

# 5. Vietnam

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## 1. INTRODUCTION

Vietnam is at an exciting stage in the development of its competition policy. As the pressures of Vietnam's developing 'social-oriented market economy' balance against its traditional centrally planned and state-owned enterprise (SOE) dominated economy, competition policy will be one of the more interesting policy areas in the continuing development of the economy. A brief overview of the political economy of Vietnam is provided below as a background to understanding its evolving competition policy. With this background in place, Vietnam's competition law will be outlined along with a discussion of recent cases and relevant issues.

## 2. POLITICAL SYSTEM

### 2.1 Constitution

Vietnam's current constitution was unanimously adopted by Legislature VII of the National Assembly of the Socialist Republic of Vietnam at its 11th session on April 15, 1992 and was amended in 2001 (the '1992 Constitution'). Vietnam previously adopted constitutions in 1946, 1959 and 1980.

Some background regarding the 1992 Constitution is essential to understanding the political regime in Vietnam. It defines important state and other institutions, establishes a number of the basic rights of Vietnam's citizens and, perhaps most importantly in this context, explicitly affirms the central role of the Communist Party of Vietnam (CPV) (Article 4). Some pertinent political institutions and positions established under the 1992 Constitution are as follows.

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The National Assembly is the principal legislative body and is established as the representative organization through which the people of Vietnam exercise state power on the national level (Article 6). The term of each legislature is five years and representatives are elected through universal direct suffrage (Article 7). The last general election for the National Assembly took place on May 22, 2011. The National Assembly is required to meet at least twice each year and has both constitutional and legislative functions as well as the right of 'supreme supervision over all State activities' (Articles 83 and 86).

The Standing Committee is the permanent body of the National Assembly composed of the Chairman and Deputy-Chairman of the National Assembly and elected representatives. The Standing Committee's duties include supervising the implementation of laws, the People's Councils and explaining/interpreting the 1992 Constitution (Articles 90 and 91).

The President is the Head of State elected by the National Assembly from its members for the term of the legislature. The President represents Vietnam in foreign and home affairs and his/her duties include recommending the election or dismissal of officials such as the Prime Minister, promulgating the constitution and its laws, and ordinances, and various functions relating to the military (Articles 101, 102 and 103).

The Government is defined as the highest administrative entity and the executive branch of the National Assembly. It consists of the Prime Minister (who is the head of the executive branch), Deputy Prime Ministers, Ministers and other members. Only the Prime Minister is required to be a member of the National Assembly (Articles 109 and 110).<sup>1</sup>

The Vietnamese economy is addressed in Chapter II of the 1992 Constitution. Article 15 defines the nature of the economy as a socialist-oriented market economy and Article 16 explicitly provides for the existence and protection of different forms of economic entities including: 'the State, collective, individual, small-holder, private capitalist, State capitalist and the economy with foreign owned capital under different forms'. The economy will be discussed in greater detail below.

## **2.2 Nature and Role of Political Parties**

Vietnam is a one-party state, with the CPV taking a central role under the 1992 Constitution. The CPV's origins date back to February 3, 1930, when

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<sup>1</sup> References to 'government' in this chapter refer to the government of Vietnam generally as opposed to the specific institution 'Government' defined above.

it was created as the Vietnam Communist Party. After a series of name changes, it took on its present name in 1976.<sup>2</sup>

It is difficult to overstate the importance of the CPV in Vietnam. To give some perspective, the Vietnam Government Web Portal commences its discussion of that country's political system with a detailed description of the CPV. The CPV directs the government and other pertinent entities by deciding on political programs, recommending individuals for government and other positions and ensuring the implementation of CPV resolutions and directives through government and other agencies and entities.<sup>3</sup>

The CPV holds a National Congress every five years during which it elects its leadership – the Central Committee and the Politburo – and sets policies that its members will implement through the National Assembly and other institutions. The 11th National Congress was held January 12–19, 2011 in Hanoi. Reports indicate that there were some surprises in the elections at this National Congress, with more candidates than expected nominated for the Central Committee and fewer members than expected meeting the minimum vote threshold for election to the Politburo.<sup>4</sup> A noteworthy development was the decision to allow private business owners to become party members.<sup>5</sup>

Vietnam's National Election Council recently released the results of the May 22, 2011 National Assembly elections. Of the 500 deputies elected, 333 were elected for the first time. Interestingly, demonstrating some diversity, of the deputies elected, 2 were from the Voice of Vietnam radio, 7 were priests, 14 were not CPV members and 4 were self-nominated.<sup>6</sup>

### 2.3 Structure and Effectiveness of Elected Representatives

Article 83 of the 1992 Constitution establishes the National Assembly as 'the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam'. In the previous and upcoming legislature, approximately 90 percent of elected deputies and all of its

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<sup>2</sup> Socialist Republic of Vietnam Government Web Portal. Retrieved from <http://news.gov.vn> (last accessed 9 March 2012).

<sup>3</sup> *Id.*

<sup>4</sup> See Apco Worldwide, Inc. (2011), pp. 1 and 6.

<sup>5</sup> *E.g.*, *id.*, p. 9.

<sup>6</sup> As reported in, among others, Vietnam Election results, announced by Susan Quisel, dated June 3, 2011. Retrieved from <http://www.allvoices.com/contributed-news/9291772-vietnam-election-results-announced> (last accessed 2 February 2013); and 'Vietnam Announces Election Results'. Retrieved from <http://blogs.voanews.com/breaking-news/2011/06/03/vietnam-announces-election-results> (last accessed 2 February 2013).

leaders were CPV members, with all election candidates being vetted by the Vietnam Fatherland Front (VFF).<sup>7</sup> For many years, the National Assembly was considered to have less *de facto* power, mainly implementing the policies and directives of the CPV. However, numerous commentators have observed that the National Assembly has become more independent and effective in recent times based on developments including:<sup>8</sup>

- Introduction of question time;
- Publicly televised debates;
- Public criticism by deputies of corruption, financial policies and SOEs;
- Non-confidence votes;
- Organized and sustained opposition to government-supported investment projects;<sup>9</sup>
- Rejection of nominated ministers;
- Rejection of proposed high-speed rail project;<sup>10</sup>

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<sup>7</sup> Id. and see, e.g., Thayer, C. A. (2011a), 'Background Briefing: National Assembly Elections', and related briefings. Retrieved from <http://www.scribd.com/doc/56693625/Thayer-Vietnam-s-National-Assembly-Elections-May-2011> (last accessed 2 February 2013); United States Department of State (2010), 'Background Note: Vietnam'. Retrieved from <http://www.state.gov/r/pa/ei/bgn/4130.htm> (last accessed 2 February 2013); Economic Intelligence Unit (2011), 'Country Risk Service: Vietnam'. Retrieved from [http://www.vietnameconomics.com/images/economics%20reports/EIU\\_VN\\_Country\\_Risk\\_2011\\_05.pdf](http://www.vietnameconomics.com/images/economics%20reports/EIU_VN_Country_Risk_2011_05.pdf) (last accessed 2 February 2013).

