ASSESSMENT OF THE DRAFT COMMON INVESTMENT LAW FOR THE SOCIALIST REPUBLIC OF VIET NAM

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SYNTHESIS OF EXPERT COMMENTS TO THE VIET NAM DRAFT CIL:
Compilation and Comparison of the Major Points Expressed in the Expert Assessments to the Draft Common Investment Law of Viet Nam

1. **The commentators suggest that the CIL could be consolidated.** The commentators agree that the CIL, in general, is overly lengthy and complicated. They suggest that many of the matters currently stipulated in the draft CIL could be determined on a case-by-case basis rather than by statute. (See *Stein* at I.A; *Schildhaus* at II.A.)

2. **The commentators suggest that certain CIL provisions could be better addressed in separate legislation**.

    a. *Stein* at I.A and III.B states that the CIL may be limited to private direct investments only. At II.B.3 and III.B, *Stein* states the following areas could be better addressed in separate legislation:
        i. Articles 22, 23, 25, 26 and 27 covering purchase of shares of Vietnamese enterprises (e.g., securities trading), merger and buy-out of enterprises, and reorganization of enterprises and indirect investments. (See also *Burke* at IV.C-D.)
        ii. Articles 50, 51, 52 covering industrial zones, investment assistance funds from the State and encouragement of technology transfers.
        iii. Articles 53-57 covering offshore investment by Vietnamese firms.
        iv. Articles 86-113 covering state-owned investment funds.
        v. Provisions dealing with oil and gas, mining, insurance, banking, and other infrastructure investments.
        vi. Finally, BOT, BOO, etc. are best addressed in a concessions law.

    b. *Ojukwu* at I.A agrees and states that the CIL could focus more on regulating the trade of securities and corporate governance matters rather than on policy.
        i. *Ojukwu* suggests that the CIL currently focuses too much on policies for government-owned enterprises. CIL could limit its scope to regulate solely privately-owned or -managed entities. (See I.F.)
        ii. Also, *Ojukwu* has found that the CIL currently focuses more on state participation in certain businesses, micro credit facilities, tax or investment incentives, tenders for government contracts and reporting requirements for government funding than on securities regulation and corporate governance. (See I.C.)

    c. *Burke* at I.A ***disagrees*** and states that it is preferable to consolidate all of Viet Nam's investment laws into one statute.

3. **The commentators suggest that the role of the State in the CIL may be reduced.** The commentators agree that the CIL should be free of excessive micro-management and government interference with business management and investment decisions. (See

Stein at I.D.) They find that new industries develop and prosper best in a competitive, free market climate. (See *Schildhaus* at I.D.)

a. *Stein* specifically refers to this in his comments on Article 29 (see II.B.2), Chapter VII, Sections I and II (see II.E.1) and Article 127 (see II.U).

b. *Burke* specifically refers to this in his comments on Article 3 (see I.B) and Article 33 (see V.D).

c. *Ojukwu* specifically refers to this in his comments on Art. 54 (see II.B).

4. **The commentators suggest that the CIL's definitions should be more precisely and properly drafted.** (In reference to Article 4, see *Stein*'s suggestions at III.A and *MacLean*'s suggestions at i.B and I.C-G.)

a. *Burke* at I.C suggests that the CIL should cross-reference definitions of terms used in other statutes or regulations (e.g., Common Enterprises Law).

b. The various definitions of "Foreign Individuals", "Foreign Investors", and "Foreign Investments" should be further clarified and consolidated. (See *MacLean* at I.C, I.F and *Burke* at I.C.)

c. The term "line law" in Article 5 is undefined and is not very common in the international law context. (See *MacLean* at I.G and *Burke* at I.D.)

5. **The commentators suggest that the CIL's non-discriminatory application needs to be emphasized.** *MacLean* at I.B states that Article 3's provision concerning "non discrimination treatment to all economic sectors, foreign and domestic investment" seems to contradict other articles which set priorities according to sectors and limit foreign investment.

a. *Stein* at II.I ***disagrees*** and states the "no discrimination" matter is already adequately addressed in the current draft.

6. **The commentators suggest that expropriations deserve compensation at a fair market price.** In reference to Article 6, the commentators agree that an expropriation by the State should be based on an enabling law that provides for prompt and adequate compensation. (See *Burke* at II.A and *MacLean* at II.A.)

a. *Stein* at II.T states that the expropriation issue is a top concern of foreign investors in developing countries and thus it is important to use precise language (e.g., well-accepted international investment terms.)

7. **The commentators suggest that the stabilization provision is unnecessary.** *Stein* at II.V states that Article 13's guarantee provisions, which seek to protect investments

against changes in the law, can be eliminated because they impose policy on future governments.

a. *Ojukwu* at II.A ***disagrees*** and states that, given the history of nationalization in developing nations, the goal of eliminating expropriation is commendable.

8. **The commentators suggest that the investor's right to transfer funds abroad could be more clearly stated.** In order to encourage investment by foreigners, *Stein* suggests at II.O-S that Article 8 needs to precisely state the investor's rights concerning the repatriation of capital, dividends, sale proceeds, and the principal and interest on foreign loans.

    a. Alternatively, *Burke* suggests at II.C that Article 8 may be deleted altogether because, he states, it is best to leave the terms and conditions of offshore investments to the individual investor's discretion.

    b. *MacLean* at II.E states that Article 8 could be better addressed without resorting to quotas, times, and different rates of exchange.

9. **The commentators suggest that dividing investment sectors into categories can be confusing**. The commentators agree that Chapter V, Section I's classification of investment sectors (divided according to those investments to be encouraged, prohibited, and those to be subjected to conditions) is ambiguous, confusing to foreign investors, difficult to administer and creates opportunities for corruption. (See *Burke* at V.A-B; *MacLean* at V.A; and *Stein* at II.B.1-2.)

    a. *Burke* at V.B suggests that Articles 28-30 could be combined into: (1) a general statement that all lawful investment activity is allowed; and (2) a statement clarifying that investments in defined “prohibited” areas are unlawful.

    b. *Stein* at II.B.1 also suggests that the recommended approach is to avoid positive lists (such as in Article 28) and use only a negative list (such as in Articles 29, 30 and 31) of closed or restricted sectors/areas.

10. **The commentators suggest that the CIL's application process could be based on a “registration” rather than "approval" approach**. The commentators made the following negative assessments of Chapter VII, Sections I-II's currently proposed "approval" approach:

    a. *Burke* at VII.A states that fewer licensing and approval steps are preferred because delays and licensing duplications are frustrating for investors.

    b. *Schildhaus* at I.H states that, in reference to the issuance of permits and licenses, the proposed laws should not give government employees discretionary power which may be abused for corruption purposes.

c. *Ojukwu* at II.C states that the provisions in Articles 58-71 appear to be duplicative and may discourage investment in Viet Nam. He also notes that the draft Common Enterprises Law already provides for the registration of businesses.

11. **The commentators suggest that the CIL could contemplate the designation of a government investment authority**. In reference to Chapter IX and Article 117, the commentators suggest that the CIL could establish a single independent investment board or commission to administer the authorized activities, stipulate the composition of the board and provide for the promulgation of rules and procedures for the board to follow. (See *Stein* at II.C) The authority could furthermore ensure that public companies comply with its rules and protect investors from harm. (See *Ojukwu* at I.E.)

    a. *MacLean* at VI.A suggests that it is preferable to deal with foreign investment matters within a specialized body established under the Ministry of Economy, the Ministry of Trade, the Central Bank or within an independent body under the prime minister's office.

    b. *Schildhaus* at I.H suggests that persons enforcing the laws and regulations should be held to high standards of fairness and honesty. Employees of State regulatory bodies should be compensated adequately so that they are not economically compelled to engage in corrupt practices.

Memorandum

TO: ABA-UNDP International Legal Resource Center (ILRC)

FROM: Stephen W. Stein

DATE: June 3, 2005

RE: Comments on Draft Common Investment Law for Vietnam

At your request, we have reviewed the undated draft of the proposed new Common Investment Law for Vietnam ("CIL") which was forwarded to me on May 10, 2005, by Alan Budde. Our review has been premised on the goal of maximizing investor, particularly foreign investor, interest while keeping Government commitments within the parameters of current international practice. We have relied on our experience in dealing with investment statutes on behalf of both foreign investors and developing country governments.

