to the company by a violation of his obligations should be liable for damages caused thereby; the other members should not be liable. Therefore lines 2-3 should be amended as follows: “”or others, that member shall be liable for the damages directly caused thereby”.

Art. 92: “By the end of the fiscal year” seems early to report on the then terminating year. Therefore, these words could be replaced by, e.g., “Within 3 months after the end of any fiscal year, …”. (Three months is 30 days prior to the end of the 4 month period within which the annual meeting must be held pursuant to Art.71.1a.)

Art. 92.2: this article should clarify if all shareholding companies must have their accounts audited by an independent auditing firm or whether this provision applies only to companies with more than 11 shareholders holding more than 50% of the vote. Whatever is the case, this should be stipulated in a separate Article.

Art. 92.4 last sentence: all shareholders should be treated equally and those shareholders who have held shares for at least one year should not have more rights than others. However, I doubt if Art. 92.4 is very useful because (almost) all of the reports referred to will (if I read Artt. 71.1a and 73.1 correctly) be sent to the shareholders before the annual meeting anyhow.

Art. 93.1: The period of 90 days seems too short and should be longer than the 4 month period (that may be extended to 6 months) mentioned in Art. 71.1a. This Article should clarify what “a brief of the annual financial statement” entails – what exactly must be sent to the business registrar?

Art. 93.2: all shareholders should receive, with the invitation and agenda for the annual meeting, the complete set of the annual accounts (including balance sheet and profit and loss account) with auditors certificate, and not only a brief.

Art. 93.4: creditors are included in the interested persons or organisations mentioned in Art. 93.3; Art. 93.4 stating that creditors can ask for “other relevant documents” is too broad and should be deleted..

Art. 94: one set of rules regarding record retention should apply to all enterprises and could be included in chapter VIII – see Art. 118.5 which provides for a retention period of 5 years. Under Netherlands corporate law, legal entities must preserve their financial records during a period of 7 years.

Chapter V

General comment: this chapter is difficult to read because of the varying terminology; in the next draft the terms general partner, partner, limited partner, member and capital contributor could be reduced to just general partner (as defined in Article 3) and limited partner, the term limited partner should be defined in Article 3 and no different definitions should be introduced in Chapter V.

Art. 95.1.a: please use the term general partners defined in Art. 3 and delete "(hereby so called partners)". The text of the last line should clarify if there may be one limited partner of if there should always be several limited partners.

Art. 95.1.b: the words "must be individuals" seem to indicate that enterprises or companies cannot be general partners. If this is the case, this should be expressed in the text by inserting words like "and cannot be enterprises [companies]; however, there seems no good reason that enterprises or companies cannot form a partnership. Under Netherlands law, companies can form a partnership, e.g. to enter into a joint venture. The words "who own reputation and professional level" are rather vague. If the intention of these words is that through a partnership only professions (like the medical or lawyer's profession) and no "business or industry" can be conducted, that could be made clear in the text (but the terms of profession, business and industry should then be clearly defined in Art. 3).
In line 2 could read as "and each of the general partners shall, in addition to the partnership itself, be jointly and severally liable for all liabilities of the partnership with his/her entire property".

Art. 95.1.c: if the partnership has legal personality, why would the limited partner be partly (up to the value of his contribution) liable for the debts of the partnership?

Art. 95.1a: to avoid any uncertainty in the future the following could be added: "Consequently, a partnership will have its own capital, property and rights and obligations and can conduct business and sue and be sued in its own name. Explanation: in several countries (including up to the present time the Netherlands) partnerships are not legal entities and in such case there is much debate whether the partnership itself or the partners own property and have the rights and obligations, etc. For your information: according to the draft of a new law, partnerships will have legal personality in the Netherlands in the future.

Art. 95.2: why would a partnership not be able to issue, e.g., bonds, notes or IOU's?

Art. 95.3: a new paragraph could added to the effect that the partnership must keep records and accounts showing (the value of) the capital contribution by each general and limited partner.

Art. 95a: the English terminology (partners and members) is confusing. Please use the defined terms. In the following comments I assume that both terms refer only to general partners.

Art. 95a.2: it seems "logical" that a general partner will (continue to) be liable to pay his committed contribution to the partnership and to pay damages that (subject to normal rules of evidence) the partnership suffers as a result of (caused by) the failure of the general partner to pay. However, all general partners are and remain jointly and severally liable (externally) for all liabilities of the partnership.

Art. 95a.3: what is the difference with Art. 95a.2? If there is no difference, this Article must be deleted.

Art. 95a.4: in line 2, insert a new second sentence after the first sentence "A certificate of capital contribution can only be transferred in accordance with Art. 95c.3".

Art. 95c.3: Please add language explaining what must be done with the certificate in case of such transfer; e.g., return it to the partnership which shall cancel it and issue one (or more) new certificates to transferee (and in case of partial transfer also to transferor)?

Art. 96.1.a: it would be preferable to provide that (general) partners have a vote in accordance with the proportional value of their contribution to the capital of the partnership.

Art. 96.1.b: overlaps with Art. 96c.1.

Art. 96.1.h: please reconsider this provision. In favour of this provision is that general partners will often enter into a partnership on the basis of personal relations etc. Against this provision is that payment of the portion of the assets to the heirs (and withdrawal by theirs from the partnership) will often result in termination of the partnership (because only one partner remains, which is in violation of Art.95.1 or because of liquidity problems).

Art. 96.2.c+d: there seems overlap between these provisions and Art. 95c.1+2. It may be considered to combine these paragraphs.

Art. 96.2.dd: there is overlap with Art. 95.1.b. The words in lines 2-4 "if the property … pay for the debts:" suggest that the general partners are considered more or less as guarantors of the partnership and that creditors must first demand payment from the partnership and only after and to the extent the partnership does or cannot pay, demand payment from the general partners. If this is the intention this could be expressed somewhat more clearly in Artt. 95.1.b and 96.2.dd. In line 2 of Art. 96.2.dd the words "shall be jointly and severally liable for" can substitute "shall jointly pay off".

Art. 96.2.e: the problem addressed in the first line seems to arise only if the losses lead to a negative equity capital. Even then the question is whether it is necessary to say anything

about negative capital (or losses) because the general partners are jointly and severally liable for the debts and obligations of the partnership.

Art. 96a: please simplify the terminology (partners and members); this Article should make clear whether it applies to both general and limited partners and whether the board of members is open only for general partners or also for limited partners.

Art. 96a.3.e: after “borrowing” insert “issuing guarantees, surety or security rights”.

Art. 96a.3.i: add “and a petition for bankruptcy of the partnership”.
Please define the term “capital contributors”.

Art. 96a.3: this rule may have an unsatisfactory result if, e.g. 2/3 of the partners have contributed only 10% of the capital. See my comment on Art. 96.1.a.

Art. 96b.1: overlaps and inconsistent with Art. 96a.1.

Art. 96c.1: the text would be clearer if “Each partner by himself” were substituted for “All partners”. See comment on Art. 96.1.b.

Art. 96c.2 last paragraph: what does this mean for the external obligations or liabilities to the party with whom a partner has acted? Is the intention that if a partner has acted in the name of the partnership but outside the normal business of the partnership (as described in the business register?), the partnership is not bound and the third party with whom the partner acted is not protected because he could and should have checked the normal business of the partnership of the partnership in the business register? If this is the case, please insert after “company” in line 1 “as described in the business register”. A nhew sentence could be added at the end of this paragraph “The partner who has conducted an activity for which the partnership is not liable in accordance with the foregoing sentence, shall be liable for the obligations created vis-à-vis and the damage suffered by the third party as a result of his acting”.

Art.96c.3²: combination of the functions of chairman of the board and general director may lead to uncontrollable cumulation of power and should be avoided.

Art. 96d.2: Insert “In such case …” at the beginning of the last sentence of this paragraph.

Art. 96d.5: add that any dispute between the parties regarding the value of the capital contribution shall be submitted to and solved by an independent registered accountant. The provision that a return of the capital may only be made in cash seems too rigid. It may be very important for a partner that he receives the particular asset that he contributed (e.g. a house or some equipment) back. I suggest to substitute “in accordance with and in the form stipulated in the Charter” for “in cash”.

Art. 96d.6: there is no reason to limit the liability of a withdrawing partner for the partnership's debts existing at the time of withdrawal to two years. Such limitation may harm the interest of certain creditors of the partnership. Accordingly, delete "Within 2 years … of this Article" and insert after "the company's debts" the words "existing at the date that his withdrawal becomes effective as stipulated in section 2 of this Article".

Art. 96dd first paragraph: the distinction of partners in between partners and capital contributors is not very clear while "capital contributors" is an undefined term.

Art. 96dd last paragraph: any new general or limited partners must of course be subject to the general rules on liability of Art.96.1.b+c. Any other agreements between new and remaining partners should have only internal effect, that is: among themselves, and not for other parties. Therefore, Art. 96dd last paragraph should be deleted, either entirely or starting from the words "unless otherwise …".
If it is desired that the charter can provide for (or that partners (old and new) can agree on) a different liability internally, among themselves, for all or some of the obligations of the partnership, this should be stated in a separate Article, emphasizing that this does not affect the external liability of partners according to this Law.

Art. 96e, general: assuming that capital contributors are limited partners, please note that partnerships with limited partners are called in the Netherlands (in English translation) "limited partnerships", distinct from "general partnerships" that have only general partners.
Netherlands law provides (i) that (subject to a small exception) it is prohibited that the name of the limited partner be used in the name of the partnership; (ii) that the limited partner is prohibited to perform any management act or to work or be active for the business of the partnership, even when on the basis of a power of attorney or delegation; and (iii) that he is not liable for the losses or damages of the partnership for a higher amount than he has contributed or should have contributed (this last provision is based on the fact that (limited and general) partnerships do not yet have legal personality under Netherlands law). The limited partner who violates items (i) and (ii) of the foregoing sentence is jointly and severally liable for all the debts and obligations of the partnership.

Art. 96e.2.a: the text should clarify if each of the limited partners has the same vote as each general partner (but see my earlier comment that votes could be related to the proportion of the contribution of each general and limited partner to the capital of the partnership).