<sup>8</sup> See United States Department of State (n 7); United States Department of State (2011), 'Human Rights Reports: Vietnam'. Retrieved from <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154408.htm> (last accessed 2 February 2013); Thayer, C. A. (2011b), 'Background Briefing: Vietnam National Assembly Rejects Capital Bill'. Retrieved from <http://www.scribd.com/doc/52290767/Thayer-Vietnam-National-Assembly-Rejects-Capital-Law> (last accessed 2 February 2013). Numerous press reports are also informative, including Vietnamnet Bridge (2011), 'National Assembly Rejects Draft Law on Capital City'. Retrieved from <http://english.vietnamnet.vn/en/politics/6528/national-assembly-rejects-draft-law-on-capital-city.html> (last accessed 30 March 2011); and 'National Assembly Flexes Legislative Muscles with Bill Rejections'. Retrieved from <http://www.lookatvietnam.com/2011/04/national-assembly-flexes-legislative-muscles-with-bill-rejections.html> (last accessed 4 April 2011).

<sup>9</sup> For more detail with respect to the Bauxite mining controversy in particular, please refer to Thayer, C. A. (2009), 'Political Legitimacy of Vietnam's One Party-State: Challenges and Responses', *Journal of Current Southeast Asian Affairs*, 4, pp. 47–70. Retrieved from [http://www.viet-studies.info/kinhte/Thayer\\_Political\\_Legitimacy\\_JCSEA.pdf](http://www.viet-studies.info/kinhte/Thayer_Political_Legitimacy_JCSEA.pdf) (last accessed 2 February 2013).

<sup>10</sup> For more detail with respect to this, a number of press articles are helpful, including Steinglass, M. (2010), 'Vietnam Assembly Derails High-Speed

- Amending proposed legislation;
- Rejection of proposed legislation.

Despite this list of accomplishments, commentators have noted a number of measures which have to be implemented before the National Assembly can fully realize its potential as an independent and effective representative body, including providing more training and information to deputies, more full-time deputies and more time for debate of government measures.<sup>11</sup>

## 2.4 Rule of Law and the Legal System

The importance of the rule of law in Vietnam can be traced to President Ho Chi Minh's advocacy of this principle.<sup>12</sup> Vietnam's 2009 National Report under the Universal Periodic Review of the United Nations Human Rights Council (the '2009 UNHRC Report') described the rule of law both as an aspect of Vietnam's accomplishments and as part of its ongoing commitments and noted Vietnam's goal of strengthening the rule of law through improvements to its judicial system and administrative framework.<sup>13</sup>

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Rail Link'. Retrieved from <http://www.ft.com/cms/s/0/65255d72-7d6f-11df-a0f5-00144feabdc0.html#ixzz1O6ZTS4fk> (last accessed 21 June 2010).

<sup>11</sup> See, e.g., World Bank (2010), 'Vietnam Development Report 2010', Joint Donor Report to the Vietnam Consultative Group Meeting, December 3-4, 2009. Retrieved from [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/19/000333037\\_20100319004055/Rendered/PDF/535730WP0P11221ng0reduced0file0size.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/19/000333037_20100319004055/Rendered/PDF/535730WP0P11221ng0reduced0file0size.pdf) (last accessed 2 February 2013); Thayer (n 7); Nguyen, T., J. Teicher and R. Smith (2010), 'Challenges for the Public Governance in Vietnam', paper presented at 14th Annual Conference of the International Research Society for Public Management, Berne, Switzerland, April 7-9, 2010. Retrieved from [http://www.irspm2010.com/workshops/papers/28\\_challengesforthe.pdf](http://www.irspm2010.com/workshops/papers/28_challengesforthe.pdf) (last accessed 2 February 2013).

<sup>12</sup> See, for example, Nghia, T. T. (2002), 'The Rule of Law in Vietnam: Theory and Practice', The Maureen and Mike Mansfield Foundation, Mansfield Dialogues in Asia. Retrieved from [http://www.mansfielddn.org/backup/programs/program\\_pdfs/10nghia.pdf](http://www.mansfielddn.org/backup/programs/program_pdfs/10nghia.pdf) (last accessed 2 February 2013); Painter, M., H. H. Hop and C. Q. Khoi (2009), 'Institutional Reform for Public Administration in Contemporary Viet Nam', in Jairo Acuña-Alfaro (ed.), *Reforming Public Administration in Viet Nam: Current Situation and Recommendations*, United Nations Development Programme, Vietnam Fatherland Front and Centre for Community Support and Development Studies, Ha Noi, Viet Nam: The National Political Publishing House, pp. 318-76.

<sup>13</sup> Socialist Republic of Vietnam (2009), 'National Report of Vietnam under the Universal Periodic Review of UN Human Rights Council'. Retrieved from

The 1992 Constitution enshrines the rule of law as follows:

The State administers society by rule of law and constantly strengthens the socialist legislation.

All State agencies, all economic and social organizations, the people's armed forces units and all citizens shall strictly abide by the Constitution and the law and take part in crime prevention and in the fight against crime and violations of the Constitution and the law.

All infringements on the interests of the State and on the lawful rights and interest of collectives and citizens shall be sanctioned according to law. (Article 12)

It is evident that Vietnam is concerned with its implementation of socialist rule of law and, in particular, initiatives to address its legal system and other issues should be noted.<sup>14</sup> This is also clearly an area of interest to numerous commentators.<sup>15</sup>

## 2.5 Legal System

The independence and transparency of Vietnam's judicial system is explicitly provided for in Chapter X of the 1992 Constitution. Concerns have been raised regarding issues such as the efficiency of the judiciary, public confidence in the judicial system, enforcement of judicial decisions,

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<http://www.vietnamembassy-usa.org/news/story.php?d=20090424174141> (last accessed 2 February 2013).

<sup>14</sup> See, e.g. Nguyen, M. T. (2009), Speech at the Opening Ceremony of the 10th General Assembly of the ASEAN Law Association in Hanoi, October 15, 2009; and Socialist Republic of Vietnam (2009), 'National Report of Vietnam under the Universal Periodic Review of UN Human Rights Council'. Retrieved from <http://www.vietnamembassy-usa.org/news/story.php?d=20090424174141> (last accessed 2 February 2013).