Our comments are set forth below. They consist of some general observations and then comments on specific provisions of the CIL. We have also attached as annexes drafts of particular provisions which the Government may wish to consider for replacement of existing provisions or as additions to the CIL. However, given the time frame for our review and the policy issues which we have raised, we have not attempted to provide a section-by-section analysis on content and have provided only limited comments on the draft language itself. Such further comments and detailed analysis would require substantially more time to prepare, as well as feedback on our recommendations and suggestions.

I. General Observations

A. Consideration should be given to consolidating and simplifying certain aspects of the CIL, making the language more precise and providing for less bureaucratic involvement. Details can be left to regulations. It would be advantageous to cover certain areas in separate legislation. In this regard we are referring specifically to the provisions relating to investments by Vietnamese abroad, privatization, concession (BOT/BOO, etc.) investments, investments using State owned funds and the tendering process, portfolio, i.e., indirect, investments and technology transfer. We recommend that the CIL be limited to coverage of private direct investment.

B. There is currently considerable debate among economists about what types of investment incentives attract capital most efficiently and also some debate about what types of incentives actually provide more benefits than costs. Some experts, for example, believe that the increase in investment caused by a tax holiday will in many cases not be worth the cost to the government in lost revenue. There is considerable opinion that incentives play only a limited role, relative to other variables, in a foreign investor's determination as to where

or whether to invest. More important factors appear to be such things as an efficient and fair court system (or other mechanism for dispute resolution), currency convertibility, political and economic stability, markets, intellectual property rights, a transparent and non-burdensome regulatory environment, wage levels and quality of infrastructure. It may be advisable simply to rationalize generally applicable income tax rates to conform to worldwide norms. If they already do so, tax holidays may not be necessary. This does not foreclose the possibility of providing certain other income tax incentives such as accelerated depreciation, loss carry forwards or investment tax credits for certain capital equipment purchased in connection with the investment. Nor does it preclude the possibility of providing exemptions from export taxes and some relief from import duties. To the extent that tax holidays and other tax incentives are made available, they should be simplified and clarified.

C. It would be desirable to have more clarity with regard to the concept of investment registration as opposed to approval of investment by government authorities in Vietnam. The former is preferable, although with regard to certain types of large complex projects a case by case approach may be necessary. Registration should not be utilized as a screening process for foreign investment, but should be kept as more of a formality, which all businesses, foreign and domestic, have to go through in order to legally operate in the country. The registration of an investment should not require approval, except for investments in specified sectors. Subjecting the investment to a screening process, i.e., obtaining a permit, would restrict the flow of investments, and does not send positive signals to investors. Screening should be used only under special circumstances. In addition, screening often lacks transparency and accountability and may result in corruption. The legal framework for the regulation process should minimize the discretion of the government, maximize predictability and strive for a basic, automatic registration. Such screening as is allowed should be the exception, not the rule, and should be for the purpose of refining incentives when necessary to stimulate further investment.

D. Throughout the CIL there seems to be an excessive amount of micro-management and interference with business management and investment decisions and investment implementation as in Section III of Chapter VII and Chapter IX. This should be eliminated. The concept of “Investment Projects”, i.e., business plans, should also be eliminated. These should not be subject to government review and approval.

E. Although the draft CIL covers both domestic and foreign investment, the importance of attracting foreign investment cannot be overemphasized. Therefore, the CIL should be particularly looked at from the perspective of prospective foreign investors. Furthermore, some of the investment incentives will be of interest or benefit only to foreign investors, i.e., repatriation, etc. In this regard, the wording of the CIL should be tightened up. Although the draft which we are reviewing is in English, it would appear that this is a translation from Vietnamese and that the draft was originally prepared in Vietnamese. Although this is quite appropriate and understandable, it may be helpful to draft certain of the provisions that relate particularly to foreign investors in English first which could then be translated and incorporated into the Vietnamese language draft. The specific language will be of particular interest to foreign investors who will be reviewing the English language version of the CIL.

II. Specific Comments

Private direct investment statutes generally contain certain essential provisions which cover rights of investors, incentives, guarantees and other benefits available to investors and set forth administrative provisions regulating investments. The CIL would appear to include provisions addressing all of such essential matters. Set forth below are such categories of provisions, the treatment accorded to such provisions in the CIL and our comments and suggestions thereon.

A. Relationship with Other Laws

Article 5.1 of the CIL provides that line laws which conflict with the CIL shall prevail. Article 5.2 of the CIL provides that such line laws shall be repealed, amended or supplemented in accordance with an annex that has not yet been provided for comment. This seems contradictory and is confusing. We suggest that the preferable and more common approach would be to provide that in the event of any discrepancy between provisions of the CIL and provisions of existing laws relating to or affecting investment the provisions of the CIL shall prevail. This is what we believe is intended by the current draft and, in any event, is the recommended approach. As to laws to be enacted in the future, such laws should state whether or not they are intended to supersede the CIL and provide accordingly. If silent in this regard, depending on rules of statutory interpretation in Vietnam, we assume that the law enacted later in time would govern and prevail over provisions in the CIL, unless the CIL were to contain a stabilization clause. We will address stabilization below in paragraph II.V.

B. Permitted Investments

This subject is addressed in several articles in the CIL – 21 through 24, 26, 28 through 30, 32, 33, 58, 63, 64 and 65. The generally

recommended approach for investment laws, particularly with regard to foreign investment, is to avoid a positive list, that is, a list of sectors and/or areas open to investment, but instead to use a negative list of closed or restricted sectors and/or areas. Thus, investments may be made in all sectors and/or areas except those which are specified on the closed or restricted lists. This is likely to encourage more investment. The CIL would then provide that, except as otherwise provided in the closed and restricted lists, investors may make investments in all sectors of the economy.

The CIL would appear to take the approach of using both a positive list (Article 28) and a negative list (Articles 29, 30 and 31). There also seems to be some inconsistency between Article 14 and Article 28.1. This will cause confusion. The positive list itself is confusing as the sectors are described only in general terms. At this time there is no positive list of areas as this is contemplated to come later. We would recommend that the CIL contain only a negative list if the objective is to maximize investment. This negative list could be amended from time to time. Such list should be very specific to avoid misunderstandings and encourage ease of implementation. Sectors which are often excluded from private investment are national defense, national security and the like. Some of the items listed in the prohibitions in Article 29 are too ambiguous. Investments which are harmful to safety, health, environment and the like can be controlled by requiring investors to comply with Vietnamese laws regulating these matters.

This also raises the issue of the scope of the CIL. This, of course, is a policy issue for the Government. However, based on our experience elsewhere, we have some suggestions to make. It should be recognized that there are certain areas of investment which are so specialized or unique that they should be regulated by separate legislation. These would include oil and gas, mining, insurance, banking, pipelines and other infrastructure. BOT, BOO and similar types of investments in infrastructure would probably be better addressed in a separate concessions law. We also believe that it is most unusual to address investments from state-owned funds in the same law applying to private investment as the considerations are very different. Likewise, investment by Vietnamese parties overseas does not belong in a statute regulating investment in Vietnam. Finally, portfolio, or indirect, investments, should be covered by separate legislation, perhaps relating to the stock exchange or securities regulation.

If, as we suggest below, the basic rule for private investment in Vietnam is that investments need only to be registered, rather than approved by any government entity for the investor to commence

investment, then there will be a need for what we would call a "restricted list". This would be a list of those investments for which registration alone is not sufficient. The investment would have to be reviewed by the designated government investment authority. The content of the list would depend in part on the scope of the CIL. For example, if investment in the banking and insurance sectors were to be covered by the CIL instead of by separate legislation, the restricted list might require that investments in such sectors be approved by the designated authority as the considerations involved are too complex to be dealt with by a mere registration process. Investment in other sectors which might involve special considerations of an economic, political or social nature might also require express approval and perhaps different incentives and governmental support. An illustrative example would be an investment in an automobile manufacturing facility. Finally, there might be a requirement that any investment over a specified significant amount must receive specific approval.