Art. 96e.2.d: in view of the often personal nature of partnerships (a limited partner has a more personal relationship than a creditor, participates in meetings etc.) it is suggested to add at the end of the sentence: "unless the charter (as existing at the time the capital contributor accedes to the partnership) prohibits or restricts this", or "subject to (unanimous or majority) approval of the partners meeting as stipulated in the charter". Please add how the capital contribution is transferred (contract, delivery of certificate?).

Art. 96e.2.dd: same comment as for Art. 96e.2.d. See also the rigid provisions for general partners in Art. 95c.1+2.

Art. 96e.2.e: see Art.96.1.h, my comment thereon and Art.96d.1.b; is there a compelling reason to provide differently for limited partners?

Art. 96e.3.a: the sanction that a limited partner is liable for all the obligations of the partnership if he does not pay his contribution (on time) is too strong. As with shareholders of a company, a limited partner should be remain liable for his contribution (and for damage to the company directly caused by his failure to do so (as ultimately determined by a court)), but not more than that. Please change this provision accordingly.

Art. 96.3.b: see my general comment on Art. 96e. What is the sanction if the limited partner violates Art.96e.3.b?

Chapter VI

Art.. 100: since the private enterprise is not a legal entity and the proprietor is wholly liable for the enterprise, the question is (at least from a legal perspective) what meaning of the declaration of the investment capital is. The same question applies to (statements of additions or withdrawals from the investment capital.

Art. 101.3: at the end could be added “but he can give an authorisation or power of attorney to one or more other parties to act as such, either in general or for specific transactions”.

Art. 102: line 1, after “business” insert “to a third party”; line 2 substitute “proprietor” for “lessor”.
With respect to the second sentence (“During … proprietor”): I would think that the purpose of leasing an enterprise would be that the lessee will conduct (“exploit”) the business (e.g. sell the merchandise) at his own account and that the lessor/proprietor simply receives the amounts of the lease payments. If this is correct, this sentence should state that the proprietor shall continue to have the ownership rights and obligations but that the lessee has, and is liable for, the rights and obligations arising from the business.

Art.103.2: Substitute “The selling proprietor” for “Such proprietor” and substitute “existed at the time of the sale and transfer of the enterprise” for “were not handled”.

Chapter VIa

Art. 104a: Netherlands corporate law has no specific provisions governing joint ventures. In general, two or more companies (the joint venture partners) may form a joint venture either by entering into a contract, or by forming a partnership to which each contributes capital and or other assets (e.g. know how) or form a joint limited liability or shareholding company in which each participates with shares etc. In principle also an unincorporated business can enter into a joint venture.

I am not sure what Art. 104a intends to mean; I am not sure either whether joint venture companies are always legally independent and have legal status. I suggest that this Article be deleted.

Art. 104b.1.a: please reconsider the definition of subsidiary – e.g. if company A owns more than 50% of the ordinary shares in company B but none of voting preference shares so that A has no control over B, will A be the parent and B be the subsidiary?

Art. 104b.2: the criterion "can directly or indirectly supervise managers, business or financial activities …" is vague. What does supervision mean here?

Netherlands corporate law defines as "subsidiary" of a legal person:

(i) a legal entity in which the legal person or one or more of its subsidiaries can exercise, alone or by virtue of an agreement together with other parties entitled to vote, more than 50% of the voting rights in the shareholders meeting

(ii) a legal entity of which the legal person or one or more of its subsidiaries are shareholders and can, alone or by virtue of an agreement together with other parties entitled to vote, appoint or dismiss more than half of the directors or board members, also if all persons entitled to vote cast their vote.

Art. 104c.2, 3 and 4: the terms "equally and market oriented", "counter with normal business" and "not-for-profit activities without proper compensation" are extremely broad and leave room for arbitrary decisions; who will decide and what are the criteria? The sanctions mentioned in paragraphs 3 and 4 are strong and don't leave scope to take specific circumstances into account. Moreover, what is the meaning of the words "liable for the damages" at the end of paragraph 3 and "such losses" at the end of paragraph 4? Does this include damages of the subsidiary itself and also, e.g., damages (unpaid salaries) of employees and of (unpaid) creditors?
Suppose that a company discovers that one transaction has a very big risk. In order to secure its own survival (and preserve employment for its labour force), the company may want to transfer and isolate the problematic transaction in one subsidiary and not give it full financial support. Should this lead to personal liability of the managers? In the Netherlands these matters are left to the court to decide, based on general principles of contract-, tort- and bankruptcy law and on the specific circumstances of the individual case.
It is suggested to leave these matters for the courts to decide and to delete paragraphs 2 – 6. A new paragraph could require that all transactions and contracts between parent and subsidiary be described in writing.

Art. 104d, general: under Netherlands law each company (parent and subsidiary) must make its own annual financial statements and have those adopted by its shareholders meeting (which for subsidiaries will usually be the parent company). Each company must also publish its financial statement by submitting those to the trade register. However, the top parent company of a group can avoid publication of the accounts of those direct and

indirect subsidiaries whose shareholders meeting so decides and for whose contractual obligations the parent company issues a publicised statement of joint and several liability. In this case publication of the consolidated accounts of the group will suffice.
Under the UEL, do the financial statements of each subsidiary as well as the consolidated statements for the whole group all have to be sent to the business register?

Art. 104d.5 line 1: before “inaccurate” insert “not”.

Chapter VI

Articles 105 – 108, general:
The procedures and requirements as envisaged by the provisions in this chapter seem short. By comparison Netherlands corporate law has 27 articles for legal mergers and 35 articles for divisions and separations. These provisions are based on EU Directives and similar arrangements will be found in the corporate laws of other EU countries. Instead of giving detailed textual comments on these provisions, I will summarise the main requirements of “legal mergers” under Netherlands law so that you can see what the system is. You will see that the procedure sets out to protect (minority) shareholders and creditors of all companies involved. Please note that other rules (labour law, the law on works councils and merger guidelines) protect the rights of employees and give advisory roles to elected works councils and trade unions that may be active within the companies.

Aspects of legal mergers under Netherlands law:

a. legal merger is defined as a legal transaction of 2 or more legal entities by which one of them acquires the capital (i.e. assets/rights and obligations) of the other “under general title” or whereby a new legal entity which is incorporated though this transaction by them, acquires their assets and obligations “under general title”.
   Note: “acquisition under general title” means that all assets/rights and obligations transfer by operation of law from one to the other entity, as is the case with succession (inheritance) between the deceased person and the heirs, so that a transfer of individual assets and obligations is not required. The draft UEL does not clarify exactly how the transfer of the rights and obligations would take place legally.

b. except for the acquiring company, the other merging companies cease to exist. By the merger, the members/shareholders of the disappearing entities become members/shareholders of the acquiring company (subject to a few exceptions, e.g. in case of a merger between parent and subsidiary companies).

c. if, based on the exchange ratio of the shares in the companies involved, a right on money or a receivable exists, the aggregate amount thereof may not exceed 10% of the nominal amount of the awarded shares.

d. the merger procedure consists of 3 stages:
(i) the proposal for the merger – it must be the initiative of the managing boards of the merging companies See e. – i. below)
(ii) the resolutions to merge – the shareholders meetings must adopt decisions to merge, the acquiring company may decide by resolution of the managing board (see j. below)
(iii) following (ii) the merger can take place – a deed of a civil law notary is required (as is the case for the incorporation of companies and amendment of the charters) (see k. below).

e. the proposal for the merger must include: details of the merging companies; the (draft) charter of the acquiring company; benefits awarded to members of the boards of the merging company; proposed board and directors after the merger; for each disappearing company the time from which financial data will be included in the accounts of the acquiring company; measures in connection with the transfer of shareholding in the disappearing company; intention regarding continuation or termination of activities.
Moreover, the proposal must mention: the exchange ratio of the shares and the amount of payments, if any, by virtue of the exchange ratio; as from which time and to what extent the shareholders of the disappearing company will share in the profits of the acquiring company; the impact of the merger on the amount of the goodwill, share premium and reserves in the balance sheet of the acquiring company.

f. In a written explanation the board of each company must state the reasons for the merger; discuss the expected economic, legal and social (employment) consequences; and the method(s) for determining the exchange ratio of the shares, to which valuation these methods have lead and related problems.

g. A registered accountant appointed by the board must investigate the proposal and declare if the proposed exchange ratio of the shares is fair and that the equity capital of each disappearing company on the latest balance sheet date was at least equal to the nominal paid up share capital that its shareholders will obtain in the acquiring company plus the payments to which they will be entitled. If 2 or more of the merging companies are “the equivalent of) shareholding companies, the same accountant may only be appointed if the president of a special company court approves. The accountants have equal access to all merging companies.

h. Each merging company must submit with the trade register: the merger proposal; the 3 last annual accounts as adopted, with auditors certificates, and annual reports of the merging companies. The last accounts may not be older than 6 months. Submission must be published in a nationwide

newspaper. Any advice from works councils (which must exist within companies with at least 45 employees and which have the right to advise on the proposed merger) and of relevant trade union(s) must be submitted as well.

i. At least one of the merging companies must (subject to opposition by a creditor being honoured) give security or surety for each creditor of those merging companies who so requests. This does not apply if the creditor has sufficient surety/comfort or if the financial position of the acquiring company does not offer less comfort than there was before. Until one month after all merging companies have announced the submission of the proposal can file his opposition to the merger with the court, mentioning the security he demands. The court may give the companies the opportunity to give security. The notarial merger deed (by which the merger is effectuated) may only be executed if the opposition has been withdrawn or cancellation of the opposition can be enforced.

j. The shareholders resolution to merge may only be adopted one month after all merging companies have published the submission of the merger proposal; such resolution must be adopted in the same manner as a resolution to amend the charter; if different majorities are required for the amendment of different provisions, the largest majority apply for the merger resolution. A majority of at least 2/3 of the votes is required if less than ½ of the issued share capital is represented at the meeting.

k. The merger takes effect by the execution of a notarial deed which must take place within 6 months after publication of the submission of the proposal or if this is not possible because of opposition by a creditor, within one month after withdrawal or cancellation thereof.