<sup>15</sup> For a brief overview see Freedom House (2011), 'Freedom in the World 2011'. Retrieved from <http://www.freedomhouse.org/template.cfm?page=594> (last accessed 2 February 2013); United States Department of Commerce (2011), 'Doing Business in Vietnam: 2011 Country Commercial Guide for U.S. Companies'. Retrieved from <http://export.gov/vietnam/marketresearchonvietnam/countrycommercialguide/index.asp> (last accessed 2 February 2013); Thayer, C. A. (2009), 'Political Legitimacy of Vietnam's One Party-State: Challenges and Responses', *Journal of Current Southeast Asian Affairs*, 4, pp. 47–70. Retrieved from [http://www.viet-studies.info/kinhte/Thayer\\_Political\\_Legitimacy\\_JCSEA.pdf](http://www.viet-studies.info/kinhte/Thayer_Political_Legitimacy_JCSEA.pdf) (last accessed 2 February 2013); Vietnam Committee on Human Rights (2011), 'Crime and Punishment in the Socialist Republic of Vietnam: A Report for the Conference on the Rule of Law for Human Rights in ASEAN Countries'. Retrieved from [http://www.queme.net/eng/doc/Crime\\_and\\_Punishment\\_in\\_Vietnam.pdf](http://www.queme.net/eng/doc/Crime_and_Punishment_in_Vietnam.pdf) (last accessed 2 February 2013).

scarcity of legal counsel, transparency and public access.<sup>16</sup> In his remarks to the Central Steering Committee for Judiciary Reform to review the five-year implementation of the Politburo's Strategy on Judicial Reform to 2020 issued by Resolution No. 49-NQ/TW dated June 2, 2005 (the 'Judicial Reform Strategy'), President Nguyen Minh Triet was reported to have 'pointed out weaknesses such as corruption, the failure to train qualified judiciary staff, and poor investment in technical facilities for judiciary agencies'.<sup>17</sup>

In light of these comments and recognizing the importance of ensuring the integrity of the judicial system, the government has focused on this issue.<sup>18</sup> Vietnam's progress in this area has been noted by observers such as the World Bank,<sup>19</sup> and President Triet, despite the concerns noted above, in his remarks regarding the implementation of the Judicial Reform Strategy, commented that:

Judiciary agencies have recorded significant achievements with the quality of investigations, prosecutions, judgments and court rulings having been improved over the past five years.<sup>20</sup>

With respect to the legal profession, while the number of lawyers in Vietnam has grown significantly over the last 20 years, Luu notes:

The number, experience and exposure of Vietnamese lawyers are however still modest. The Vietnamese government is putting effort in improving the experience and competence of its lawyers, seeing this essential in the country's integration into the global economy.<sup>21</sup>

## 2.6 Corruption

Corruption is considered a significant issue in Vietnam by international and domestic commentators as well as by the government. For example,

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<sup>16</sup> E.g., see World Bank (n 11); Freedom House (n 15); United States Department of State (n 8); Heritage Foundation and *Wall Street Journal* (2011), 'Index of Economic Freedom 2011'. Retrieved from <http://www.heritage.org/index> (last accessed 2 February 2013).

<sup>17</sup> See 'State President Hails Efforts in Judiciary Reform' (2011). Retrieved from <http://en.vietnamplus.vn/Home/State-President-hails-efforts-in-judiciary-reform/20115/18636.vnplus> (last accessed 30 May 2012).

<sup>18</sup> See Socialist Republic of Vietnam (n 13).

<sup>19</sup> See World Bank (n 11).

<sup>20</sup> 'State President' (n 17).

<sup>21</sup> Luu, A. (2010), 'UPDATE: Vietnam Legal Research'. Retrieved from <http://www.nyulawglobal.org/Globalex/Vietnam1.htm> (last accessed 2 February 2013).

Transparency International's 2010 Corruption Perceptions Index ranked Vietnam 116 of 179 countries reviewed.<sup>22</sup> The government has acknowledged this issue and is taking steps to address it.

According to the Viet Nam Provincial Governance and Public Administration Performance Index 2010, produced by the VFF, the United Nations Development Programme (UNDP) and the Center for Community Support & Development Studies:

Corruption is perhaps one of the biggest challenges in governance and public administration in Viet Nam today, as it has become embedded in the overall administrative system and serves as a major obstacle to the success of reform.<sup>23</sup>

Vietnam's draft National Strategy for Preventing and Combating Corruption Strategy 2020 notes:

corruption is still taking place in a rampant, serious and complicated fashion in multiple areas, especially in such areas as administration and use of land, construction investments, equitization of SOEs, management and use of funds, natural resources, mineral resources and State assets . . . Corruption has become a major obstacle for the success of Doi Moi process and the fighting force of the Party, threatening the survival of the regime.<sup>24</sup>

From a competition policy perspective, in addition to obvious impacts on enforcement of competition law and on competition generally, in the context of an economy dominated by SOEs, it has been observed that SOEs may obtain the benefits of close links to the government that may

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<sup>22</sup> Transparency International (2010), 'Corruption Perceptions Index 2010'. Retrieved from <http://www.transparency.org/content/download/55725/890310> (last accessed 2 February 2013), p. 3; see also, e.g., United States Trade Representative (2010), 'The 2010 National Trade Estimate Report on Foreign Trade Barriers'. Retrieved from <http://www.ustr.gov/about-us/press-office/reports-and-publications/2010> (last accessed 2 February 2013); Heritage Foundation and *Wall Street Journal* (n 16); United States Department of State (n 8); Socialist Republic of Vietnam (n 13).

<sup>23</sup> UNDP (2011), 'The Viet Nam Provincial Governance and Public Administration Performance Index (PAPI) 2010: Measuring Citizens' Experiences'. Retrieved from <http://www.undp.org.vn/detail/publications/publication-details/?contentId=3866&languageId=1> (last accessed 2 February 2013), p. xiii.

<sup>24</sup> Vietnam promulgated a final version of this strategy in Resolution No. 21/NQ-CP of May 12, 2009, promulgating the National Strategy Against Corruption up to 2020. However I was unable to obtain a final version of the National Strategy in English prior to the deadline for publication of this chapter.



not be available or as easily available to private enterprises, such as access to resources and favorable dealings with government.<sup>25</sup>

Vietnam has addressed this issue in a number of ways, including enactment of an anti-corruption law in 2005, promulgation of the Anti-Corruption Strategy in 2009 and becoming a party to the United Nations Convention on Anti-Corruption in 2009. Numerous government strategies and policies have also arisen from the government's concern with this issue. However, it is apparent that much more work is required. A recent report examining corruption with a focus on the construction sector concluded as follows:

The GoV deserves all due credit for passing one of the most comprehensive and ambitious AC-Laws in Asia . . . A lot of progress can be noted in moving towards a more system and preventive approach to curbing corruption. However, the assessment . . . points to several areas where actions are needed to boost the intended effects . . .<sup>26</sup>

### 3. ECONOMIC SYSTEM

#### 3.1 Structure and Nature of the Economy

The structure of Vietnam's economy is best viewed as an attempt to balance its communist heritage of centralized planning with increasing private participation. The introduction of greater private ownership and market forces is generally traced to the launching of the Doi Moi or renovation policy by the CPV's Sixth National Congress in 1986. Among the rationales for this transformation of Vietnam's economy were concerns with inflation and SOEs – concerns still relevant today.<sup>27</sup> A core principle

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<sup>25</sup> Nguyen, T. T. and M. A. von Dijk (2012), 'Corruption, Growth, and Governance: Private vs. State-owned Firms in Vietnam', *Journal of Banking and Finance*, 36(11), pp. 2935–48; for a vivid example, see Pham, A. (2006b), 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration', *Northwestern Journal of International Law and Business*, 26, p. 547.