C. Designated Government Investment Authority

It is common in investment statutes for an independent investment authority to be established which provides such governmental investment approvals as are required by the investment law, issues implementing regulations, maintains records and data relating to investments, promotes investment activities and acts as a "one stop" liaison center to coordinate between investors and the various government agencies which will need to issue licenses, permits, etc., for specific projects to investors. In some cases the investment promotion and liaison activities are delegated to a separate independent agency. The investment authority is often comprised of ministers from the several ministries which are most involved with investment, such as the ministries of commerce, finance, industry, justice, and planning. The authority employs staff to carry out its day to day functions. The rules of procedure for the authority are usually set forth in regulations to be issued by the authority.

Chapter IX of the CIL addresses the issue of State investment management and seems to place it primarily in the Ministry of Planning and Investment. However, it would appear that authority for investment management is diffused among several bodies, for example, the Standing Committee of the National Assembly and the Prime Minister. See also Article 117. This is confusing and would appear to be inefficient. It also appears to be very bureaucratic. This is not the message which needs to be sent to investors. We would recommend that the CIL establish a single independent investment board or commission to administer the activities authorized by the CIL, stipulate the composition of the board/commission and provide

for the promulgation by such board or commission of rules and procedures for the board/commission to follow. Providing for investment decisions to be made at the level of the Prime Minister or the legislature will lead to delays in implementation of investment decisions and raise the possibility of politicization of the process which will discourage investment.

D. Form of Doing Business

It is important to make clear to the investors, particularly foreign investors who may not be familiar with doing business in Vietnam, the forms of business entities through which they can invest, such as partnerships, corporations, etc. This is addressed in the CIL in Articles 14, 21 through 24 and 26. Article 21.1.a, which refers to the provisions of the Enterprises Law, may provide all of the necessary guidance in this regard (we are unaware of the contents of the Enterprises Law), but it might be helpful to specifically mention in the CIL the forms of business entities permitted under the Enterprises Law.

Please also note our comments in paragraph II.B above with regard to the scope of the CIL, i.e., limiting it to coverage only of private direct investment, and excluding portfolio investments, BOT/BOO investments and investments in state-owned enterprises.

E. Application Process

The application process for the right to invest should be made as simple, straightforward and transparent as possible. We believe that Sections I and II of Chapter VII, which address the application process, are far too complex, confusing and burdensome and do not seem to be automatic, even as to "normal" investments and certainly not as to others. See, for example, Article 65. Among those who have studied the operation of investment laws, particularly in developing countries seeking foreign investment, the consensus is that to the maximum extent possible the basic application process should be based on a "registration" concept rather than an approval process. See our comments in paragraph I.C above. There can be exceptions, as indicated in paragraph II.B above, but the basic approach would be that a mere filing of specified information with the designated government investment authority would be sufficient to permit the investor to make the investment. Thus, the investment authority would automatically register the investment and issue a certificate to that effect upon receipt of the application. For investments on the restricted list a more rigorous review process would be involved, but even in these cases the investment authority would not evaluate the feasibility of the investment. It would merely

consider whether the investment would comply with criteria previously established for investment in the sector under consideration, whether it was located in an acceptable area for that type of investment, whether the investment justified additional investor incentives beyond those otherwise provided under the CIL or other forms of government support and other issues of a similar nature. Assuming these matters were all resolved satisfactorily, the investment authority would not involve itself in consideration of the business plan. It should be remembered that our advice is based on the premise that there would be a separate law relating to BOT concessions and the like in which case the government would justifiably be more involved in evaluating the merits of the project. Furthermore, if the Government were a lender to, or joint venture partner in, the project, it would have a more active role, but in its capacity as lender or shareholder/partner as dictated by the loan agreement or joint venture agreement, not through the investment authority.

The rationale for the approach described above is that it maximizes transparency and minimizes the opportunities for discrimination, favoritism, corruption and excessive government interference with the private investment process.

Sections I and II of Chapter VII of the CIL establish three different kinds of projects (normal, important and nationally important), none of which are adequately defined, and all of which involve the government too deeply in the making of investment decisions and judging the economic feasibility of investments. They establish ambiguous and subjective standards, particularly for important and nationally important projects. We are concerned that the requirements for submitting pre-feasibility and feasibility studies to the Government will chill investor interest. These sections also impose time limits on certain foreign investment projects which will be counter-productive. Such an approach runs counter to generally observed principles in modern investment statutes and could put Vietnam at a disadvantage in competing with other similarly situated countries in attracting foreign investment. We recommend that Vietnam follow the “registration” approach described above.

One other point may be worth considering in this regard. Inasmuch as “investment” is so broadly defined, it may be worthwhile to give domestic investors the option of not registering under the CIL. Even small shops would technically be investments and require filing an application under the CIL. This is burdensome for both the investor and the government. Of course, if the domestic investor did not register under the CIL, he would not be eligible for benefits granted under the CIL. However, these may not be of much value to the

domestic investor if, as we recommend below, there are no tax holidays, but only accelerated depreciation and loss carry forwards. On the other hand, if tax holidays are retained, the domestic investor would have little reason to opt out from the CIL, and this concept need not be pursued.

F. Reporting

There should be a requirement that investors submit to the investment authority periodic reports. This information will be helpful to the investment authority in analyzing the success of the CIL. We did not find a reporting provision in the CIL, unless we overlooked something. In any event, there should be such a requirement for annual updating of the information provided in the original application and reporting of changes in ownership, capital structure or contribution of additional capital.

G. Revocation

This seems to be adequately addressed in the CIL.

H. Compliance with Local Law

This seems to be adequately addressed in the CIL.

I. No Discrimination

This seems to be adequately addressed in the CIL.

J. Income Tax Holidays and Other Income Tax Incentives

These provisions are contained in Articles 34 through 37 of the CIL. The application of these provisions needs to be clarified. In Article 34.1.a, it is not clear as to which projects or types of projects the respective rates of 20%, 15% and 10% will be applicable. In Article 34.1.b, the time period for the 50% exemption should be specified. To merely establish a maximum period leaves uncertainty. If it is contemplated that the investment authority would establish the time period on a case by case basis, we believe that this defeats the purpose of the "registration" concept as described and explained in paragraph II.E above. We recommend that a specific time period be established in the CIL. For investments in sectors or areas which are contained on the restricted list, if our suggestion in that regard were to be followed, such investments would need to be reviewed by the investment authority and the time period for the exemption could be adjusted if necessary. In Article 34.1.c, it is not clear as to how the time periods would be applied to each of the income tax rates. In Article 34.2, it is not clear in which cases the tax exemptions and

reductions will be available. Although Article 34.3 states that all of these matters will be provided for in the future by the government, we recommend that for the sake of clarity and transparency these matters should be addressed in the CIL itself or in regulations issued simultaneously with the enactment of the CIL--and that the whole structure should be simplified. We also recommend that the tax rate, period of exemption, amount of reduction and period of reduction be the same for all investors in all projects which comply with registration requirements. This would be consistent with the principle of equal treatment of all investors. If certain types of projects may need greater concessions to achieve necessary levels of viability, i.e., projects in sectors on the restricted list described in paragraph II.B above, the designated investment authority would have authority to grant such concessions if they were in the best interest of the State. As to the exemption for dividends provided for in Article 36, this may not be necessary if profits distributed as dividends are not taxed at the company level.

As to the virtues of tax holidays and incentives generally, see our comments in paragraph I. B.

K. Import/Export Duty Concessions

Import duty concessions seem to be adequately addressed in Articles 38 through 41 of the CIL. We would recommend that a provision be added which would exempt exports from any export duties which would otherwise be applicable.

L. Access to Banking Facilities

Although Article 15 of the CIL provides investors with equal access to credit resources, we recommend that a provision be added which would explicitly state that an investor would have the right to use banking facilities in Vietnam, including the right to open accounts in foreign currency and to use these banks to receive loans and credits in foreign currency from outside of Vietnam, and to maintain bank accounts in foreign currency outside of Vietnam for the purpose of purchasing equipment, services, etc., and for payment of salaries and benefits to expatriate employees.

M. Right to Use Expatriate Employees

The CIL addresses labor and employment issues in Articles 45 and 46. We recommend that these provisions be expanded to explicitly provide that investors shall have the right, directly or indirectly, to employ foreign managerial and expert personnel of any nationality and shall have the right to enter into service contracts with foreign

persons in order to conduct their business activities and to obtain work permits for such managerial and expert personnel. The current language in Article 46, "in accordance with the labor laws", may raise some doubts in the minds of investors as to their rights in this regard and should be deleted. It should be sufficient to state that all employees of investors in Vietnam, regardless of nationality, shall be subject to and shall comply with the laws of Vietnam while present in Vietnam.