Artt. 105.2.a, 106.2.a, 107.2.b, 108.2.b: what is the purpose of the requirement that the division-separation-merger and consolidation decisions or contract must be sent to creditors and employees? Can they oppose and stop the transaction? If this is not the case, how are their interests protected? Also, how is it determined who the shareholders of the new companies are, and in what proportion?

Art. 109.1: Netherlands law also requires an accountant's statement that the equity capital of the original company within 5 months before the conversion is at least equal to the paid up share capital according to the deed of conversion.

Art. 109.2: again, what is the purpose of or consequence of sending the resolutions to creditors and employees?

Art. 109.3 second paragraph: it seems that the original company is transformed and "evaporates" in the new company so it will not (have to) be wound up.

Art. 110.1: see comment on Art. 50.2 second paragraph, what happens if all capital contributions of a limited liability company are acquired by one person so that it become a single member company?

Art. 110.2: it seems that if the entire charter capital is transferred by the owner to another owner, the limited liability company continues to exist. Only if all or part of the assets of the company are transferred to an individual, there will be a private enterprise. If this is correct, line 2 of this Article should be amended.

Art. 111.4: please add the Articles of the Law pursuant to which the certificate may be withdrawn.

Art. 112.1, third item: it is often impossible to predict how long a dissolution/liquidation will last, certainly if there are disputes. I suggest to delete the reference to “duration”.

Art. 112.1a: it is better to appoint 1 or 2 persons (e.g. the director or an accountant) as liquidators with direct responsibility for the liquidation.

Art. 112.2: there is considerable overlap between the 3 paragraphs of this provision.

Art. 112.5 last paragraph: personal liability seems too strong a measure. Delay of the liquidation may due to a dispute caused by a creditor. I suggest to delete this paragraph, certainly the last sentence.

Chapter VIII

Artt. 114-115: as a general comments in the Netherlands sets in principle general rules that prohibit, restrict, facilitate or promote certain behaviour and conduct of business by enterprises generally and not individually, regarding such matters as taxation, accounting principles, environmental protection, labour conditions, advisory roles of works councils and trade unions, safety precautions, quality standards, professional requirements. Within the framework of those rules, enterprises are free to do business.

Art. 114: to the extent that the provisions of this Article envisage that the government will or may be involved in strategies and plans of individual enterprises, the question arises whether the government is equipped and has the resources (people and expertise) to do so.

Art. 115: any rules, conditions and guidelines issued by the government should be clear and transparent and create a predictable environment for enterprises so that everybody knows what the rules of the game are and will be in the near future. In addition, it must be clear which part of the government has the authority to issue rules, conditions and guidelines and with which body (court or otherwise) a person or enterprise can appeal from a decision that harms that person or enterprise.

Artt. 116-117: please add that any inspections shall not unduly interfere with or disrupt the normal business of the enterprise and that the inspectors and other employees of the government have a duty of confidentiality and secrecy for any information obtained by them.

Art. 118.4: does experience in Vietnam give comfort that 30 and 90 days are sufficient to prepare and submit financial statements? See also Artt. 71.1a and 93.1 and the comments thereon.

Art. 118.5: see Art.94 and comment thereon.

Chapter IX

Art. 121.1: please add to the text which court or tribunal has jurisdiction to discipline, impose fees or other penalties. Any such judgment should be subject to appeal.

*  *  *

If the above gives rise to any questions or reactions, please feel free to contact:

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Assessment of the draft United Enterprise Law
For the United Nations Development Program -
Vietnam

Jason Fung[2]



## Executive Summary

As part of its goals for legal reform, the government of Vietnam is pursuing economic legislation that embodies currently recognized best practices. Towards this aim, Vietnam will be enacting the Unified Enterprise Law. The Unified Enterprise Law aims to set out a uniform set of laws to regulate business entities domestically, applying to both foreign and domestic enterprises.

The government of Vietnam has request the assistance of the United Nations Development Program to provide a review of the draft legislation. This memorandum provides findings, analysis and recommendations on the draft Unified Enterprise Law.

## Introduction

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This memorandum follows an assessment of the draft United Enterprise Law (UEL) undertaken in order to provide analysis and recommendations as to the structure and legal effect of the UEL as currently drafted.[3]

I note that the UEL is designed to regulate the establishment and operation of enterprises. To this end, it purports to provide a single piece of legislation covering a range of types of enterprise actors that would be entitled to undertake business relations in Vietnam.

Many of these new types of "enterprises" appear to attempt to closely mirror the approaches and types of legal entities found in modern common law jurisdictions.

However, even after a brief overview of the UEL, several important differences become apparent. First, there are far more varieties of limited liability entities found in the UEL than in other jurisdictions (including share holding companies, limited liability companies with one member, limited liability companies with two or more shareholders, and joint ventures).

Second, the structure of the EUL is unusual; it first sets out the rights of enterprises to engage in business activities.[4] The sections which follow set out the degree to which the members of each type of enterprise may accrue liability for their participation in the enterprise as well as the mechanics of the operation of each type of enterprise.

This structure may be a result of conditions in countries such as Vietnam, where market reforms and behaviours are actively being institutionalised. This is in marked contrast to modern market economies where the right to engage in commercial and capitalistic activities is presumed by most of the participants.

This memorandum provides a number of recommendations that are aimed at assisting Vietnam by improving the functionality of the UEL.

Review of Chapter I: General Provisions

Article 3 sets out several general provisions to applied to the establishment, organization, of management, and operations of enterprises on the territory of Vietnam. Paragraph 17 of Art. 3 states that "17. The nationality of an enterprise is the nation where the enterprise registers its business license." This raises the question of whether multinational enterprises will have to choose a single nationality and/or whether several nationalities can be chosen under the UEL.

[3] It should be stated that this memorandum is provided "as is" and the author disclaims all liability arising from any reliance on the opinions provided in this memorandum. The recommendations stated in this memorandum should be further reviewed and considered having regards to the contextual situation and domestic laws of Vietnam. Moreover, the opinions stated in this memorandum are neither endorsed by nor reflective of the Department of Justice, Government of Alberta.

[4] See Art. 7 of the UEL.

Article 6 paragraph 5 sets out a number of industries where the conduct of business "should be happened in partnerships", including business in providing design services to civil works, legal services and healthcare services. The net effect of this provision is not clear to me. If it is designed to ensure that any enterprises operating in those fields be partnerships, then the language should be more restrictive.

I surmise that this provision is designed to restrict enterprises from engaging in activities in fields typically reserved for self-regulating professions that hold their members personally liable for their professional activities (rather than allow them to be shielded by a share company or other form of limited liability corporation) such as medical practitioners, lawyers, engineers etc.

It should be noted that the terminology used in the EUL is very broad and many enterprises operating in fields such as "health care services" may not warrant this restriction to partnership form. For example, spa services, pharmaceutical sales persons, etc, may arguably be caught by this restriction.

Furthermore, sole practitioner doctors, lawyers, dentists, etc may not have any partners in their enterprise, and thus this provision may unintentionally restrict them from practice.

Article 6 paragraph 6 notes that foreigners and foreign enterprises are prohibited or limited from doing businesses in particular industries. These restrictions should be carefully examined and minimized in order to meet the stated policy objective of equal treatment.

Article 7 sets out the "Rights of enterprises" and sets out a list, which appears to be limited in scope to a specific set of entitlements as well as "other rights as provided by the laws". Given the immense range of activities required to be undertaken by modern business entities, this specific expressly stated list of activities may be too narrow in scope. For example, in Canada, section 15(1) of the *Canadian Business Corporations Act* (CBCA) provides corporations with 'natural person powers':

15. (1) A corporation has the capacity and, subject to this Act, the rights, powers, and privileges of a natural person.

Providing enterprises in Vietnam (including share companies) with natural person powers (or a similarly drafted concept) would bring Vietnam's business legislation in line with western business practices. The rights, powers and privileges and capacities of natural persons are theoretically unbounded: *except where prohibited by law*, any power that may be held or exercised may be held or exercised by a natural person; anything that can be done, can be done by a natural person; any right or privilege which a person can enjoy can be enjoyed by a natural person. The breadth this freedom would allow modern Vietnamese enterprises to engage in any business conduct necessary to further their enterprise so long as it is consistent with domestic Vietnamese law.

Review of Chapter II: Establishment and Business Registration

Article 13c paragraph 3c appears to create a difficult hurdle for foreign members that wish to become involved in limited liabilities companies and share companies. It may be unrealistic to expect investors to hold that significant amount of capital (US $100,000) in a comparably lower return savings account (as opposed to higher return, less liquid investments) for an entire six months prior to registration.

Article 23b sets out prohibitions in the naming of enterprises. This provision, as currently drafted, is a good start. However, further restrictions Vietnam might consider include: (1) a provision stating that those business names specifically set out by further regulation as not being registrable will be restricted; and (2) names that are *not* distinctive enough or are confusing should not be registrable. For instance, section 24 of the CBCA states that a name is not distinctive enough and cannot be used if it is:

Only descriptive, in any language of the quality, function or other characteristic of the goods or services in which the enterprise deals or intends to deal (i.e. Apple Inc. for a seller of apples).

Primarily or only the name or surname used alone of an individual who is living or has died within 30 years preceding the request for the name (i.e. Fung Inc.).

Primarily or only a geographical name used alone (i.e. Vietnam Inc.).

In Canada, there is an exception to this prohibition, which permits the use of names that are not inherently distinctive but that, through use, have acquired a secondary meaning (i.e. General Motors Inc.). Thus, if a name has been used in Canada for so long that it has obtained a level of recognition, which distinguishes it from its competitors, it is not prohibited.

Vietnam might also consider including provisions that address any potential confusion/conflicts between enterprise names and existing trademarks. There are a number of factors that might be considered by the Registrar in determining whether a proposed enterprise name is should be prohibited on the basis of being confusingly similar to an existing trade-mark, including:

The inherent distinctiveness of the whole or any element of the corporate name and existing trademarks and the extent to which either has become known.