<sup>26</sup> Davidsen, S. (Team Leader) (2009), 'Implementation Assessment of the Anti-Corruption Law: How Far has Vietnam Come at the Sector Level? A Case-Study of the Construction Sector'. Retrieved from <http://www.danidadev-forum.um.dk/NR/rdonlyres/5D06EA03-122E-42B3-8CAF-F2E9A4220F79/0/ACLawConstructionFinalEng.pdf> (last accessed 2 February 2013), p. 45.

<sup>27</sup> As examples, see Riedel, J. and W. S. Turley (1999), 'The Politics and Economics of Transition to an Open Market in Vietnam', Working Paper no. 152. Retrieved from <http://www.oecd.org/dataoecd/18/1/1921919.pdf> (last accessed 2

of this policy with respect to the intended structure of Vietnam's economy was entrenched in the 1992 Constitution as follows:

The State adopts consistent policies on development of a socialist-oriented market economy. The multisectoral structure of the economy with diversified types of production and business organisation is based on ownership of the entire people along with collective and private ownership, of which the first two and the second are the cornerstone.<sup>28</sup>

The initial pace of change in the economy was relatively slow, although the government introduced measures to bring SOEs under greater control and promote, at least in principle, greater private ownership and foreign direct investment (FDI). At this early stage, given the government's concern for protecting and promoting SOEs, particularly in the face of its intention to open Vietnam up to greater international trade, it is not surprising that most permitted FDI was related to joint ventures with SOEs.<sup>29</sup> Rather than being driven by FDI, at least one commentator has largely attributed economic growth during this early Doi Moi period to the development of agricultural markets and greater security in agricultural landholdings.<sup>30</sup>

Arguably, it was Vietnam's decision to join the World Trade Organization (WTO) that truly accelerated the transformation of its economy and FDI. As part of this process, Vietnam entered into a series of bilateral and multilateral trade agreements, leading up to its 2007 accession to the WTO.

February 2013); also see reports such as Thanh Nien News (2011), 'Vinashin Has to Clear its Debts Despite Difficulties'. Retrieved from <http://www.thanhkienews.com/2010/Pages/20110605121915.aspx> (last accessed 9 March 2012); Vietnam Plus (2010), 'Vietnam Gains Impressive Poverty Reduction'. Retrieved, from <http://en.vietnamplus.vn/Home/Vietnam-gains-impressive-poverty-reduction/2010/9/12383.vnplus> (last accessed 9 March 2012); Vietnamnet (2010), 'National Assembly Also Made a Mistake in Vinashin Case Update'. Retrieved from <http://english.vietnamnet.vn/en/politics/1895/national-assembly-also-made-a-mistake-in-vinashin-case.html> (last accessed 9 March 2012).

<sup>28</sup> Article 15 of 1992 Constitution.

<sup>29</sup> Riedel and Turley (n 27); Leung, S. E. (2010), 'Vietnam: An Economic Survey', *Asian-Pacific Economic Literature*, 24 (2), 83–103. Retrieved from [http://apel.anu.edu.au/pdf/24-2/Articles/APEL24\\_2\\_Leung.pdf](http://apel.anu.edu.au/pdf/24-2/Articles/APEL24_2_Leung.pdf) (last accessed 2 February 2013).

<sup>30</sup> See Dinh, V. A. (2006), 'Building Up and Improvement of the Institution of the Socialist Oriented Market Economy in Vietnam', Central Institute for Economic Management Working Paper 2006: International Forum on Economic Transition. Retrieved from [http://www.eastasiaforum.org/testing/eaber/sites/default/files/documents/CIEM\\_Dinh\\_2006\\_01.pdf](http://www.eastasiaforum.org/testing/eaber/sites/default/files/documents/CIEM_Dinh_2006_01.pdf) (last accessed 2 February 2013).

These trade agreements set the stage for the reduction of various trade and investment barriers, the restructuring of SOEs and the development of the legal framework for the new economic structure through the enactment of laws such as the 2005 Enterprise Law and Investment Law and the 2004 Competition Law.<sup>31</sup>

In Vietnam's socialist-oriented market economy, it is no surprise that the government continues to play a significant role in the management of the economy through economic planning and SOEs. However, the gradual shift in focus toward a more market-driven economy continues, with ongoing reforms to key economic sectors and efforts to divest all or part of the government's stake in SOEs.<sup>32</sup> In addition to enhancing market participation in the economy, Vietnam has also focused on transparency and efficiency in the government's management through the National Public Administrative Reform Project, which has a mandate to simplify national and provincial regulations.<sup>33</sup> The benefits of this project and similar efforts can be observed in Vietnam's rank in the International Finance Corporation's (IFC) 2011 measurement of business regulation and the ten places it has moved up since the 2010 ranking.<sup>34</sup>

The positive results of the Doi Moi transformation have been noted and measured in many respects, such as: high average growth in gross domestic product (GDP), FDI and foreign trade, increased agricultural production, reduction of poverty and increased competitiveness. The World Economic Forum's (WEF) 2011 Global Competitive Index placed Vietnam 59th out of 139 countries ranked. This represented an increase in rank of 16 places since the 2010 ranking and incorporated improvements in 10 of the 12

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<sup>31</sup> E.g., see Perkins, D. H. and V. T. T. Anh (2009), 'Vietnam's Industrial Policy: Designing Policies for Sustainable Development'. Retrieved from <http://www.innovations.harvard.edu/cache/documents/6533/653316.pdf> (last accessed 2 February 2013); Turksen, U. and Nguyen, M. Phuong (2010), '“The Honeymoon is Over” Vietnam and the WTO: A Critique of Foreign Direct Investment Commitments', *Journal of World Investment and Trade*, 11 (4), pp. 601–50. Retrieved from <http://www.eplegal.com.vn/newsdetail.php?id=27&NN=en> (last accessed 2 February 2013).

<sup>32</sup> Anh, T. T. Vu (2006), 'Competition and Privatization in Vietnam: Substitutes or Complements?'. Retrieved from <http://www.grips.ac.jp/vietnam/VDFTokyo/Doc/2ndConf15Jul06/2EcoSession2VTTAnh.pdf> (last accessed 2 February 2013); United States Department of State (n 7); also see the *New York Times* (2007), 'Vietnam Lists Guidelines for Privatization'. Retrieved from <http://www.nytimes.com/2007/03/28/business/worldbusiness/28iht-dong.1.5056464.html> (last accessed 2 February 2013).

<sup>33</sup> United States Department of Commerce (n 15).