N. Land Use

Article 15 of the CIL states that investors shall have the right to access to land. Article 42 of the CIL provides that investors shall be allocated leased land for carrying out investment activities in accordance with the provisions of the Land Law. Articles 43 and 44 provide for rent and land use tax exemptions. We are assuming, from the manner in which the provisions are drafted, that all land ownership is with the State. However, if private ownership of land were to exist in Vietnam, we would recommend that the conditions of the lease, including the term, be left to the lessor and the investor to negotiate without limitation. We would raise certain points for consideration. Instead of letting the Land Law determine the term of the lease (as per Article 42.1), as it may be modified by the Standing Committee of the National Assembly only in cases of specially important investment projects, we would recommend that the CIL provide that all investors be entitled to minimum lease terms of a stipulated period, say, 50 years (but not longer than the life of the project if it is otherwise limited in time). We recommend that Articles 43 and 44 be revised to provide for the same exemption periods and amounts for all investments that comply with registration requirements. The currently proposed system is too complex and will be difficult to administer. It also seems inconsistent with the concept of equal treatment for all investors. If more concessionary terms are required to achieve viability for projects on any restricted list, the designated investment authority would have authority to enhance such terms if in the interest of the State.

O. Repatriation of Capital

Article 8.d of the CIL provides to investors the right to transfer invested capital abroad. In principle this provision meets the needs of the foreign investor. However, we believe that a more precise formulation of this concept is necessary to provide comfort to foreign investors. We have attached as Annex 1 our suggested language.

P. Repatriation of Dividends

Article 8.a of the CIL provides to investors the right to transfer profits abroad. In principle, this provision meets the needs of the foreign investor. However, we believe that a more precise formulation of this concept is necessary to provide comfort to foreign investors. We have attached as Annex 2 our suggested language.

Q. Repatriation of Principal and Interest on Foreign Loans

Article 8.c of the CIL provides to investors the right to transfer principal and interest on foreign loans abroad. In principle this provision meets the needs of the foreign investor. However, we believe that a more precise formulation of this concept is necessary to provide comfort to foreign investors. We have attached as Annex 3 our suggested language.

R. Sale or Transfer of Investment

Article 17 of the CIL addresses this issue. We believe that a more comprehensive provision is required. We have attached as Annex 4 our suggested language.

S. Repatriation of Sale Proceeds

Article 8.d would appear to address this point in part with its reference to "investment capital liquidated moneys". We believe that a more explicit provision will be necessary to satisfy the concerns of foreign investors in this regard. We have attached as Annex 5 our suggested language.

T. Expropriation

Article 6.2 of the CIL addresses issues of expropriation and in broad principle covers the necessary points. However, this subject is of special concern to foreign investors and has an extensive history over the years insofar as foreign investment in developing countries is concerned. The precise language of the relevant provisions is reviewed very carefully by foreign investors and their lawyers. Therefore it is important to get the language right. Certain words and phrases have achieved acceptance in the international investment community. It is best to follow these precedents. We are attaching as Annex 6 language which we believe will be acceptable to foreign investors.

U. Dispute Resolution

Article 127 of the CIL covers dispute resolution. This subject, like that of expropriation, is of paramount concern to foreign investors. Foreign investors will want to see a provision which would allow them to settle commercial disputes in accordance with agreements among the parties to such disputes, which could include submission to the courts of Vietnam or elsewhere, or arbitration in accordance with arbitration rules in Vietnam, other countries or of international arbitration tribunals to take place wherever the parties agree. They will also want their agreements to be subject to such substantive law as may be agreed by the parties to the dispute in their agreement. In short, they want party autonomy in commercial disputes. With regard to disputes between the foreign investor and the State, or disputes as to claims of expropriation, they will expect such disputes to be subject to arbitration under rules of arbitration established by an international arbitral tribunal and administered by such tribunal. With regard to access to local courts, foreign investors may see local legal remedies as inadequate or non-impartial, particularly concerning limitations on business operations and expropriation of property. Often the lack of training of the judges in the new sphere of commercial activities or in international customary law is an objective and true limitation of the rights of the investor. Additionally, there is normally more deference toward the State by national courts than by international dispute resolution bodies. To correct this situation, international disputes are typically submitted to international arbitration, if the parties to the dispute have expressed their consent in writing. The investment law is often the instrument for expressing the State's prior consent to international arbitration.

Most foreign investors would prefer disputes with the State to be arbitrated pursuant to the arbitration procedures of the International Center for the Settlement of Investment Disputes ('ICSID"). It is our understanding that Vietnam is not a party to the ICSID Convention so this would not be possible. However, foreign investors would also accept arbitration pursuant to the arbitration rules of the UN Commission on International Trade Law ("UNCITRAL"). These rules are also usually acceptable to sovereign states. Article 127 does not meet these requirements. We are attaching as Annex 7 language which we believe will be acceptable to foreign investors.

V. Stabilization

Article 13 of the CIL addresses stabilization, that is, investment guarantees in the case of changes in law or policy. This is a sensitive subject. The intention of stabilization clauses in legislation, which is to reassure investors that the country provides a stable and predictable economic environment in which to invest, cannot be

faulted. However, this must be balanced against the ability of a government to amend legislation to adjust to changing circumstances. In a sense it seeks to impose policy on future governments. Furthermore, it should be noted that such a provision may be repealed by a future government and therefore provides a lower level of certainty than might be expected. With regard to the development recently of a private investment law in another country, the IMF recommended that such a provision not be included, pointing out that investors will probably be most interested in a government's demonstrated track record in providing an overall stable and secure environment for investment rather than the content of a specific piece of legislation. The creation of a stable and predictable legal framework affecting investments is considered a better solution. Our advice would be to eliminate such a provision. If, with regard to a specific major project which requires the approval of the designated investment authority, such a guarantee appears necessary to secure an investment which the government deems essential, the government can agree to some limited protection for that individual project. However, it would appear to us that such a guarantee should not be made generally available in the statute.

III. Miscellaneous

A. Definitions

We suggest the addition/replacement of the following definitions in Article 4 of the CIL:

"Investment" – replace the current definition with the following – "Investment" shall mean currency and contributions in kind, including, without limitation, licenses, leases, machinery, equipment and industrial or intellectual property rights, provided for the purpose of acquiring shares of stock or other ownership interests in a Registered Enterprise.

"Investors" – for the sake of simplicity, replace the current definition with the following – "Investor" shall mean a Person who has provided an Investment.

"'Person" shall mean any natural person and any legal person constituted or organized under applicable law, whether privately or governmentally owned or controlled, and includes a corporation, partnership, sole proprietorship, limited liability company, joint venture, association, joint stock company, trust or other entity.

"Foreign Person" shall mean, in the case of a natural Person, an individual possessing the nationality of a country other than Vietnam and, in the case of a legal Person, an entity organized under the laws of a country other than Vietnam.

"Foreign Investment" shall mean Investment in the form of freely convertible foreign currency or contributions in kind (in each case transferred from outside of Vietnam) that has been provided by a Foreign Person.

"Foreign Investor" shall mean a Foreign Person who has provided Foreign Investment.

"Foreign Loan" shall mean a loan, debenture, bond or other form of debt extended to Registered Enterprise in freely convertible foreign currency by a Foreign Person for a term of not less than one year for the express purpose of enabling the Registered Enterprise to carry on its business in Vietnam.

"Registered Enterprise" shall mean a business entity registered pursuant to the procedures set forth in Articles __ of this Law.

Depending on whether any of our substantive recommendations are followed there may have to be other changes/additions/deletions with regard to the definitions. In any event, the language of most of the current definitions should be tightened up.

B. Provisions for Possible Elimination from CIL

Articles 22, 23, 25, 26 and 27 of the CIL cover purchase of shares of Vietnamese enterprises, merger and buy-out of enterprises, reorganization of enterprises and indirect investment. We would recommend that these subjects be dealt with in legislation other than the investment law, which, as indicated above, we believe should limit itself to private direct investment. The purchase of new shares issued by an enterprise would, of course, be considered direct investment, but it is not clear as to whether this is what is contemplated by Articles 22 and 23.