The length of time the corporate name and the trademark has been used and which was used first.

The nature of the goods, service or business associated with the corporate name and with the trade-mark, including the likelihood of any competitor between the corporation using or proposing to use the name and other businesses using the trade-mark.

The degree of resemblance between the corporate name and the trademark in appearance or sound, or in the ideas suggested by them.

Vietnam might also consider restricting enterprise names that are "deceptively mis-descriptive". For instance, under Canadian business legislation, a corporate name is deceptively mis-descriptive if it describes in a false way, in any language:

The business, goods or services with which it is proposed to be used.

The conditions under which the goods or services will be produced or supplied or the persons employed in the production or supply of those goods or services.

The place of origin of those goods or services.

For example, a deceptive name might be "Made in Vietnam Vases Inc." if the enterprise's product was made outside of Vietnam.

Article 21 paragraph 1e, requires the enterprise, within 30 days from the date of being granted business registration, publish in three consecutive issues of a newspaper the following:

e. Name, address, nationality, ID, passport or other legal individual certification numbers or the numbers of the decision of establishment or of the registration of the owner or all of the founding members.

Care should be had to ensure that the extent of the information publicly released is not sufficient to open up members to the risk of identity theft. Vietnam should reconsider the extent of the information released to the public.

Review of Chapter III: Limited Liability Companies

Limited liability companies appear to be similar to share companies. Thus, while the majority of my comments are directed to share companies, some of them may also apply to limited liability companies.

It is difficult to understand the rationale of the policy decision not only to set out limited liability companies apart from share companies, but also to create two species of them (with one member, or with two or more members). Certainly, also allowing for share companies with any number of shareholders (including one, a few, or many) would likely result in sufficient flexibility for Vietnamese business to achieve almost any desired corporate structure.

Review of Chapter IV: Shareholding Companies

Article 51 paragraph 1d sets out that shareholders can be "organizations" or individuals. It is not clear whether "organizations" includes such entities as partnerships or private enterprises. This provision could be more specific in this regard.

Article 52 does capture the three basic rights generally associated with 'common shares': (1) to vote at any meeting of shareholders; (2) to receive dividends declared by the board of directors; and (3) on dissolution of the corporation, to receive the property of the corporation remaining after the creditors, and any other person with claims against the shareholding company.

It is recommended that a provision be included providing the following:

Where a corporation has only one class of shares, the rights of the holders of that class of shares are equal in all respects and must include each of the three basic rights listed above.
If the charter of the shareholding company provides for more than one class of shares, then each of the basic rights must be possessed by at least one class of shares, although all of these rights are not required to be attached to the same class.

A similar provision exists in Canada under section 24 of the CBCA to clarify ambiguity with respect to the rights of shareholders in business charters.

Article 52 paragraph 3 sets out that "Voting preference shares shall be held by *only* government-authorized organizations or founding shareholders." [*Emphasis* added]. It is difficult to ascertain the policy rationale for government control over voting preference shares.

Article 52 paragraph 3 also sets out that "Voting preference of founding shareholders shall be effective for three years from being granted their certificate of business registration. After that, voting preference shares of founding shareholders shall be converted to ordinary shares." It would appear to be an unusual policy decision to force a change to the share structure of a shareholding company.

Article 53(2) paragraph 2b1 allows for the shareholder to access a "Supervision Board", which would be responsible, when called upon, to check each detailed problem relating to the management and operation of the company, if necessary. However, the term "Supervision Board" does not appear to be defined in the UEL. Further explanation and expansion of the concept (including its composition, etc.) should be included in the legislation.

Article 62 allows for shareholding companies to issue bond and debt instruments. If the shareholding companies (and other entities) are provided with natural person powers, then this section would not be necessary as shareholding companies would already likely be entitled to issue debt (or take on loans, etc) as a result of having natural person powers. However, given that shareholding companies are expressly provided the ability to issue bonds, while other entities are not, there exists the possible interpretation that

other businesses such as limited liability companies will not be permitted to issue bonds and other debt instruments unless expressly allowed to do so.

Moreover, it should be noted that I have not had the opportunity to examine the corresponding reforming investment legislation, the draft Law of Investment (LOI). I suspect that the LOI contains provisions regulating the issue of debt instruments and some tie to the LOI legislation may be appropriate in article 62.

Article 63 regulates the payment of securities as follows:

Shares and other securities of a shareholding company shall be paid in either Vietnamese Dong, exchangeable foreign currencies, gold, land use rights, intellectual property rights, technology and know-how or other assets as stipulated in the company Charter. Shares and other securities of the company shall be paid in full once.

I'm not certain that this provision adds much to the legislation. It may be best allow for the most flexible wording: that shares and other securities shall be paid for in either Vietnam Dong or some other form of valid consideration so long as such consideration is given in accordance with the charter of company.

Article 64 governs the where a buy-back of shares occurs at the request of shareholders. Under paragraph 2, the "market value" method (for determining the price at which shares will be purchased) is used (unless stated otherwise in the company's charter).

It should be noted that there are four widely accepted methods for valuating the shares of a corporation:

*Market value*: The value determined by reference to the price at which shares trade in some market.

*Asset value*: The value of the assets of the corporation, either on a going-concern basis, or as though the corporation's assets were being sold as part of a liquidation.

*Earnings value*: Some sustainable level of earnings is established and the value of the corporation is calculated as the value today of those earnings received by the corporation in an indefinite number of years.

*Combination method*: Value is determined by determining the values under the above three methods, then assigning a weight to each and generating a weighted average value on that basis.

In Canada, courts have adapted each o these methods with the position that no rigid rule can be adopted about which method is appropriate. Thus, Canadian courts will arrive at a method on the basis of the context of the valuation, including (1) the nature of the business; and (2) the nature of the share holdings.

For example, courts have found that where a corporation's shares are widely held and actively traded, the best method may be to take the market value. *However*, the market-value approach may not be appropriate where trading is thin and dominated by a controlling shareholder. Moreover, if a corporation's sole asset is a large land holding with little income flow, fair market value based on earnings may not be appropriate. Lastly, high tech company start-ups will likely have little or no assets or revenues.

I do agree that that allowing the company to specify a preferred valuation method vis-à-vis the company charter is the best method. Also, an alternative to a stated "market value" would be to specify a "fair market" value in the UEL and allow the courts to decide which of the four previously described valuation methods is most appropriate. The UEL could even set out what factors the Court should consider in choosing a valuation method.

Article 67 paragraph 1 sets out a dividend test. It states "A shareholding company shall be entitled to pay dividends to its shareholders *if its business is profitable*…"

This test of "profitability" is very ambiguous. Vietnam should consider using a test found in other jurisdictions where dividends *cannot* be paid if there are reasonable grounds for believing that the corporation cannot meet either of the following two financial tests:

*Solvency Test*: That the corporation is, or would after the payment be, unable to pay its liabilities as they become due.

*Capital Impairment Test*: The realizable value of the corporation's assets would, after the payment, be less than the aggregate of its liabilities and stated capital of all shares (stated capital being the historical total of all money and other assets paid into the corporation in return for shares).

Article 80 paragraph 2 did not appear clear as to the restrictions existed on becoming a Member of the Board of Management. Note that in Canada, a person is not qualified to be a director to a Corporation (equivalent to a member of the Board of Management) if:

The person is under 18;
If the person is of unsound mind as found by a Court in Canada or elsewhere;
An undischarged bankrupt; or
Is *not* an individual.

Vietnam should consider whether the 10% share ownership is truly necessary (or whether it inhibits flexibility). For example, there may be numerous instances where companies wish to appoint a member to the Board of Management who does not own sufficient shares but brings a particular expertise to management.

Similarly, there may be circumstances where a member is unable to participate in meetings of the Board of Management for six consecutive months, contrary to Article 84,

paragraph 1b. It may allow share companies to have increased flexibility in managing their affairs to simply allow them to incorporate such restrictions (as that expressed in article 84) in the company charter, if they desire to do so.

Review of Chapter V: Partnerships

Partnerships can vary significantly in their operation and the quantity/types of contributions by its partners. Article 96 sets out the rights and obligations of partnership members in a fairly detailed way. It may be better alternative to provide a number of default provisions governing the operation of partnerships unless varied from agreement or the charter of the enterprise.

For instance, one Canadian jurisdiction includes the following default provisions in the Ontario *Partnerships Act*:

Each partner shares equally, both in the capital of the partnership and in any profits distributed and must contribute equally to any losses incurred.
Each partner is entitled to be indemnified in respect of payments made or liabilities incurred in the ordinary course of the partnership business, or to preserve the business or property of the firm.
A partner is not entitled to interest on capital contributed.
If a partner makes a contribution to the partnership in excess of the amount that he has agreed to contribute, he is entitled to interest at 5% per year on the excess contribution.
Each partner has a right to participate in the management of the partnership business.
Decisions regarding ordinary matters connected with the partnership business may be decided by a majority of the partners.
Each partner has equal access to the partnership books.
Admission of a new partner and any change in the nature o the partnership business require unanimous consent.
No majority of partners may expel a partner.
Any person who takes an assignment of a partner's interest, whether as a purported transfer or for the purpose of taking security for the performance of some obligation to the partner, has no rights as a partner, except to receive the partnership profits to which the assigning partner would otherwise be entitled.
Any partner may terminate the partnership by giving notice to the others.
Any variation of the default rules requires unanimous consent of the partners.

Article 95 paragraph 1b states that:

General partners to a partnership must be individuals who *own reputation and profession level* and shall be liable for all enterprise liabilities with his/her own entire property; [*emphasis* added]

It is not clear what is meant by "own reputation and professional level". This concept should be more clearly defined.

It should be noted that under Canadian and other common-law jurisdictions, partnerships are quite different from corporations. For instance, a partnership is like a sole proprietorship in that partners themselves carry on business directly and the partnership is *not* a legal entity separate from its partners. Each partner is liable full for debts and other liabilities of the partnership business. Certainly there is a degree of ambiguity in this legislation, as currently drafted, as to whether partnership enterprises are to be treated as separate legal entities.