<sup>34</sup> Vietnam was ranked 78 in 2011 and 88 in 2010 – see <http://www.doingbusiness.org/data/exploreconomies/vietnam/> (last accessed 2 February 2012).

sub-indices.<sup>35</sup> As another example of its relative progress over a slightly longer period, on the WEF's 2000 Current Competitiveness Index, Vietnam was ranked 53rd out of 58 countries ranked.<sup>36</sup> Another metric of the impact of the Doi Moi policy is the enormous growth of Vietnam's GDP and GDP per capita from 1985 to 2009 in terms of current USD. Based on World Bank data, Vietnam's GDP has increased from USD 14 billion to USD 97 billion and GDP per capita has increased from USD 239 to USD 1113 in the period from 1985 to 2009 in current USD terms.<sup>37</sup>

The results of the Doi Moi policy are also reflected in the relative changes to certain key economic sectors over time. Looking at specific economic sectors in terms of percentage of GDP:

- Manufacturing was 21 percent in 1985 and 20 percent in 2009, but hovered between 12–18 percent between 1988 and 1998;
- Industry, which includes manufacturing as well as construction, mining and other categories, went from 27 percent in 1985 to 40 percent in 2009;
- Services increased from 32 percent in 1985 to 39 percent in 2009;
- Agriculture decreased dramatically from 40 percent in 1985 to 21 percent in 2009.<sup>38</sup>

Despite these successes, issues of concern continue to be raised regarding such matters as inflation, distribution of benefits, pace of implementation and levels of economic freedom.<sup>39</sup> For example, the 2011 Index of Economic Freedom ranks Vietnam a fairly low 139th out of 179 countries and cites concerns discussed earlier, such as an unreliable legal system and corruption, as significant issues.<sup>40</sup>

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<sup>35</sup> World Economic Forum (2010), 'The Global Competitiveness Report 2010–2011'. Retrieved from [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2010-11.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf) (last accessed 2 February 2013).

<sup>36</sup> World Economic Forum (2000), 'The Global Competitiveness Report 2000'. Retrieved from [http://www.cid.harvard.edu/archive/res/gcr\\_2000\\_overview.pdf](http://www.cid.harvard.edu/archive/res/gcr_2000_overview.pdf) (last accessed 2 February 2013).

<sup>37</sup> World Bank (2009), World Bank Data. Retrieved from <http://www.enterprisesurveys.org/ExploreEconomies/?economyid=202&year=2009> (last accessed 2 February 2013).

<sup>38</sup> Id.

<sup>39</sup> E.g., see DFDL – *Vietnam: Legal and Investment Guide* (unpublished draft); United States Department of State (n 7). Heritage Foundation and *Wall Street Journal* (n 16).

<sup>40</sup> Heritage Foundation and *Wall Street Journal* (n 16).

### 3.2 Structure and Ownership of the Industrial Sector

SOEs play a significant role in Vietnam's economy, with various current estimates citing SOEs as representing as much as 40 percent of GDP or 25 percent of industrial production depending on the source.<sup>41</sup> Regardless of the actual percentage or even the metric used, it is clear that SOEs represent a significant part of Vietnam's economy and economic planning. Despite this large SOE presence and influence, the decline in the relative importance of SOEs in the context of the Doi Moi transformation is observed when one notes that as late as 1995, SOEs' share of industrial production was 50 percent.<sup>42</sup>

From a structural perspective, as noted by Perkins, with respect to the Enterprise Law:

the 2005 law removed at least some of the elements of the privileged position enjoyed up to then by state owned enterprises at least in terms of the law. The boom in private enterprises began with the 2000 law and has accelerated under the 2005 law. For the first time since the reform period in Vietnam began in the late 1980s, Vietnam had three distinct sectors of industry that enjoyed rapid growth, the foreign owned sector, the state owned sector, and private enterprises.<sup>43</sup>

SOEs have presented many actual and perceived advantages in competing with privately owned companies, including benefits from links to government, privileged lending access – in part through the ability to use land and implicit government backing as collateral<sup>44</sup> – and being a primary vehicle for government management of the economy. However, Vietnam

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<sup>41</sup> E.g., see Adams, F. G. and A. L. Tran (2010), 'Vietnam: From Transitional State to Asian Tiger? Issues of the Vietnamese economic transformation experience', *World Economics*, 11 (2), 177–99. Retrieved from [http://www.relooney.info/0\\_NS4053\\_821.pdf](http://www.relooney.info/0_NS4053_821.pdf) (last accessed 2 February 2013); United States Department of Commerce (n 15); Leung (n 29); 'Competition Law and Policy in Vietnam' (2007), background paper prepared by the conference organizer in collaboration with Mitsubishi UFJ Research & Consulting Co., Ltd. for 4th East Asia Conference on Competition Law and Policy, March 17. Retrieved from [http://www.jftc.go.jp/eacpf/06\\_04\\_main.html](http://www.jftc.go.jp/eacpf/06_04_main.html) (last accessed 2 February 2013).

<sup>42</sup> Leung (n 29).

<sup>43</sup> Perkins and Anh (n 31), p. 6.

<sup>44</sup> Of course, this latter perceived advantage has been challenged in the wake of Vinashin – as discussed below. Also see 'Petrovietnam Gas in Talks to Raise Up to USD 700 Million for LNG Terminal'. Retrieved from <http://www.lngworldnews.com/petrovietnam-gas-in-talks-to-raise-up-to-usd-700-million-for-lng-terminal> (last accessed 2 February 2013).

has committed to privatize or equitize<sup>45</sup> many SOEs and has started reforming the management of many SOEs through the State Capital Investment Corporation, which was established in 2005 to represent the government's ownership stakes in SOEs.<sup>46</sup> To date, approximately 4000 SOEs have been equitized or privatized, with the remaining 1000 to be converted over the next five years.<sup>47</sup>

The need for reform of the SOE sector was publicly demonstrated by the recent experiences of the Vietnam Shipbuilding Industry Group (Vinashin). A recent government report cited poor government oversight of Vinashin as well as poor investment decisions and diversification<sup>48</sup> as reasons behind this leading SOE's financial crisis and requests for debt extensions and write-offs. The Vinashin situation led to significant concerns being raised in the National Assembly and by domestic and international commentators about the continued state management of SOEs.<sup>49</sup>

### 3.3 Infrastructure

Infrastructure is regularly noted as a serious concern for Vietnam's economy despite infrastructure investment of approximately 10 percent of GDP for over ten years ending 2007.<sup>50</sup> Generally, concerns related

<sup>45</sup> In this context, equitization generally refers to a partial privatization of an SOE.

<sup>46</sup> Apco Worldwide, Inc. (2011); Leung (2010); United States Department of Commerce (2011).

<sup>47</sup> DFDL.

<sup>48</sup> See Thanh Nien News (n 27).