Articles 50, 51 and 52 of the CIL cover industrial zones, etc., investment assistance funds from the State and encouragement of technology transfers, subjects which may also be better dealt with in separate legislation.

Articles 53 through 57 cover offshore investment by Vietnamese enterprises which is not a subject normally included in inbound investment laws.

Articles 86 through 113 cover investment from state owned funds which, in our judgment, is better addressed in separate legislation.

ANNEX 1

Transfer of Foreign Investment Capital

(a) Notwithstanding any currency restrictions in Vietnam to the contrary, a Foreign Investor shall be permitted to freely transfer out of Vietnam without unreasonable delay distributions received from a Registered Enterprise, to the extent that such distribution is treated as a distribution of capital under the [Income Tax Law], in the currency of the Foreign Investment, at the prevailing exchange rate for that currency, in an aggregate amount equal to the amount of such Foreign Investor's registered Foreign Investment. The transfer of these funds may take place in one or more transactions, PROVIDED THAT a Foreign Investor may not pursuant to this provision transfer such funds at any time prior to a date two (2) years after the date of commencement of operations.

(b) Except as otherwise provided by law, each time a Foreign Investor transfers out of Vietnam funds pursuant to subparagraph (a) above, it must notify the [Central Bank] whereupon, the [Central Bank] shall reduce the amount of such Foreign Investor's registered Foreign Investment by the amount that has been transferred.

ANNEX 2

Transfer of Profits Associated with Foreign Investment

A Foreign Investor shall be permitted to freely transfer outside of Vietnam without unreasonable delay dividends, or distributions treated as dividends under the [Income Tax Law], received from a Registered Enterprise in the currency of the Foreign Investment, at the prevailing exchange rate for that currency.

Annex 3

Transfer of Principal and Proceeds on Foreign Loans

A Registered Enterprise shall be permitted freely to transfer out of Vietnam funds for payment of principal, interest and fees relating to a Foreign Loan to such Registered Enterprise in the currency of the Foreign Loan at the prevailing exchange rate, provided that such Foreign Loan is entered into in accordance with all applicable laws of Vietnam.

Annex 4

Sale of Approved Entities

(a) Subject to the limitations on Foreign Investment in certain areas of the economy of Vietnam which have been established pursuant to this Law, anti-competition laws and any other limitations created by the laws of Vietnam, an investor in a Registered Enterprise, after settling his legal and financial obligations, shall have the right to sell or transfer all or part of its ownership interest in a Registered Enterprise to domestic or Foreign Persons or the Government of Vietnam, in its discretion, without approval of the [designated investment authority] or the Government of Vietnam, PROVIDED THAT the purchaser's Investment in the Registered Enterprise shall not violate any applicable law of Vietnam. The [designated investment authority] shall have the right to void any sale made in violation of this provision.

(b) The [designated investment authority] shall be notified of any sale or transfer of an ownership interest in a Registered Enterprise and the purchaser shall be recorded as a Foreign Investor or domestic investor as the case may be.

Annex 5

Transfer of Proceeds from the Sale of Registered Enterprises

After a sale or transfer of an interest in a Registered Enterprise, a Foreign Investor shall, subject to payment of any taxes applicable to such sale or transfer in Vietnam, be permitted freely to transfer out of Vietnam immediately, in the currency of the Foreign Investment at the prevailing exchange rate, the proceeds of any such sale.

Annex 6

Expropriation

(c) Expropriation, either directly or indirectly, of an Investment or of the assets of a Registered Enterprise is only authorized for an overriding public purpose. The decision to expropriate shall be based on a law permitting such expropriation and shall be made on a non-discriminatory basis.

(d) The State shall provide prompt, adequate and effective compensation in conformity with principles of international law, equivalent to the fair market value of the expropriated Investment or assets immediately before the expropriatory action was taken. Such compensation shall include interest at the one-year LIBOR rate for the period between the date of the expropriation or nationalization and the date of complete payment of the compensation. In the case of an Investment made in a foreign currency, the

compensation shall be made in the currency in which the Investment was made at the prevailing rate of exchange.

(e) In order to ensure that compensation is, in all cases, prompt, adequate and effective:

1. If the State expropriates (i) a Foreign Investment or (ii) the assets of a Registered Enterprise of which over [twenty five percent (25%)] of the ownership interest is held by Foreign Investors, such Foreign Investor or Registered Enterprise, as the case may be, shall have the right immediately to dispute the expropriation or the adequacy or fairness of the compensation therefor, pursuant to the provisions of Article 127 below.

2. A Foreign Investor or a Registered Enterprise of which over [twenty five percent (25%)] of the ownership interest is held by Foreign Investors may freely transfer any payment from the Government as compensation for expropriation or nationalization out of Vietnam without the payment of taxes under the [Income Tax Law] to the extent that the payment represents the return of unrepatriated Foreign Investment, the costs of contesting the expropriation or nationalization or the costs of transferring the compensation.

Annex 7

Dispute Resolution

(f) Except as otherwise provided below, an Investor or a Registered Enterprise may, in any contract or other agreement, if agreed to by the other party or parties to the contract or agreement, specify (i) any arbitration or other dispute resolution procedure, (ii) that the place of such arbitration may be outside of Vietnam, and (iii) that the law of a jurisdiction other than Vietnam may apply to the resolution of such dispute If such contract or other agreement so provides, any award resulting from such arbitration or other dispute resolution procedure shall be final, and shall be enforceable upon application of any party to such arbitration or procedure.

(g) Except as otherwise provided in subsection (c) below, if a dispute arises pursuant to a contract or other agreement entered into between an Investor or a Registered Enterprise on the one hand and the State (or any constituent subdivision, agency or instrumentality thereof) on the other, with regard to an Investment, or if an Investor or Registered Enterprise has a claim under Article 6.2 of this Law, the dispute shall be resolved according to applicable law of Vietnam.

(h) If a dispute arises pursuant to a contract or other agreement entered into between a Foreign Investor or a Registered Enterprise with foreign equity ownership and the State, or any constituent subdivision, agency or instrumentality thereof, in regard to a Foreign Investment, or if a Foreign Investor or Registered Enterprise has a claim under Article 6.2 of this Law, the parties shall endeavor to settle such dispute amicably by mutual discussions.

Failing such amicable settlement, and unless the parties to such dispute otherwise agree, the parties shall submit such dispute to arbitration in accordance with arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

ASSESSMENT OF THE DRAFT UNIFIED INVESTMENT LAW OF THE SOCIALIST REPUBLIC OF VIETNAM

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

June 1, 2005

Michael E. Burke (mburke@williamsmullen.com)

It is our pleasure to review the draft Unified Investment Law (the "Law") for the American Bar Association/United Nations Development Programme's 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. Our comments will focus on each of the eleven (11) chapters in the Law.

CHAPTER I: GENERAL PROVISIONS

As a general matter, it is preferable and more efficient for a nation to consolidate all of its investment-related laws in one statute, with the possibility of subsidiary legislation. Such an integrated investment code, like the Law, should consolidate international best practice aspects of legislation such as property rights and ease of entry, national treatment, nondiscrimination and dispute settlement. Restrictions on the grounds of national sensitivities should be a small marginal part of the code that should signal that Vietnam is a welcoming place for investors.

Article 3, "Basic Principles in Investment," should contain a stronger declaration that the Law supports, and is subject to non-discrimination and national treatment principles. Further, this Article 3 should convey a presumption that (a) investors are free to engage in any lawful activity; and (b) the government and/or state-owned enterprises are restricted from impacting Vietnam's economic sector.

Article 4, "Interpretations," should better cross-reference definitions of terms used in the Law but originating in other statute or regulation. For example, the definition of "Partnerships" contained in this Article 4 should refer to that term's definition as provided in the Unified Enterprises Law. Further, we note that the term "co-operatives" as provided in subsection 2(g) of Article 4 is not defined in the Law or in the Unified Enterprises Law. This Law should not use or otherwise include undefined terms. Further, this Law should consider consolidating the various definitions of "foreign individuals," "Vietnamese living abroad," and "foreigners residing in Vietnam" into a single definition of "natural person." These terms should distinguish only between "legal persons," entities who exist by virtue

of a law or regulation, and "natural persons," such as individuals. Distinctions between nationalities should be amended out of this Law.