Review of Chapter VI: Private Enterprise

As with the provisions on partnership, it is not entirely clear on the wording of the provisions in Chapter IV whether private enterprises are intended to be separate legal entities capable of entering into contracts, holding legal title to property, etc.

There is wording to suggest that private enterprises are intended to be separate legal entities, such as art.101 paragraph 3, which states that "The proprietor shall act as the legal representative of the enterprise". In either case, the intent behind this provision and the legal status of private enterprises should be more expressly stated.

If the intention is that legal enterprises have separate legal identity, then many of the kinds of provisions applicable to share capital corporations should also be included here. For instance, members of the public and the registrar should have a registered mailing address on file should notices need to be served on private enterprise members.

Review of Chapter Via: Parent Companies, Subsidiaries, Joint Venture Companies.

It should be noted at the outset that it is often the case, as in Canada, that joint ventures are *not* distinct legal entities but can be used to *create* distinct legal entities. Their term is often used to describe relationships among persons who combine their money, skills, etc for some common purpose. The distinguishing feature of such an arrangement is that it is usually temporary and based on contract.

For example, if a smaller mining company that has rights to certain claims combines its efforts with those of larger, financially more powerful business, this could be described as a joint venture. This activity could be effected through a corporation (here, share company) in which each business was a shareholder or through a partnership in which each business was a partner.

Given that the other categories of enterprise allow for the creation of joint ventures, it is questionable whether a separate Chapter for joint venture companies is necessary.

Conclusions

The UEL is a significant step forward towards a uniform set of laws to assist with the modernization and codification of the rules whereby private actors may operate in the

Vietnamese economy. Still, the current draft of the UEL can be still be improved substantially through by reducing the number of types of enterprises and clarifying the characteristics of these enterprises:

First, given the proven flexibility of shareholding companies in modern economies, it seems unnecessary to create two additional types of limited liability entities. Therefore, it is recommended that Vietnam consider whether Chapter III limited liability companies are really necessary as a class of enterprise. Rather, Chapter IV shareholding companies will likely be more than sufficient, flexibility wise, to suit the needs of economic entities in Vietnam seeking to architect their businesses' structures.

Second, the differences between the different types of entities need to be clarified further. For instance, the UEL, as currently drafted, often focuses upon the degree to which its members may be exposed to liability for the activities of the enterprise.

For example, article 99 of the UEL defines private enterprise as "an enterprise owned by an individual who is liable for all of its operations with his/her active property." Is the private enterprise a separate legal entity capable of such rights as holding title to property? Article 99 and article 7 paragraph 1 would suggest that the answer may be "yes". However, in most common law jurisdictions, this type of business would be likely be classified as a sole proprietorship (which is *not* a separate legal entity capable of holding the title to assets). Ambiguities such as these must be made clear under the UEL.

My thanks to the United Nations Development Programme (UNDP) and the American Bar Association for allowing me this opportunity to participate and assist with the review of Vietnam's draft United Enterprise Law.

# COMMENTS ON THE DRAFT ENTERPRISE LAW (Version 1) FOR THE SOCIALIST REPUBLIC OF VIETNAM

Roberto G. MacLean

## General Introduction to the Comments

When commenting on any draft, bill, or statutory law issued by any of the countries classified by international multilateral organizations under the generic term of "developing" nations or communities, it is important to have in mind, for purely practical reasons concerning their social efficiency and final economic impact in their communities, the following common features in all of them, disregarding whether the law under exam and consideration, is to be applied in a socialist country, and economy in transition, a roman-civil law country, a "Common Law" state, or an islamic legal system. Far from being these matters only of an academic or theoretical interest, institutions like the Institute of Liberty and Democracy leaded by the economist Hernando de Soto, and his important books on the subject for developing countries, have deciphered them in numbers referring to costs, time and impact on economic and political development.

During the several years of work at the World Bank, my own experience around the world, has confirmed these findings that we began to establish in Peru, under de Soto's institute, where I am also a director, member of the board, and which specifically refers to the establishment and operation of small enterprises. These characteristics which are the legal indicator of lack of adequate development, are the following:

To a greater or lesser degree, all of the developing economies and political organized states, present an enormous and unsettling gap between laws as they are enacted and the conduct of ordinary people and governments in regard economic affairs and commercial transactions. In my own country – Peru- around 63% of the GNP, 62% of the labour force, and an average of 50% of the population, conduct their normal, honest, productive and daily activities outside the law, with the subsequent predictable consequences.

The social efficiency of laws is a matter of culture, and culture is not equal to knowledge. Culture is knowledge deciphered in the daily behaviour of common people and government officials. An excellent statute can mean a great deal or absolutely nothing, according to how it is, thus, deciphered by this daily culture. A law is not enough by itself.

The best of legal texts, transplanted out of its original and natural legal context, can develop into becoming a complete and dramatically different one with another meaning and producing a strangely opposite effect. So, an excellent text has no meaning unless we attach to it, a set of common modest standards for these particular type of laws.

As, or more, important than a very good statute is not to keep changing it, every so often. And to support its objectives with a coherent legislation and other rules.

II) Minimum standards assumed to be the objective for the unification of the Enterprise Laws and other related rules

To proceed to the next step necessary for giving a specific meaning to the intent and direction of the comments, the following minimum standards are assumed to be the intent of the government of the Socialist Republic of Vietnam, regarding enterprises:

To promote private or public investment, with the indispensable legal, political and economic stability, in order to produce sustained economic and the related political development.

To encourage private, both foreign and local, national, investment. In this last case emphasis is stressed in encouraging micro, small and medium size enterprises which are the most thriving and prosperous throughout the developing world, disregarding cultures, civilizations or political regimes. Also, to encourage savings and investing then in ventures where the minority shareholders or bond holders are promptly, efficient and effectively protected by authorities, in particular by the judicial systems or any other effective alternative method of dispute resolution.

III). Priority issues in the draft, according to the above mentioned assumed minimum standards

Within the framework of these guidelines, and with a reasonable leeway for perfectly explainable inadequate legal translations, which are not strange, because more than translating words it is a matter of translating inexistent concepts, classifications and patterns; and a leeway, also for a certain immeasurable degree of inaccurateness for a predictably deficient and incomplete perception of the whole context surrounding, determining the real life and three-dimensional effects of the submitted draft. This draft is in my opinion, a very clear manifestation of a serious effort by the authorities of the PSRV to insert the country into a global economy by opening markets through a competitive and participatory exchange of goods and capitals.

However, laws are easier to be changed and modified than value priorities, standards, and behaviours. Through the naturally slow process of cultural change some inconsistencies or surviving concepts from the previous legal context emerge. I am going to mention the ones which are most noticeable for a lawyer from a developing country that has gone through this process in his and in several others countries around the world, several of them either socialist or formerly socialist countries, now in transition to an open market, free trade, and private enterprise economics.

The most noticeable of them all, appears in an apparently innocuous and subdued way, in an article that seems to have been misnumbered either in the Draft, the translation or the

transliteration. It appears as Article 23 –for a second time- at the end of Article 23, after 23,d. It simply states at its final part that "Business registrars can refuse the request of names registration and the decision of the business registrar is the final decision".

In some of the most developed countries and economies in the world like, for example, Germany or Norway, registrar are not only like judges, but they actually are judges part of the regular judicial system of the country. Of the formerly socialist countries which I remember, Poland also follows this trend. In most of the rest of countries I know, registrars are not judges but in name. So, the projection that causes on an outsider the idea of an official having the authority of issuing a final decision on something, and without resource to any administrative or judicial revision or appeal is unsettling.

Equally, moderately disturbing are the provisions in Article 9, 6; and 35, 3, a; by which the mere initiation of a criminal procedure against someone, without having been declared guilty, would seem to be enough to disqualify this person to be entitled, in the first case, to establish, make capital contributions and manage enterprises. And in the second case, would prevent that person to be appointed as an authorized representative of members of a legal entity. These not very ostensible provisions, infringe however a solid old principle in roman law and one of the enunciated rights of the individual according to the universal Declarations of Human Rights, that every person has the right to be presumed innocent until it is found to be the contrary by an independent court in strict observance of the rule of law, and due process.

A third source more of curiosity and puzzlement than concern is that contained in Article 5, which refers to the Ground Unit of the Communist Party of Vietnam, the Trade Union and other social-political organizations in enterprises; which says very little about its meaning or on information of practical use for the investor. It is very difficult to make either head or tails out of it.

The fourth issue is one of imprecision and ambiguity on a point which is supposed to be of capital importance for many of the people whose participation is supported to be encouraged by this law.

Namely, the controversial and delicate, multiple question of the nationality of enterprises, dealt with in Article 3, paragraphs 17 and 19 that would seen to contradict or blur the effect of each other, particularly in the light of Articles 6.6. or 13 a. 4, as examples, and in relation –as another example –to article 12, 1 and the related Article 24. This ambiguity and imprecision it is not necessarily the real situation, but it is how it appears to an outsider with practical experience in the field. Even though, perhaps, there are other complementary provisions, as it stands I can easily imagine a half a dozen situations creating conflicts that could be avoided. This has been an acute problem during the past in Latin America, one in which is a disparity of views, and in which a ratter reasonably useful and practical solution has been reached in capital exchange through investments.

The next issue, perhaps it is only a matter of concern for international and comparative lawyers, but in the past it has been cause of some problems and litigation to establish clearly the correct international characterization of enterprises like the ones denominated in the preamble as "partnerships". Is it meant by this a "partnership" in the Common Law sense? Or, it is a translation difficulty to transpose, into English, of the French model of a "Societé en nom Collectif", or a "Societé en Commandite", which is not such a wild assumption considering the past links of Vietnam with the French legal system? This could have a slight but important relevance for determining the exact nature and priorities for determining the payment of debts and other obligations, even though – unless there is some inaccuracy in the translation- this concern would seem to have been answered by the provision of Article 96, 2, dd.