<sup>49</sup> E.g., United States Department of Commerce (n 15); Vu, B. P. (2009), 'Vision for an ASEAN Competition Regime', OECD, Bangkok Regional Forum, February. Retrieved from <http://www.oecd.org/dataoecd/29/9/42712787.pdf> (last accessed 2 February 2013); also see note 27 and Vietnam Today Blog (2011), 'ADB Provides US\$630 million for SOE Reform'. Retrieved from <http://vietnamtodayonline.typepad.com/blog/2011/06/adb-provides-us630-million-for-soe-reform-1.html>; Vietnamnet (2010), (last accessed on 26 March 2013.) 'SOE – Motive Force of Economy: Please Don't Be Too Reliant on the Set Rails'. Retrieved from <http://english.vietnamnet.vn/en/special-report/1816/soe---motive-force-of-economy--please-don-t-be-too-reliant-on-the-set-rails.html> (last accessed 2 February 2013); Vietnam Business Forum (2012), 'Economic Engines: Roles of Driving the Country Forward'. Retrieved from [http://www.vccinews.com/news\\_detail.asp?news\\_id=22086](http://www.vccinews.com/news_detail.asp?news_id=22086) (last accessed 2 February 2013); *The Saigon Times* (2012), 'Economic Restructuring A Must'. Retrieved from <http://english.thesaigon-times.vn/Home/business/vietnam-economy/16066> (last accessed 2 February 2013).

<sup>50</sup> Nguyen, X. T. (2009), 'Vietnam's Infrastructure Constraints', UNDP–Harvard Policy Dialogue Papers Series on Vietnam's WTO Accession and International Competitiveness Research. Retrieved from <http://www.un.org.vn/en/>

to Vietnam's infrastructure development involve access to funds and/or efficiency of investment. The former is likely to be an ongoing problem given both the high levels of investment required to properly upgrade Vietnam's infrastructure and Vietnam's difficulties in raising funds, particularly in light of recent concerns with Vietnam's credit rating.<sup>51</sup> Concerns related to efficiency of infrastructure often include poor planning, poor management, significant cost overruns and delays.<sup>52</sup>

A recent example of these issues can be observed in recent high-speed rail proposals. After significant debate on this matter and criticism by numerous government officials, the National Assembly rejected a USD 56 billion proposal to link Hanoi and Ho Chi Minh City (HCMC) by high-speed rail, based, in part, on concerns about the proposal's cost and economic viability. The National Assembly recommended additional study of this important project and Prime Minister Nguyen Tan Dung recently announced that the project would be studied again as part of a comprehensive plan to further develop Vietnam's transportation infrastructure.<sup>53</sup>

### 3.4 Human Capital – Education

An additional aspect of Vietnam's infrastructure difficulties concerns investment in human capital in relation to education and health care. This issue has been recognized and is being addressed by the government of Vietnam. According to the UNDP's 2010 Human Development Index

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publications/publications-by-agency/cat\_view/126-un-publications-by-agency/90-undp-publications.html (last accessed 2 February 2013); Tran, K. C., D. T. Thang, P. T. Hoang, N. T. Huy (2010), 'Addressing the Bottlenecks: Towards an Effective Mechanism for Financing Infrastructure'. Retrieved from <http://www.vnep.org.vn/Upload/Paper3-English-final.pdf> (last accessed 2 February 2013); Tran, T. Q. (2009), 'Sudden Surge in FDI and Infrastructure Bottlenecks: The Case in Vietnam', *ASEAN Economic Bulletin*, 26 (1), pp. 58–76. Retrieved from <http://muse.jhu.edu/journals/ase/summary/v026/26.1.tran.html> (last accessed 2 February 2013); World Economic Forum (n 35).

<sup>51</sup> See, e.g., BBC New Business (2011), 'Vietnam Raises Interest Rate in Fight Against Inflation'. Retrieved from at <http://www.bbc.co.uk/news/business-12501339> (last accessed 2 February 2013); Bloomberg (2011), 'Vietnam Must Erase Balance-of-Payments Deficit'. Retrieved from <http://www.bloomberg.com/news/2011-01-19/vietnam-must-erase-balance-of-payments-deficit-moody-says.html> (last accessed 2 February 2013).

<sup>52</sup> See n 49.

<sup>53</sup> See Thayer (n 9), and Thanh Nien News (2011), 'Vietnam to Study High-speed Railway Again: Gov't'. Retrieved January 28, 2011, from <http://www.thanhniennews.com/2010/Pages/20110128183952.aspx> (last accessed 2 February 2013).

(HDI), Vietnam ranked 113 out of 169 evaluated countries based on a composite index that considers metrics reflecting health, knowledge and income. However, Vietnam's efforts in this area are evidenced by the significant improvement in its HDI score over the period from 1980 to the present.<sup>54</sup>

As an educated workforce will be an important component of Vietnam's future gross national product (GNP) and FDI growth,<sup>55</sup> issues with the education system in particular must be noted. The 1992 Constitution states that education is a primary national policy and further that it is a guaranteed right and obligation of the people.<sup>56</sup> The government has made development of the education system a priority as evidenced by the 2005 Higher Education Reform Agenda (Resolution 14/2005/NQ-CP) and Socio-Economic Development Plan 2006–2010, attached to government Resolution No. 25/2006/NQ-CP, dated October 9, 2006. Successes in this area are evidenced by increased enrollments, increasing participation in higher education, relatively high expenditures on education and high literacy rates that have generally increased over the Doi Moi period.<sup>57</sup> As one commentator noted:

From all this it can be concluded that obviously the Vietnamese mixture of economic liberalization in a political socialist framework pursues a pretty

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<sup>54</sup> UNDP (2010), 'Human Development Reports 2010'. Retrieved from <http://hdr.undp.org/en/statistics/hdi> (last accessed 2 February 2013).

<sup>55</sup> E.g., see Anwar, S. and L. P. Nguyen (2010), 'Foreign Direct Investment and Economic Growth in Vietnam', *Asia Pacific Business Review*, 16 (1–2), 183–202. Retrieved from [http://www.viet-studies.info/kinhte/FDI\\_Growth\\_VN.pdf](http://www.viet-studies.info/kinhte/FDI_Growth_VN.pdf) (last accessed 2 February 2013).

<sup>56</sup> Articles 35 and 59 of 1992 Constitution.