Article 5, "Application of International Laws and Agreements" is appropriate and clearly acknowledges that, in a rules-based international trading system, a nation's trading regulations are subject to those international agreements made by that state. Two points bear mentioning with relation to this Article 5: (a) subsections 1 and 2 use an undefined term, "line law;" and (b) it is not clear how an investor can challenge any given statute or regulation based on such item's alleged incompatibility with one of Vietnam's international agreements. The government should consider a mechanism by which investors, foreign and domestic, can notify the government of a specific law or practice that may be incompatible with, for example, Vietnam's WTO commitments.

CHAPTER II: INVESTMENT GUARANTEES

Article 6, "Guarantee not to Nationalize," should be expanded to provide that expropriation can only occur for specific reasons. Further, any expropriation should be based on an enabling law that provides for prompt and adequate compensation that may exceed market price. Further, where compensation is to be remitted overseas there should be no restrictions on the manner of such remittance. Note that there is increasing concern that concepts such as "indirect expropriation" may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate for this act.

Article 7, "Trade Related Investment Measures," contains a very good description of those activities related to the trade in goods that the government agrees not to undertake. This Article 7 could be improved by (a) including a more specific reference to the WTO Agreement on Trade Related Investment Measures; (b) specifying that such

commitment applies to the national government and each subnational level; and (c) specifying that the government should not directly or indirectly require or take any action that would violate this Article 7.

Article 8, "Transfer of Investment Abroad," may be deleted, as it is best to leave the terms and conditions of off-shore remittance of earnings, dividends or principal to the investors' discretion.

Article 9, "Imposition of Prices, Fees to Investment," should be amended to provide that foreign investors will not be charged prices or fees that are not charged to Vietnamese investors. This Article 9 should include a more deliberate reference to the national treatment principle. Related thereto, recall that customs fees and charges on imports in WTO Member States are required by GATT Article VIII to be limited in amount to the approximate cost of services rendered; and not to represent indirect protection to domestic products or a taxation of imports for fiscal purposes.

Article 11, "Regulations on Non-Control of Goods, Products," should be amended to provide that any such control to be exercised by the government should only be attempted pursuant to a statute or regulation that has provided some form of prior notice, and opportunity to comment, to potentially affected investors.

The protections of Article 12, "Import of Products by State Bodies," should be expanded to include all investors, not just defined "encouraged investors."

CHAPTER III: RIGHTS AND OBLIGATIONS OF INVESTORS

Article 16, "Trading Rights, Right to Advertising," is well drafted, but Vietnam should be aware of the difficulties that China has had in implementing similar commitments. While making such commitments is a valuable first step, implementation will be most important.

Article 17, "Right to Assign Capital, Adjust of Investment Capital Structure," should clarify that investors may assign capital or otherwise adjust their investment according to their own preferences, provided that their actions are not unlawful.

Article 18, "Provisions on Transparency and Publicity in Relation to Investment Activities," is well drafted. As you know, the production of timely official translations of business-related laws and regulations into English is important for foreign investors to be able to assess the investment law framework to make an initial determination as to investment location and to comply, in an ongoing manner, with such regime's requirements. Viet Nam's Ministry of Planning and Investment has done a good job of providing official English translations of Viet Nam's foreign investment laws. Further, consider implementing a process by which interested or potentially affected parties may be given notice of, and an opportunity to comment on, proposed law or regulation that may affect their investment.

CHAPTER IV: FORMS OF INVESTMENT

The government should consider replacing the long list at Article 21, "Application of Forms of Direct Investment," with a shorter, "positive list" statement that investors will be allowed to undertake any lawful activity in Vietnam. Further, reiteration of the non-discrimination and national treatment principles would be appropriate as the basis for governing all investment activity in Vietnam.

Further, consider whether the equity holding limits in Article 22, "Purchase of Shares of Foreign Investors in Enterprises of Vietnam," will be effective. In general, such equity limits serve as a disincentive to foreign investors and, as a practical matter, can be very difficult and time-consuming to administer. Consider whether a foreign investor can purchase up to 100% of a Vietnamese enterprise's equity, except for specified state-owned enterprises or businesses in sensitive areas.

Related thereto, clarify in Article 23, "Merger, Buy Out of Enterprises," that the result of the merger activity can't violate the provisions of Article 22 of this Law. Consider further leaving the regulation of mergers and acquisitions to a separate piece of legislation that unifies all relevant merger regulations into one item.

The provisions in Articles 24 "Branches," and Article 25, "Re-Organization of Enterprises," should be left to the Unified Enterprise Law and not mentioned in this Law.

It is not clear whether Article 26, "Application of Indirect Investment Forms," is necessary if Article 21 is amended to be as indicated in the above comment. Further, it is not clear whether Article 27, "Investment in Shares of Foreign Individuals and Entities," is necessary given the language in Article 22. It may be best to integrate Articles 21 and 26 into a statement that all investment activity, except unlawful activity, is to be allowed in Vietnam, and to eliminate Article 27 in its entirety.

CHAPTER V: INVESTMENT SECTORS, AREAS, AND INVESTMENT INCENTIVES

As a basic matter, dividing investment sectors into categories is confusing for foreign investors and difficult to administer. Further, evidence indicates, from other nations' experience, that such divisions create opportunities for corruption. This corruption risk increases with the number of steps, or permits, an investor must obtain before engaging in investment activity. These multiple steps also increase the transaction costs on investors, expose investors to an increased risk of non-national treatment, and detract from the attractiveness of Vietnam as an investment destination.

Many nations experience high rates of unrealized project approvals or foreign investment outflows because of difficulties with the bureaucracy. Investment agencies must be closely networked with other government agencies to provide investors with a variety of contacts (for information purposes) and to support the agency's efforts to assist investors in overcoming bureaucratic hurdles and related obstacles. For instance, the investment authority might be called upon to sort out problems with other government

agencies over licenses or permits, customs, and tax matters. Another common inter-agency issue is the low level of information exchange, particularly when procedural requirements change, leaving the investment authority without proper or updated information on matters such as taxation, permits, immigration/visas, and others. Establishing a "network" of key contact persons in business-related ministries would greatly assist the Vietnamese government in offering more efficient services to investors and increase the flow of information among ministries. Such network members should have sufficient decision-making authority to resolve most matters quickly when called upon, but they should not be too high-ranking (such as a minister) that their availability is severely limited.

Articles 28 through 30 should be combined into (a) a general statement that all investment activity, except for unlawful activity, is allowed; and (b) a statement that investment in defined "prohibited" areas would be considered unlawful. Further, Article 31 should require that the List be issued in English as well as Vietnamese, and that investors be given notice of proposed changes, and an opportunity to comment, well before such proposed changes take effect. Further, development of the List should be centralized in a single national government regulator that is vested with appropriate regulatory and administrative powers. Further, Article 33 should be edited out of the Law, as a foreign investor should be allowed to determine their own level of investment in a Vietnamese foreign-invested enterprise. Alternatively, Article 33 could be amended to schedule increases in the acceptable amount of foreign investment.

Article 34, "Exemption, Reductions of Enterprise Income Taxes," should refer specifically to the relevant sections of Vietnam's tax code. Further, the process by which such incentives are adopted and implemented should be transparent, in a manner similar to our comments for Articles 28-30. Further, Article 38, "Import Duties," should be reviewed so that it is consistent with the earlier sections on trade-related investment measures, and administered in a transparent, non-discriminatory manner.

Land use issues, such as described in Article 42, "Provisions on Land Use," can be

difficult for foreign investors to understand and for government regulators to administer effectively. Common bottlenecks creating inefficient land use rights include (a) slow re-zoning of land for alternative uses and of planning permission for development; (b) slow ministerial approval, where needed, and slow registration of land titles; and (c) government authorities developing sites that are then allocated on non-market terms. Incentives and exemptions on land use rights should be provided clearly in a relevant regulatory action and administered in a transparent manner.

Article 45 should include a reference to relevant Vietnamese law on immigration and visa requirements. The Law should carefully use the verb "shall" as it creates an obligation on the government's part. Note further that the issue of work and residence permits can be slow and inefficient in other nations, something that adds transaction costs to an investor's project. Further, be mindful that localization requirements may be implemented too rigidly and without regard to sound commercial requirements for employing non-citizen staff.

CHAPTER VI: OFFSHORE INVESTMENT

No comments.