A very important concern in respect of business regulations in developing countries, connected with the point stressed in I.- A) of the General Introduction of these comments, and based on field experience in Latin America and other parts of the world is that of the real access to the market as opposed to the merely legal access to it, and the efficient economic and commercial operation of businesses. This should be patently clear for a legal culture familiarized with Marx's vision of legal systems as a superstructure in contrast with the infrastructure, because that is exactly how it works in some of the most backward, conservative, and poorest of the developing nations, including, paradoxically, all of the socialist countries in which I have had the chance and privilege of working. This was summarized above as the existing gap between law as stated in writing and the real practice. This is of the outmost importance for the leap to economic development, and it is densely concentrated in the requisites for the establishment, registration and operation of enterprises, which have created all across the so-called Third World an enormous and incredibly prosperous "informal" economy, outside of the law, which represents in some countries around one third of the GNP, or investments amounting to a total sum enough to pay the entire external debt of the country.

Establishment and Registration of Enterprises

Standing on their own, as a piece of legislation on paper detached of any order of impurities, and unconcerned with the particular peculiarities of Vietnam, the whole of Chapter II, with the observation made on Article 9.6, seems to stand fairly well. However, this type of asceptic, formal legal approach can literally go either way, when contrasted with actual practice. In Peru we tested a system which raised no objections on paper, with an undercover simulation unknown to everyone concerned, that produced at the end the surprising results that the registration of a simply business enterprise actually took 298 days, 12 requests for bribes, two of which came out to be unavoidable (the details of all of this appears in Hernando de Soto's book "The Other Path" which has been also printed in English). At the end of the experiment, the same team traveled to Orlando, Florida, in the U.S., and the whole procedure took no much more than two hours. It is not surprising, then, that other circumstances surrounding the law can make a great deal of difference. As can be well noticed by the fact that essentially the same Commercial Code stayed in force in Poland during the republican government of President Paderewski, the Nazi occupation, the communist regime, and the government

of President Walessa's solidarity. All of the changes that affected the conduct of normal business occurred outside the text of the code, properly.

Encouragement to promote small enterprises and small investors by protecting their contributions
The same appreciation and comment can be made in respect to this key aspect, which is essential for the type of accomplishment aimed at by the government of Vietnam. The several provisions, including Articles 4, 7, 8 or in Chapter III, either in Part I, Article 29, 1, d, g; 2 –with, perhaps a remaining curiosity about what exactly can be meant, after the very clear text of Article 38, by "the concrete ratio is specified by the company charter, unless it is meant the possibility of increasing the percentage fixed there. Also in Part II, in Article 53, 1, c2 and c3; 2; and Article 96c, 2, c.

The Business Registrar
Something that I consider of essential importance for the effective operation of this law is the office and person of the Registrar. Article 116 offers sufficient information about its theoretical role and power but, again, this can come out as a whole range of different things, depending on what really goes behind this good start.

Breaches of the Law
The whole of chapter IX remains as a misty, promising, and interesting prospect, but which does not provide outsider with enough information, about how it might really work.

IV) Other brief comments and final words
As to the rest of the text, it seems on its own good to me, and as it stands at face value. I have a bit to explain on why I have come apart from the guidelines suggested for the comments. But, as I thought than nothing in it merited a more detailed exam article by article –at least as far as I perceived I could usefully contribute at this stage- with the information available; and according to my field and practical experience in this particular activity, I found that my contribution to the subject would be more useful if presented in the order of priorities learned from practical experience, instead of offering it in an order in which somehow its very clear importance and priority could be lost in a formal sea of Articles ordered by numbers and rational subjects. A permanent temptation and danger is trying to force models or foreign statutes into contexts, circumstances and situations that do not fit the original, but rather distort and deform it until making it, in practice and real life, hardly and painfully unrecognizable.

May 2, 2005

UNDP

Legislative Assessment of the
Draft Unified Enterprise Law & Investment Law- Viet Nam

By

Chudi Nelson Ojukwu LL.B, LL.M

In conducting the review I have adopted the approach of discussing the sections of the draft law that I have a reservation or wish to make a suggestion. For the most part many of the provisions of the law in terms of detail are well crafted. I have relied for my comments mainly on experiences with the English Law, Nigerian Law, Ghanaian Law and sometimes the United States. Many of the section comparisons are drawn from the English Law and Nigerian Law.

The Enterprise Law under review is what is known in most jurisdictions as Company Law or Corporations Law. Thus whenever reference is made to company law in this review it should be understood to means reference to the Enterprise Law.

General Comments

As a general comment the law in many areas doe conform to general principles of company law but in certain areas there are major issues of concern. The main one as I will discuss later is found in the types of entities governed by this law and the organs of the companies provided for under this legislation. It is also not clear what structures are in place for implementing the provisions of this since it is difficult to discern whether the Business Registrar is a person an office or an institution.

In Nigeria a Corporate Affairs Commission is created to administer company matters and the Commission, which has a board of 10 members and including a Registrar General as its Chief Executive. This commission has offices all over the Federation, with staff that are equipped to carry out the functions stipulated under the Act.

It is not clear from the legislation under review whether the business registrar is an office with the requisite structure and independence to implement the law. If this is not the case,

I suggest that the creation of such a body or institution be included in this Draft legislation.

Another important general comment is that the draft law appears to give too many powers to shareholders under the provisions dealing with shareholders rights in Articles 70 to 79. Whilst it is important to define the relationship between the Board and the Shareholders I believe that more of the specific powers should be given to the board or the companies allowed by the charter to assign powers and functions to the two organs.

The draft law ought not to have gone as far as specifying the terms of the boards and even ascribing powers and functions to the General Director. Such should be left for each board to decide and all powers should primarily reside in the board, which should then delegate to the General Director.

Also the control committee created under the draft law should be an ad hoc committee and not a permanent one. Their powers also appear too wide. In jurisdictions such as Nigeria they are known as audit committees. The audit committees are constituted at each Annual General Meeting to examine the financial affairs of the company.

Another general comment is in relation to partnerships. Generally it is not the purview of the law to legislate on how person may organise themselves into partnerships. What the law should generally provide for is how parties may register as partnerships, the consequences of operating a business as a partnership and how a partnership may be dissolved. Other details as to capital, structure, rights are left to partners to agree on their own.

Also the draft contains no reference to Company or Board Secretary, which is a key office in company governance and administration.

Also very little provisions are made in terms of filing of returns in reference to activities of the company like, resolutions, creation of new shares, changes in the board, financial returns etc.

There also appears to be little in terms of punitive sanctions against companies for failure to comply with regulations. Monetary fines are usually preferable to any other kind of sanctions.

The draft should also make more elaborate rules for mergers etc, winding up and liquidation of companies.

More Specific Comments

Art. 1 (1) - Comment 1

The categorization of types of enterprises is too unwieldy and somewhat repetitive and does not appear to conform to easily understandable categories worldwide.

In many jurisdiction a company or enterprise may be categorized as (i) a Limited Liability Company, (ii) Limited by Guarantee and (iii) Unlimited Company. Any of these types of companies may be a public or private company.

Another category of enterprises recognised in many other countries are Partnerships and Business Names. These types of enterprises do not have share capital and usually have unlimited liability although they are registered under the law. The above categorization is what is found under Nigerian Law and English Law.

It will make for easier understanding if these categories are employed by the Act.

Though this law provides for partnerships it is not clear what the difference is between the various types off business entities provided for. The categorization of Limited Liability Companies, Shareholding Companies, Partnerships and Private Enterprise are unclear and create room for multiple legislation and confusion.

Art. 1 (2) – Comment 2

The distinction between the enterprises that are owned by the state or political organizations and those owned by individuals are unnecessary and would negate the concept of commercial participation. Once the enterprise in question falls into any of the above mentioned categorizes that is either a Limited liability company, Unlimited Liability Company or a registered partnership or business name the fact of its ownership is irrelevant for the purposes of regulation. Government ownership of a business enterprise is no different from private ownership

To discriminate by legislation may lead to difficulties in the future if the state decides to transfer ownership to individuals or sell off the enterprise.

Art. 3(12a) – Comment 3

It is not clear why these laws refer to authorized representatives. Companies are usually represented by their principal officers. It will serve no useful purpose to make special provisions creating a category of authority known as authorized representative. This has the capacity of leading to confusion especially if these enterprise have to deal with foreign entities that have little or no understanding of these complex group of enterprise representatives.

In most jurisdictions an enterprise has as its legal representative, the Directors in the case of limited liability companies, Managing Partner or the Partners in the case of partnerships and the Proprietor or manager in the case of a registered business name.

Art. 3 (19) - Comment 4
The practice is no longer to regard citizenship of the owners of the company as defining the citizenship of the company. Thus it is not in consonanace with international practices

to consider a company with 50% foreign ownership as being a foreign company . What defines whether a company is foreign is its country of registration.
Under Nigerian and Ghanaian law a company is only a foreign company if it is not registered in the respective country but registered in another country.

Art. 4 (3)- Comment 5

Whilst this proviso to article 4 may have been inserted due to the history of the country it serves no useful purpose to insert it into an Enterprise Law. Such provisions are usually contained in some other legislation on National Security or the Constitution. The general effect of inserting it in a law such as this is that it tends to unnecessarily create fear and apprehension of state appropriation of private concerns.

Art 6 (4) - Comment 6

It is sometimes usual especially in developing countries to schedule enterprise in which foreigners cannot participate. These provisions are usually to protect the internal economy or otherwise protect the internal security of the country. Sometimes also certain business are reserved for only the state this is usually to implement the states economic or political ideology. For emerging states it is understandable if they choose to maintain certain businesses in the hands of the state. They must however be aware that the general international opinion is to open all areas to the investing public and limit the participation of government in businesses.

Art. 6 (5) - Comment 7

Whilst certain of the businesses specified above should ordinarily be conducted in partnerships those in 5 b & c are not usually required to be conducted in partnerships. In many countries health services and civil works are usually incorporated limited liability companies. Indeed it will be strange to imagine that big construction works can only be done by partnerships instead of limited liability companies.