<sup>57</sup> In 2009, literacy was 93% among adults and 97% among children. As a comparison, in 2009, World Bank Data ranked Vietnam 48th in adult literacy out of 101 countries for whom data had been provided, only a few places below Singapore. See Leung (n 29); Runckel, C. (2011), 'The Education System in Vietnam'. Retrieved from [http://www.business-in-asia.com/vietnam/education\\_system\\_in\\_vietnam.html](http://www.business-in-asia.com/vietnam/education_system_in_vietnam.html) (last accessed 2 February 2013); Sheridan, G. (2010), 'Viet Nam: Preparing the Higher Education Sector Development Project (HESDP)', Asia Development Bank. Retrieved from <http://www.adb.org/Documents/Reports/Consultant/VIE/42079/42079-01-vie-tacr-03.pdf> (last accessed 2 February 2013); World Bank (2009), World Bank Data. Retrieved from <http://www.enterprisesurveys.org/ExploreEconomies/?economyid=202&year=2009> (last accessed 2 February 2013); Nguyen, T. P. H. (2008), 'Big Challenges for Vietnam's Education Policy'. Retrieved from <http://stdb.hnue.edu.vn/portal/journals.php?volumeid=47> (last accessed 2 February 2013); Anwar and Nguyen (n 55).



successful strategy in the education sector, also in attempting to develop education systematically from the bottom up.<sup>58</sup>

However various commentators have noted concerns with respect to high failure rates in high school, poor quality of education (particularly with respect to universities) and relatively low numbers of Vietnamese with university degrees.<sup>59</sup> For example, the 2010 Human Development Index noted Vietnam's relatively low total expected years of school as compared with some of its higher ranked regional peers such as Thailand, Indonesia, Singapore and China.<sup>60</sup>

### 3.5 WTO Membership

The process of Vietnam's accession into the WTO began in 1993 when the CPV and government began investigating the General Agreement on Tariffs and Trade (GATT), leading to Vietnam participating in GATT as an observer in 1994. This was followed by 11 years of bilateral and multilateral negotiations with various parties, resulting ultimately in Vietnam becoming the 150th member of the WTO in 2007.<sup>61</sup>

As noted above, Vietnam's efforts to join the international trade community can be linked to tremendous changes in its economy. Vietnam's international commitments are reflected in the Services Schedule, which presents the agreements and covenants between Vietnam and WTO Members in relation to market access on trade in services, and the Working Committee Report. Vietnam's Services Schedule provides specific provisions related to the establishment of foreign commercial presences in Vietnam, based, in part, on the business sector in which the foreign investor seeks to participate. Other relevant commitments, reflected in the Working Committee Report, relate to SOEs conducting their business on commercial terms without government interference, to privatization and equitization of SOEs, and to trading rights.<sup>62</sup>

Vietnam's accession has been linked to growth in its FDI, domestic

<sup>58</sup> Nguyen (n 57), at p. 3.

<sup>59</sup> See 1992 Constitution (n 56).

<sup>60</sup> Vietnam – 10.4, Thailand – 13.5, Indonesia – 12.7, Singapore – 14.4, China – 11.4. See UNDP (2010).

<sup>61</sup> Turksen and Nguyen (n 31); and Nhan Dan Newspaper (2007), 'WTO Joining: From Observer to Official Member'. Retrieved from [http://www.mof.gov.vn/portal/page/portal/mof\\_en/dn?p\\_page\\_id=2522361&item\\_id=2734986&p\\_details=1](http://www.mof.gov.vn/portal/page/portal/mof_en/dn?p_page_id=2522361&item_id=2734986&p_details=1) (last accessed 12 January 2007).

<sup>62</sup> See [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_vietnam\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm) (last accessed 2 February 2013).

economy and trade, as well as to an increased trade deficit; however, one commentator surprisingly observed that ‘the biggest thing Vietnam has done is open policies on reform and transparency’ since accession.<sup>63</sup>

### 3.6 Foreign Direct Investment

As part of the Doi Moi policies, FDI has grown exponentially in Vietnam from a 1980 level of USD 2 million to a 2009 level of USD 4.5 billion (down from USD 8 billion in 2008).<sup>64</sup> As noted above, early FDI was focused on joint investments with SOEs, in part due to significant concerns among international investors regarding discriminatory treatment.<sup>65</sup>

The 2005 Investment Law provides the current legal framework for FDI in Vietnam and, in conjunction with other laws such as the Enterprise Law, attempts to promote increased volume and diversity of FDI, in part by legislating a more level competitive playing field. These laws contemplate FDI participation in the economy through a variety of means, including:

- Wholly foreign-owned enterprises;
- Joint ventures;
- Business cooperation contracts;
- Build-Operate-Transfer and similar arrangements;
- Resident Representative Offices;
- Foreign Contractors; and
- Branch Offices.

Despite the dramatic opening up of Vietnam’s economy to FDI and foreign participation, commentators have observed numerous obstacles to Vietnam fully realizing the advantages of FDI, including: currently undeveloped financial and securities markets, quality of education and training, bureaucracy, overregulation, the legal system and the prohibition or limitation of FDI in numerous sectors.<sup>66</sup>

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<sup>63</sup> Hoa, N. (2011), ‘Vietnam’s Four-Year WTO Membership Reviewed’. Retrieved from <http://news.isc.vn/en/viet-nam/vietnams-four-year-wto-membership-reviewed.html> (last accessed 2 February 2013).

<sup>64</sup> UNCTAD (2010a), ‘2010 Handbook of Statistics’. Retrieved from <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=5771&lang=1> (last accessed 2 February 2013).

<sup>65</sup> E.g., see Leung (n 29); Turksen and Nguyen (n 31).

<sup>66</sup> E.g., see Turksen and Nguyen (n 31); DFDL; Anwar and Nguyen (n 55); Heritage Foundation and *Wall Street Journal* (n 16); United States Department of Commerce (n 15); IFC (2012). *Doing Business 2011: Vietnam*. Retrieved from <http://www.doingbusiness.org/data/exploreconomies/vietnam/>

## 4. COMPETITION POLICY

### 4.1 Nature of Competition Policy

There does not appear to be a single generally agreed conceptualization of the nature of competition policy or its objectives. The United Nations Commission on Trade and Development (UNCTAD) Model Competition Law 2010 states that it:

consists not only of competition law enforcement, but also of trade liberalization and deregulation in the interest of consumers' welfare.<sup>67</sup>

The Association of South East Asian Nations (ASEAN) Regional Guidelines on Competition broadly define it:

as a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets.<sup>68</sup>

From a Vietnamese perspective, Mr Hoang Xuan Bac, a legal expert at the Ministry of Industry and Trade (MIT), wrote that:

competition policy is considered as all measures of the government to maintain competition as a market-economy regulating instrument.<sup>69</sup>

There appears to be some consensus in the literature that competition policy encompasses both competition law and some basket of other government measures and policies focused on accomplishing the stated purpose(s) of that competition policy. Some of the measures and policies incorporated into competition policy have been stated to include: investment and trade policy, privatization policy, industrial policy and

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<sup>67</sup> UNCTAD (2010b), 'Model Law on Competition – Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislations'. Retrieved from [http://www.unctad.org/en/docs/tdrbp-conf5d7rev3\\_en.pdf](http://www.unctad.org/en/docs/tdrbp-conf5d7rev3_en.pdf) (last accessed 2 February 2013).

<sup>68</sup> ASEAN (2010), 'Regional Guidelines on Competition Policy'. Retrieved from <http://www.aseansec.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf> (last accessed 2 February 2013), at Clause 2.1.