CHAPTER VII: INVESTMENT PROJECTS AND IMPLEMENTATION OF INVESTMENT PROJECTS

Our above comments to Articles 28 through 30 are equally applicable to Section I of Chapter VII.

As a general matter, fewer licensing and approval steps are preferable. While there may be certain public interest reasons for specific licenses, any license requirement should be made pursuant to a clear and significant public interest. Delays and duplication in licensing are frustrating for investors. Difficulties in some areas of licensing and registration will damage the investment climate.

CHAPTER VIII: INVESTMENT FROM STATE-OWNED FUNDS

No comments.

CHAPTER IX: STATE MANAGEMENT

No comments.

CHAPTER X: REWARDING, DEALING WITH BREACHES, AND DISPUTE SETTLEMENT

No comments.

CHAPTER XI: IMPLEMENTATION PROVISIONS

No comments.

Williams Mullen is happy to have been able to offer its comments on the Law. Please let us know if you have any questions about our comments.

Roberto Maclean

Comments on Viet Nam's Draft Common Investment Law

I. Introduction

As a general comment about the structure of the Draft, I would like to mention that after an in depth review, the statute is much more complex than it first appeared. The main reason for this is that its eleven chapters involve methods and techniques that are markedly different from their respective chapter headings. Chapters 1 through 6 are what conventionally could be called International Trade Law Provisions. Chapter 7 deals with administrative matters while Chapters 8 and 9 deal basically with internal administrative regulations of the government of Viet Nam, which may affect private investors only indirectly. Chapter 10 deals with remedies and the important matter of dispute resolution. Finally, Chapter 11 contains norms for the implementation of the statute.

A second general comment, which may only be a problem of translation, is that sometimes the usual terminology about direct and indirect investment does not read in a manner to which I am accustomed. The essence of the difference between the two, in my experience, is that the direct investor runs a commercial risk and has no limit for profits, while the indirect investor essentially runs only the risk of insolvency or delays and has a fixed or predetermined rate of interest as its only return. The only exception and confusion with this is in the case of Islamic banking operations where, by its very peculiar characteristics, it is easy to confuse the difference between direct and indirect investors and investments.

Another matter concerning terminology is the use of very loose terms in article 58, namely the terms "Normal Projects," "Important Projects" and "National Important Projects." The Draft does not define more precisely what is meant by each of them and what are each of their individual requirements, procedures, etc.

II. Investment Provisions (Chapters 1 through 6)

I find, in Chapter 1, that articles 1 and 2 could be written in one article only because article 1 on its own is unnecessary and repetitive with respect to the articles that immediately follow it.

In article 3, the reference about “non discrimination treatment to all economic sectors, foreign and domestic investment” seems to contradict other provisions of the law which establish priorities according to sectors and which apply certain limits to foreign investors. Perhaps it is only a matter of rewording, but, as it stands, this is what I have understood from the Draft's English version.

In regards to article 4, paragraph 1, my opinion is that–in contrast to paragraph 2--the definition of "Investments" is not as specific as the definition of the listing of "Investors". My suggestion would be to define both briefly or to define both in equal detail. Also, the long list of entities enumerated in paragraph 2 seems to be unnecessary, especially in light of the provision in sub-paragraph m. The same applies to the definition of “Goods” in paragraph 12.

I already commented on the difference between direct and indirect investment on paragraph 14 and 15. Lastly, I do not find there is a very clear difference between paragraphs 20 and 21.

Two very important points that are missing from this article about the interpretation of terms are the precise definitions of “Foreign Investor” and “Foreign Investment”. Although this might seem obvious or superfluous, I am certain that I could easily write a 20-page article interpreting exclusively these two terms, based on the Latin American perspective and experience.

Finally, in article 5, I am totally puzzled, as a foreign lawyer, by the term “line law” despite the fact that I am very familiar with most of the common terms in all of the major legal systems in the world. This term is new to me.

As for Chapter 2, I would suggest that in article 6.2.c, the text should be changed to: “adequate, effective and prompt compensation is paid”. Also in paragraph 3 of the same article, I think that equal treatment to nationals does not necessarily have to be an acceptable international standard. As a matter of fact, in Latin America we have had plenty of unpleasant experiences in this regard. Another standard that could be used is that of the most favored nation status. Additionally, perhaps article 6 could also address the foreign investor's access to the foreign currency in which the investment was made, or other equivalent, at the time of debt repayment or at the time of profit or capital repatriation. Lastly, I suggest that the article indicate the availability or disposition of the Government of Viet Nam to subscribe to the ICSID and or MIGA Conventions as a way of reassuring the investor.

In regards to article 7 paragraph 8, this provision seems to contradict the new Enterprise Law Draft (on which I also had the privilege to comment), which compels an entity to set up its head office at its main place of business. Perhaps, again, this is only a matter of translation, yet, nevertheless, I wanted to mention my concerns about this point.

Article 8 deals with some of the concerns that I expressed above about the convertibility to foreign currency. I think that these concerns could be much more adequately addressed without resorting to quotas, times, and different rates of exchange. As has been the practice in many Latin American countries, the rate of exchange–in spite of a very clear IMF prohibition--differed according to whether they were for exports, imports, payments of loans, etc.

Article 18 is very important for building investor confidence. However, I agree with the Vietnamese legislators that in practice, such as in Latin America, this provision has been

very difficult to implement. Given a traditional cultural resistance in authoritarian societies, where there is a large gap between what the law says and how it is put into practice, if there is neither a strong judiciary nor a requirement to resort to an international forum for dispute resolution like ICSID, than this type of provision is in danger of being ignored.

Chapter 4 has several provisions, e.g., articles 22.2, 23.2, 24, 27.2, as well as in Chapter 5, e.g., article 29.1, where the real meaning and the operation of the Draft law depends on the regulations to be made in the future by the government and on the actual application of all these provisions. In Chapter 5, there is a classification of investment sectors, which are classified according to those sectors to be encouraged, prohibited, and those to be subjected to conditions and regulations. If I was an investor, or a legal counsel advising an investor, I would not be very happy with the ambiguity of these terms and the potential consequences of such ambiguity, despite the provision in article 32. Also, it should be stressed that, pursuant to article 30 as it appears in the English translation, the prime minister has full authority to disregard all of these classifications.

Section 2 of this chapter, as a whole, leaves me with a general concern regarding its effects on exports because the text of the law, without deeper knowledge of all the other legal provisions, creates the possibility of retaliatory measures in response to their being classified as dumping. However, it does not necessarily have to be this way. I only stress that the matter should be researched in depth to see whether this is really so.

In Chapter 7, apart from the point regarding the classification of investment sectors, which I mentioned above, the additional comments on the rest of the articles would require a better knowledge of the administrative organization of the government in Viet Nam. Nevertheless, in my experience in Latin America, I have found that it is best to deal with these foreign investment matters within a specialized body established under the Ministry of Economy, the Ministry of Trade, the Central Bank or within an independent body under the prime minister's office. In my own country I used to be Chairman of such a specialized body.

In regards to government investments, I would need to know a bit more about the present organization of the internal administration of the Vietnamese government in order to make additional comments. This knowledge will allow me to better assess whether a proposed statute, while well-written and rational, is socially efficient.

Upon request, I am willing discuss more extensively on any of the above mentioned points, especially, but not exclusively, on those concerning foreign investments.

Legislative Assessment of the

Common Investment Law 2005- Viet Nam

By

Chudi Nelson Ojukwu LL.B, LL.M

Introduction

In general, the Common Investment Law is a unique piece of legislation. It seeks primarily to control the manner and means of investing both by domestic businesspeople and foreigners.

First of all, the legislation should have focused more on regulating the trade of securities and related corporate governance matters. Many of the issues covered by the legislation are matters of policy that should be dealt with through a set of guidelines rather than legislation.

Another critical issue is the limitation placed on sectors and the extent of investment by foreign investors. Whilst it was fashionable for developing countries to so do in the 70's and 80's, it did not always produce the desired result. Nigeria is a country that has experimented with that model without success as it lead to a de-scheduling of enterprises and allowed foreigners to wholly own or control any business in Nigeria. Whilst there is a general reference to the scheduling of enterprises in this law, it may be preferable to drop the restriction entirely.