Art. 11- Comment 8

These provisions generally provide for what is known internationally as pre-incorporation contracts. These provisions are to ensure that contracts entered into before the formation of an enterprise for its benefit are enforceable by and against it. In some jurisdictions such as the UK, the development of company law (enterprise law as it is known here) was that where persons enter into contracts on behalf of a company before its formation the company cannot after its formation ratify or adopt such contract. The law in the UK has been improved to the extent that such contracts are now deemed to be contracts by the person purporting to be acting for the company.

In Nigeria and several EU countries any contract or other transaction entered into by the company or any person purporting to be acting on behalf of the company prior to its formation may be ratified by the company after its formation and thereafter the company shall be bound as if it had been in existence at the date the contract or transaction was entered into. Also prior to ratification by the company the person who purportedly acted for the company shall be entitled to the benefits and be bound by the contract.

These provisions are usually made with intention of protecting third parties and possibly persons who act on behalf of company who enter into business relations when the entity is yet to be registered by law. The provisions in article 11 will serve to protect such transactions.

Art. 13a- Comment 9

The provision contained in this article is one that will not encourage foreign direct investment. There appears to very little incentive for a person proposing to conduct business to deposit $100,000 dollars in a bank for 6 months before he is eligible to form an enterprise under the law.

Also the provision in article 13a (1), which requires a copy of the identification of the persons seeking to register the enterprise, is too onerous a condition to include in pre-incorporation documents. The provision fails to take into consideration that members of limited liability companies may be many and diverse.

The same type of conditions is contained in Art. 13c (3). Indeed this requires the $100000 bank account from each foreign investor. Even if the condition were justifiable for each company it is difficult to see how it will assist doing business in the country if every prospective investor will have to keep such sum in an account for 6 months.

Art. 15 – Comment 10

This article deals with the contents of the company's charter. Most of the provisions are the usual things that should be contained in company charter. In some jurisdictions such as the UK, Nigeria and Ghana the company charter comprises of two distinct documents namely the memorandum of association and articles of association. The memorandum of association more less defines the objects and powers of the company, whilst the articles of association is the internal regulations of the company guiding its affairs.

Whilst I continue to debate the concept of legal representative of a company it is also not clear whether this article requires that he be identified by name or by office.

Also it is not clear from the provisions requiring that the organisational and management structure it is meant that the charter must include an organogram or merely that the powers and functions of various organs of the company be defined.

The disadvantage of having to provide for management structure in the charter lies in the rigidity of having to amend the charter every time a change in the structure is envisaged. In traditional company law it is usual to simply divide the powers of the company between the General Meeting (that is the members of the company or enterprise) and the Board of Directors. The board of directors usually has the power to define the management structure and delegating functions appropriately.

Art. 21- Comment 11

The provisions requiring that a company shall make an announcement of its registration within 30 days from the date it was granted business registration is a bit curious. It more or less appears like a compulsory advertisement. Indeed such advert whatever its intended purpose would ultimately achieve little. In contemporary company law the registered documents of company are public documents which any person seeking to do business with the company can access. To require companies to publish the fact of the registration may be too much of a burden on the small private companies.

Art. 23a-d – Comment 12

The provision is standard clause found in many Company Laws. The purpose is to prevent confusing the general public with names that are too similar. Also it is to prevent entities from passing themselves off as another entity to the detriment of the general public.

I also believe that the provision should be couched in such a way as to give the business registrar the discretion to refuse to register any company it considers to have a name that is inappropriate in the circumstance.

An example of how to couch an inclusive prohibition of names clause can be seen from section 30 of the Nigerian Companies Act which provides-

*No company shall be registered under this Act by a name which-*
*is identical with that by which a company in existence is already registered, or so near resembles that name as to be calculated to deceive, except where the company in existence is in course of being dissolved and signifies its consent in such manner as the Commission requires; or*
*contains the words Chamber of Commerce unless it is a company limited by guarantee; or*
*in the opinion of the commission is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy; or*
*in the opinion of the Commission would violate any existing trade mark or business name registered in Nigeria unless the consent of the owner of the trade mark or business name has been obtained.*

The style adopted in the above provision from Nigeria are more concise and inclusive.

Art. 24 – Comment 13

Article 24 (2) requires that the head office of a company must be open at least 4 hours in each day. This provision is too cumbersome especially on small companies. Time that company opens for business should be a business decision not a matter of compulsion. It is not clear for what purpose the business registrar would want to regulate working hours. This kind of regulation is not found in many of the jurisdictions I have had contact with.

Also the restriction on the movement of the seal of the company is not proper. What the Law should provide for is that the seal can only be affixed by certain officers of the company. It will not serve the dictates of commerce if any time a seal needs to be moved to another location permission of an authorizing agency is sought.

Art. 25 – Comment 14

The provisions of this article is totally not in consonance with international practices. Apart from businesses like telecommunications that require licensing restrictions it is not usual to seek to regulate where or how many branches a company can open. Indeed issues relating to branching are only provided in certain sector specific legislation like banking. The same applies to establishment of subsidiaries, which should only be subject to regulations related to competition and anti-trust.

Art. 26 – Comment 15

The concept of limited liability companies appears to be a little different from that in jurisdictions such as the United Kingdom, Nigeria and Ghana. The first major divergence can be found in the fact that the Act allows one person to form a limited liability company. This is not possible under these other jurisdictions. Whilst in fact a company may be a one-man company in the sense that 99% of its shares are held by one person or that all shareholders hold the shares de facto for him it remains a principle that there cannot be limited liability Company with a sole member.

Under the law of jurisdictions such as the UK and Nigeria the upper limit of membership of Limited Liability Company is only imposed in respect of private companies. In Nigeria once the membership of company exceeds 50 it has to register as a public limited liability company.

Also essentially a limited liability company issues shares but by the provisions of this law a limited liability company cannot issue share. This provision is in direct contrast with the law in most jurisdictions. The very essence of limited liability companies is that members hold shares. The distinguishing factor between private and public companies is size and how it may raise capital.

Perhaps the problem lies more in terminology. What is described in Chapter IV of the draft law as Shareholding Company appears to be what is more commonly known as

public limited liability company (PLC). The provisions relating the securities and shares are all similar to the legislations in Nigeria and UK in relation to public companies.

It is however important to point out that there is no reason why the same regulations should not govern the entities described as Limited Liability Companies which are what under Nigerian law will be described as private companies. All that would have been necessary will be to make the essential distinction in such matters as offer of shares to the public, transfer of shares, notice of meetings etc.

Art. 29 – Comment 16

The article 29 (1) a deals with rights of member to share in profit. This right should not be expressed in such terms because the right to dividend or profit only accrues after the company has declared it. In most jurisdictions the company may choose not to declare dividend even though it has made profit. A member cannot thus insist that he has a right to the profit until it is declared by the company. Also it is for the company through its organs to determine the rate of profit per share or investment and not a matter that should be contained in the body of the law.

Another provision contained in article 29 (g) that is different from what obtains in many other jurisdictions that have company law or enterprise law history. In those jurisdictions only the company can sue for a wrong that has been done to the company. The power given members to sue the General Director of the company for failing in his obligations which cause loss or damages to the interest of the member is liable to abuse.

The general position is that only the company can complain or file a suit to enforce a right. The theory is based on the concept of majority rule. In companies it is believed that it is for the majority to decide what is in the interest of the company. In certain circumstance members may be allowed to maintain a minority shareholders action. Also the liability of directors is usually only in relation to breach of their fiduciary duties and simply in cases of failed business decisions as envisaged by this article.

Art. 31 – Comment 17

The provision in article 31 (2) amounts to allowing reduction of the capital of the company. Generally companies under most traditional company laws cannot buy back their shares. Under section 160 & 161 of the Nigerian Law a Company may acquire its own shares for the purpose of-
*settling or compromising a debt or claim asserted by or against the Company; or*
*eliminating fractional shares; or*
*fulfilling the terms of a non-assignable agreement under which the company has an option or is obliged to purchase shares owned by an officer or an employee of the company; or*
*satisfying the claim of dissenting shareholder; or*
*complying with an order of court.*

Such purchase may only be done from profits which would otherwise have been available for payment of dividend or from proceeds of a fresh issue made for the purpose of the purchase.

The main difference between the draft and the Nigerian position is that the law is strict on the source of the funds for the purchase of the company's own shares.

In the UK, the law is little more relaxed and a company can now freely purchase its own shares subject to some restrictions imposed to ensure that there is no abuse. In the United Kingdom unlike United States of America where a company purchases its own shares it cannot be kept as treasury shares, which can be sold later, but rather it will have to be cancelled.

Art. 34 – Comment 18

The above article appears to be over legislation. It is more appropriate to develop a more focused distribution of powers between the organs of the company and leave the creation of structures within a company to the individual companies. As we have pointed out too many classifications leads to much confusion and over legislation. Under English law the powers of the company are divided between the General meeting and board of directors. The board as we earlier stated will usually set up structures for the management of the company, including management committees.

Art. 35 – Comment 19

In many jurisdictions the enterprise law of company Act specifies the various types of meetings that can be held by the company. Under the English law and the Nigerian law every company is required each year to hold an annual general meeting. Any other meeting of the company is described as extraordinary general meeting.

The general functions of the general meeting is usually to elect the officers of the company and approve things like dividend and accounts of the company. Unlike the provisions of Art. 35 (d) the general meeting does not deal with issues like marketing, market development. These should be matters left for the persons managing the company. To this extent I feel that the provision will be cumbersome and ought to me removed. Indeed it would appear from the entire provisions of Art 35 that the general meeting is vested with too much power.

Art. 36 – Comment 20

This article in line with the other sections appears to vest too much powers on organs outside the board of the company. The organ known as the Chairman of the meeting of members is possibly the same as the person known as the Board Chairman under Nigerian Law or English law. The power to convene a meeting usually resides in the board and is usually exercised through the Managing Director (perhaps known here as General Director) and the Company Secretary who acts at the direction of the board. To

forestall abuse of the power to call meeting members are given a power to requisition a meeting after fulfilling certain conditions.

It is also not necessary to stipulate the tenure of persons elected by the company to serve in any position such decision should be left to the Company to decide in its own best interests.

Art. 37 – Comment 21

The article requires that meeting of the company be held at least once every quarter and at anytime that a member holding more than 25% or the Chairman of meeting of members requests.

The requirement that a meeting be held at least every quarter I feel is to frequent and might itself become a burden. I believe a requirement that the company must meet once every year is preferable with the proviso that 25% of the members can requisition a meeting or a meeting may be called by the company any time it is necessary.

Also the requirement that all members sign the minutes of a meeting contained in 37 (1) a will be too cumbersome to properly implement.

Art. 38 – Comment 22

My main comment on this provision is that the quorum demanded by the meeting is too high. In most jurisdictions a quorum for meetings is one third of members. The provision for a decrease in percentage for the quorum for a meeting is too technical and less desirable than a fixed lower quorum.

Art. 40 – Comment 23

The article stipulates the contents of the minutes of a meeting of a company. This is another example of over legislation. It is not exactly clear why the minutes of the meeting must contain all that information relating to shareholding.

Art. 41 – Comment 24

The powers conferred on (General) Director in this article are the powers usually exercised by the board of directors. In other jurisdictions the equivalent of the (General) Director will be the chief executive of the company and he usually exercises many of the powers contained in the above article. The difference however lies in the fact that these powers are usually delegated to him by the board and conferred on him by a law.

The danger of conferring such powers by law is the rigidity and lack of flexibility in case change is needed and it also inadvertently creates a tyranny of control especially where sometimes such General Directors are merely employees and not even shareholders. The second concern that the General Director may not even have membership interest though

not applicable under this law because share qualification is required yet such qualification is only 10% as such it is a minority interest.

Further it must also be pointed out the requirement of share qualification to be a director is a matter that ought to be left to the charter of the company to decide and made statutory. The same comment goes for all provisions relating to salary and bonuses of directors or other principal officers.

Art 49. – Comment 25

This article demonstrates how incongruous it is to contemplate a one-man limited liability company. The article talks of meeting of members when there is only one member. It is my suggestion that all reference to one-man limited liability company be expunged so as to not create an absurdity. In practical terms a company may be a one-man company but in legal terms there cannot be such a company.

MEMORANDUM

To: UNDP
From: Aaron Schildhaus
Subject: Vietnam Proposed Draft Enterprise Law Review
Date: 8 May 2005

This review of the proposed Enterprise law is based upon my experience as an international lawyer for the past 37 years, representing investors and businesspersons from around the world, engaged in a wide spectrum of business operations and transactions touching virtually all countries and regions. Before engaging in a line-by-line review of the proposed law, it is suggested that the following remarks be seriously considered.

Of primordial importance to the State in the development and promulgation of new laws governing the business sector is the State's ability to balance its legitimate interests and priorities for stimulating the economy with its *raison d'etre*, which is to protect and safeguard the security, health and safety of its citizens, prevent the wasting of its natural resources, and protect the environment. [This general point is covered in Article 6, Paragraph 2 of the Draft Law.] It should be pointed out that a healthy economy is a prerequisite for a State to effectively provide for these necessities, i.e., for its *raison d'etre*. In the absence thereof, the State will never marshal sufficient resources to fulfill its underlying obligations to its citizens.

However, a significant factor in judging the economic strength of a country is that State's own attractiveness to investors and businesspersons from within the country as well as from other countries. That means that the laws and their application must be as simple as possible; they must be easy to understand. They must also be consistent and even-handed in order to encourage the growth of domestic business so that the State's own citizens have the incentive and the ability to learn from, and compete with, foreign investors. Moreover, foreign investors should be treated no better or worse than domestic investors. Treating foreign and domestic investors in the same manner provides a great deal of legal predictability, thus encouraging additional engagement and investment within the State by parties from both groups.

It has been proven that the greater the competitive opportunities there are, the more effectively new industries can develop and prosper. To the extent that business thrives, the economic strength of the country will grow and the gross domestic product will multiply, thus enabling it to most effectively serve its citizens in the areas discussed above.

The underlying consideration, therefore, is to maximize the opportunities for business to thrive; to make it most effectively compete in a global, or even regional economy, yet remain mindful of its citizens' overall needs to be protected and nurtured.

It is critical that the laws not be overly long, detailed or complex, because the intent of the legislation is to provide guidelines for the investors and business-persons to structure their businesses easily. The State, through its laws and their even application, must enable enterprises to remain agile in their ability to adapt to changing business situations. The laws in the country must, therefore, be readily understandable so that anyone wishing to engage in business, whether citizens of that State or from other countries, can proceed quickly to establish business and to allow it to be operational.

It is my experience that certain elements must exist as a part of the laws and legal climate of any jurisdiction in order to encourage and stimulate investment and business activities there. Where these elements do not exist, business-persons from outside the country will invest their time and money in other countries. They will go where there is legal security and the predictability of business success.

By the same token, people within the country who would otherwise engage in business and thus strengthen the economy will be discouraged from investing their own time and energy if their chances for success are not maximized by the laws in place, and the ways in which these laws are applied.

This necessarily requires an approach in the drafting of legislation which will encourage individuals and businesses within the country and from other countries, to invest their capital, money and energy to create more business and energize the private sector, which has been seen consistently throughout history as the sector producing the most innovative and successful ideas and business models.

In a socialist economy, this is a major challenge, but frankly no more of a challenge than in other legal systems. The key to successful business development is to create a legislative and practical environment that will attract investment and the commitment to work hard on the part of the business.

This is particularly difficult, if not impossible, unless certain basic criteria are met. It is necessary to greatly simplify the oversight of the State, to make the business creation and operation process as easy, transparent and balanced as possible for all investors and businesspersons.

The process starts with laws that are easy to understand and easy to comply with, that minimize the paperwork and red tape involved in getting necessary permits and approvals, and that simultaneously reduce the opportunities for government agents to engage in corrupt activities, i.e., to demand or require bribes in order to either grant the

necessary permits and licenses to start in business, or afterwards, to allow the business to continue.

As a general rule, the best laws are those which are very simple and straightforward, and which do not give government employees or agents discretionary power which could be

abused. The legal system must also provide for an independent means whereby businesses can appeal for fair treatment in an unbiased and clear process. Thus, it is necessary that an independent appeals mechanism is in place that is not subject to corrupt influences

The legislative climate must be very clear and unambiguous, the persons enforcing the law and any regulations relating to it must be held to a high standard of fairness and honesty. Normally, this also means that employees of the State regulatory bodies must receive a decent enough salary for their work so that they do not find it necessary to engage in corrupt practices. It also means that sanctions must be applied where agents are found to be corrupt. Corruption is a disease in any economy, and the best way to have a strong and healthy economy is to prevent the disease in the first instance.

Not all businesses need to be regulated. Certain aspects of all businesses need some regulation and licensing. For example, enterprises serving food to the public need to have oversight with respect to sanitation and the safety of the food that is prepared and served. Likewise, the employees where food is prepared or served must be free of disease and required to observe strict standards of cleanliness and hygiene. The business establishment itself in such a case must observe strict standards, that are subject to inspections and oversight. The same applies with respect to any health-related business: pharmacies, hospitals, hair dressing, clinics, dental businesses, etc. Building codes must be published and observed in order for the safety of the public. Public transport businesses, such as taxis and buses need to be regulated to protect the public.

The examples are numerous, but wherever there is an objective need for regulation and there are published rules and regulations, including licensing requirements, there is a possibility of corruption. Corruption in the granting of licenses must be eliminated for the good of the economy, as a whole. Therefore, there needs to be in place a means whereby the withholding of licenses or permits can be challenged in an open and fair and equitable forum. The right of judicial review is beyond the scope of this analysis, but it is one of the pillars of a business system that is open and welcoming to investments and business activities, no matter how small.

Generally speaking, the simpler the law, the more understandable it will be for the business person, and the more likely to encourage new business. To the extent that the law can be simplified and state general principles whereby sector-specific regulations will be enacted and be subject to the law, there will be standards in place so that acts of

state employees can be reviewed to determine whether they were arbitrary or based on an open and honest assessment of the facts.

With this underlying philosophy in mind, I have reviewed the draft law on enterprises, and find it to be overly long, complex and confusing. There is no question but that it could and should be greatly simplified. It is overly lengthy and complicated, containing many provisions that could be determined, not by the statutory provisions of the law, but

on a case-by-case basis by the principals of the business in their own internal statutes and internal regulations. For many reasons, it is not practical or advisable for the State to dictate the internal workings and priorities of all businesses. This takes away the agility mentioned before, and provides a climate of too much regulation and oversight by State bureaucracy, thus wasting valuable time and resources and opening up the entire process to the risk of arbitrary decision-making, hence, corrupt practices.

It appears to me that the law is more confusing than it need be. Instead of dealing with all different types of enterprises in one law, it would be far easier to understand if each type of enterprise were to have separate provisions governing it, and if the number and breadth of provisions could be kept to a minimum. Many of the provisions would be very similar or even identical, but the average business person would be viewing laws with much less ambiguity. Great ease in understanding the laws and procedures lead to less arbitrariness and fairer, more even application of the laws.

Another observation is that businesses of all types and sizes are being subject to the same statutory legal requirements. It would be simpler to understand the law if it specifically related separately to small, privately owned business operations than also including those with large numbers of employees and shareholders, and physical locations.

Upon providing you with a marked-up copy of the proposed Enterprise Law, indicating suggested modifications in language, such suggested modifications must be taken into consideration, in the context of this discussion.

NB: The English-language document contains many typographical errors, and phrases the syntax of which are difficult to understand. However, in view of the fact that the original document will be in Vietnamese, I would suggest only selective corrections, on a merely indicative nature. Rather than spend the extensive time to re-draft the English, it is preferable to wait until a final draft of the law(s) has/have been completed in Vietnamese, and then translate into proper English for the purposes of publishing so as to attract foreign investors. All things considered, I would propose a very short and general law, leaving minimal supervision, providing for maximum transparency and maximum ease in interpretation, and one in which there is the opportunity for quick, just and transparent review of administrative decisions.

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