The law appears to be a peculiarity of the Vietnamese socio-political context. It would actually be a misnomer to describe it as an investment law. The law appears to focus more on state participation in certain businesses, micro credit facilities, tax or investment incentives, government contracts tenders and reporting requirements for companies

having access to government funds. In reality, an investment law should focus more on securities, corporate governance and regulation.

Investment laws worldwide are generally made to regulate the capital market and the persons performing functions relating to the governance and the trade of securities. Whilst this present law makes oblique references to trading securities, it appears that it is not its major concern. It is not clear whether there are other legislations dealing with the issuance and the sale of securities apart from this present legislation and the Draft Common Enterprises Law. If there are none, then it constitutes a big lacuna which ought to be filled.

Investment regulation goes beyond stipulation of guarantees and licensing. There should be a regulatory agency charged with ensuring that public companies (shareholding companies) comply with rules meant to protect the investing public from harm. Such an agency works to prevent insider trading and abuses. It also regulates mergers and acquisitions (to which only cursory references are made in this law). In Article 27, reference is made to the State Securities Commission but no further references are made regarding its functions and duties in relation to regulating investments.

Thus, whilst many of the issues this law seeks to regulate may be important to the political and socio-economic goals of the State, the law falls short in several key areas in order to be properly described as an investment law. Indeed, I find many of the articles as merely restating government policies for government-owned enterprises and not designed to regulate privately owned or managed businesses.

In this context I can only make a limited comment on few of the provisions.

a. Articles 6, 7, 8, 10, 11, 12, and 13

Laws relating to investments have been passed in many emerging economies seeking to encourage investment. Many of the provisions of this particular legislation, especially

those in articles 6, 7, 8, 10, 11, 12, and 13 which seek to reassure and guarantee any investment by an investor whether foreign or domestic, are commendable. The purpose to eliminate fear of expropriation of the investment by the government goes a long way in reassuring would-be investors that they have some form of binding contract between them and the state that they are not going to arbitrarily lose their investments--for example, by way of nationalization efforts which were rampant in the 60's and 70's in many developing counties.

b. Article 54

The provisions that seek to regulate offshore investments by Vietnamese Companies appears to be an interference with the business decisions made by Enterprises of the state. Except where an enterprise is state-owned, its decision to invest in a particular project or place--save for issues of national security--should not be interfered with by the state, especially in light of present trends of globalization and cross border investments.

c. Articles 58 - 71

All the provisions contained in these articles are suspect, especially as they appear to be duplicative and can only create bottlenecks for those desiring to do business or invest in Viet Nam. The Draft Common Enterprises Law already provides for the registration of business. To further require registration and licensing of investments appears to be superfluous legislation and redundant. These provisions will only tend to defeat the desired benefit of attracting investments to Viet Nam. Whilst licensing may be necessary for certain types of businesses independent of the registration of companies, this cannot be broadly applied to every type of investment.

On the whole, whilst many of the provisions of this law are commendable, many of them need only apply to enterprises that continue to be owned by the government and not otherwise.

MEMORANDUM

To: ABA/UNDP ILRC
From: Aaron Schildhaus
Subject: Vietnam – Review of Proposed Draft Enterprise Law and Proposed Draft Common Investment Law
Date: 1 June 2005

This review commenced with a line-by-line analysis, correction and critique of the proposed draft of the Enterprise Law, followed by an overview of the proposed draft Common Investment Law, as well as the Bankruptcy and Competition Law and the Constitution of Vietnam.

My conclusions and comments upon the draft laws are based upon my experience as an international lawyer for the past 37 years. During this time, I have been representing investors and businesspersons from around the world, engaged in a wide spectrum of business operations and transactions touching virtually all countries and regions.

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 Enterprise Law and in Articles 29-31 of the Draft Common Investment Law, and again touched upon in Article 52.2 thereof relating to technology transfers.] It should be pointed out that in the absence of extreme natural wealth, a healthy economy is a prerequisite for a State to effectively provide for these necessities, i.e., for its *raison d'etre*. Without extreme natural wealth and without a healthy economy, the State will never marshal sufficient resources to fulfill its underlying obligations to its citizens.

On the other hand, 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.

The laws on investment and on enterprise must also be consistent and even-handed in their drafting 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 new industries develop and prosper best in a competitive market climate. 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' collective needs, as discussed above.

The underlying consideration, therefore, is to maximize the opportunities for business to prosper; in order to make the State 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 business legislation should be 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 businesses and make them 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 open-ness and fairness of 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. Moreover, the laws and their implementation must provide clear, fair, simple and time-sensitive means whereby there may be recourse to an equitable resolution of any disputes at every stage in the process of establishing or operating a business. Predictability of fairness is an essential component of any investor's and any

businessperson's criteria to enter the market. Where it does not exist, as said before, the investor will prefer to risk her/his funds in another jurisdiction.

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 to function and grow.

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 be in place that is not subject to corrupt influences

The legislative climate must be very clear and unambiguous, the persons enforcing the laws and any relevant regulations must be held to high standards of fairness and honesty. Normally, this also means that employees of the State regulatory bodies must receive adequate salaries for their work so that they do not find it necessary to engage in corrupt practices to supplement them. 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, and to vigorously enforce anti-corruption laws.

Not all businesses need to be regulated. However, 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, and be 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 safety.

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. Without independent, fair and transparent judicial process in place, investment and business activity levels will suffer.

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 have been arbitrary, or whether they are 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 the draft law on investment, and find both to be overly long, complex and confusing. There is no question but that both laws could and should be greatly simplified. They are 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 laws are more confusing than they 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. Certainly, any foreign investor trying to understand the provisions of the law will not find any easy comprehension, and hence will be disinclined to commit investment funds in the country.

Another observation regarding the draft enterprise law 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.

A final observation is appropriate. The English-language documents contain many typographical errors, and phrases, the syntax of which are difficult to understand. Rather than spend extensive time to re-draft the English, it is preferable to wait until final drafts of the laws have been completed in Vietnamese. They could then be translated into proper English for the purposes of publishing so as to attract foreign investors.

In my view, the best use that can be made of the existing drafts of both laws would be for comparison and discussion purposes. I suggest that the best way forward is to draft new versions of both laws, that are very short and general, leaving minimal supervision, providing for maximum transparency and maximum ease in interpretation, and providing

the opportunity for quick, just and transparent review of administrative decisions. My recommendation would be that an initial draft be made in English and then carefully translated into Vietnamese.

Using the new bi-lingual drafts as the starting point, I would suggest that seminars and discussions about the new laws be organized with a wide spectrum of businesspersons and government officials, so that the rationale behind simpler legislation and implementation can be explained and discussed. This is an approach which seems to work best in countries wishing to attract foreign investors, but it needs support and understanding from the business, banking and investment communities, as well as from the government administrations and politicians. It is suggested that these discussions be held with simultaneous interpretation in Vietnamese and in English.

I realize that this may be viewed as a radical recommendation, because it will necessitate some review of the underlying constitutional and legislative bases of the country; however, this has been done successfully in many other countries. Based on my own very positive impressions when I visited Vietnam about four years ago, I am convinced that this approach would enable Vietnam to rapidly compete very effectively, not only in the region, but in the global economy.

Assessor Contact Information:

Michael E. Burke
Williams Mullen
1666 K Street, N.W., Suite 1200
Washington, D.C. 20006
USA
Phone: 202.833.9200
Fax: 804.783.6507 or 202.293.5939
www.williamsmullen.com
mburke@williamsmullen.com

Roberto MacLean
Miranda & Amado
Av. Larco 1301, Piso 20, Torre Parque Mar
Lima 18
Peru
Home Phone: (511) 449-5962
Work Phone: (511) 610-4747
Fax: (511) 610-4748
rgmaclean@mafirma.com.pe

Chudi N. Ojukwu
Legal Research Initiative
Plot 728 Alexandria Crescent
Off Aminu Kano Crescent
Wuse II, Abuja
Nigeria
Phone: 09 4130274, 4139584,
08033114820, 08044136340
chudiojukwu@hotmail.com;
ojukwu@justice.com

Aaron Schildhaus
1101 New Hampshire Avenue, NW
Washington DC 20037
Phone: 1-202-7754570
Fax: 1-202-887-1912
Email: aaron@schildhaus.com
Webpage: www.schildhaus.com

Stephen Stein
Partner
Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178-0002
Email: sstein@kelleydrye.com
http://www.kelleydrye.com/home