<sup>69</sup> Hoang, X. B. (2003), 'The Role of Competition Policy and Approaching Method of Competition Bill of Vietnam'. Retrieved from [www.ciroap.org/apcl/conf/documents/Vietnam\\_country\\_report.doc](http://www.ciroap.org/apcl/conf/documents/Vietnam_country_report.doc) (last accessed 2 February 2013), p. 2.

improving regulatory efficiency.<sup>70</sup> It is reasonable to expect that the scope of the non-competition law ‘tools’ incorporated into competition policy should vary depending on the objective(s) of that competition policy.

While competition policy is commonly associated with the promotion of economic efficiency, economic growth and development, and/or promoting consumer welfare, it is not uncommon to see other objectives linked to competition policy, such as integration of national markets, promoting innovation, addressing fiscal and monetary policy, and promoting small and medium enterprises.<sup>71</sup>

Ascertaining the objectives of Vietnam’s competition policy is therefore an important component of describing its nature. Unfortunately the Competition Law (the ‘Law’) does not contain an ‘objectives’ clause which might assist in this endeavor. However, Tran Anh Son, Deputy Director of the Vietnam Competition Authority (VCA), wrote that the objectives of Vietnam’s competition policy are:

- Creating and developing the fair competition environment;
- Non-discrimination;
- Protection of legitimate rights and interests of businesspersons, consumers;
- Contributing on the socio-economic development.<sup>72</sup>

Hoang stated that Vietnam’s objectives are ‘to create and develop a level playing field; to protect legitimate rights and interests of producers and consumers; and to further boost socio-economic development’.<sup>73</sup>

While not official statements of government policy, the substantially similar statements of both officials give some insight into the objectives of Vietnam’s competition policy. In the context of Vietnam’s transition to a socialist-oriented market economy, these objectives can be viewed as ambitious and challenging. To accomplish them, Vietnam’s competition policy would reasonably be expected to incorporate a broad scope of government measures and policies beyond competition law, including: trade

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<sup>70</sup> See CUTS (2009a), ‘Module on the Basics of Competition Policy and Law’. Retrieved from [http://www.cuts-hrc.org/index.php?option=com\\_content&view=article&id=135:strengthening-the-competition-authorities-in-vietnam&catid=47](http://www.cuts-hrc.org/index.php?option=com_content&view=article&id=135:strengthening-the-competition-authorities-in-vietnam&catid=47) (last accessed 2 February 2013).

<sup>71</sup> UNCTAD (n 67); World Trade Organization (2006), ‘General Council Approves Viet Nam’s Membership’. Retrieved from [http://www.wto.org/english/news\\_e/pres06\\_e/pr455\\_e.htm](http://www.wto.org/english/news_e/pres06_e/pr455_e.htm) (last accessed 2 February 2013); ASEAN (n 68).

<sup>72</sup> Tran, A. S. (2006), ‘The Role of Competition Policy in Economic Development in Vietnam’. Retrieved from [http://www.jftc.go.jp/eacpf/06/6\\_02\\_15.pdf](http://www.jftc.go.jp/eacpf/06/6_02_15.pdf) (last accessed 2 February 2013).

<sup>73</sup> Hoang (n 69).

policies, enterprise creation, managing the economy according to competitive principles and the role of VCA.<sup>74</sup> While a number of these ‘tools’ have been identified with Vietnam’s competition policy,<sup>75</sup> this chapter focuses on the competition law aspects of Vietnam’s competition policy.

Vietnam’s commitment to promoting competition policy is anchored in the 1992 Constitution, Article 16 of which states in part:

The economic sectors constitute important components of the socialist-oriented market economy. Individuals and organizations from different economic sectors may conduct production and business in industries and trades permitted by law; may jointly carry out long-term development and co-operation, and shall be equal and shall compete in accordance with the law.

The State fosters the establishment, development and step-by-step completion of all kinds of socialist oriented markets.

Vice Minister of Trade, Dr Le Danh Vinh, underscored Vietnam’s commitment when he wrote that the government:

has full awareness and acknowledgement about the urgency of building and enforcing competition law and policy for its own to meet its inherent need and in accordance with the scenario of currently globalized world economy.<sup>76</sup>

Hoang observed that the establishment of legal systems based on competition policy was evidence of the government’s recognition of its importance.<sup>77</sup> More direct evidence of Vietnam’s commitment derives from its considerable efforts to draft and enact the Law and in the activities of the VCA itself – its efforts to promote the Law and educate Vietnamese consumers and businesses, its welcoming of technical assistance to increase its capabilities and promote more effective enforcement of the Law, its review of key market sectors, and the high-profile cases it has investigated and acted upon.<sup>78</sup>

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<sup>74</sup> Tran (n 72).

<sup>75</sup> E.g., Vietnam Competition Authority (2010), ‘Annual Report 2010’. Retrieved from <http://earlywarning.vn/portal/sites/default/files/vca/Final%2027052011-LC.pdf> (last accessed 2 February 2013); Tran (n 72); Hoang (n 69).

<sup>76</sup> Le, D. V. (2003), ‘Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the Light of Trade Liberalization and International Economic Integration’, ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area (AFTA), March 5–7, 2003. Retrieved from [http://www.jftc.go.jp/eacpf/04/vietnam\\_p.pdf](http://www.jftc.go.jp/eacpf/04/vietnam_p.pdf) (last accessed 2 February 2013).

<sup>77</sup> Hoang (n 69), at p. 1. Also see Vu (n 49).

<sup>78</sup> See Vietnam Competition Authority (n 75).

Finally, Vietnam's commitment to competition policy is evidenced by its activities within ASEAN. As an ASEAN member, Vietnam has worked toward the development of and approved the ASEAN Economic Community Blueprint which calls for each member to have a national competition policy by 2015. As part of its ASEAN related activities, Vietnam has chaired the ASEAN Consultative Forum for Competition and the ASEAN Experts Group on Competition. Further, Vietnam led the Working Group on developing the Handbook on Competition Policy and Law in ASEAN for Business and actively participated in the development of the ASEAN Regional Guidelines on Competition Policy and Law in ASEAN.<sup>79</sup> In summary, the government has demonstrated significant commitment to developing and implementing its competition policy through both domestic and international actions.

#### **4.2 Nature and Structure of Competition Agencies**

The Competition Council (the VCC) and the Competition Managing Agency (now known as the VCA) are established under Articles 49–55 of the Law, with further details provided in Decree No. 05/2006/ND-CP (the VCC Decree) and Decree No. 06/2006/ND-CP (the VCA Decree), dated January 9, 2006.<sup>80</sup>

The VCA is a department under the MIT with its principal office in Hanoi and branch offices in HCMC and Da Nang. Its director is appointed by the Prime Minister, based on recommendations by MIT, and its deputy directors are appointed directly by the Minister of MIT. VCA is divided into six boards, reflecting its different responsibilities: International Cooperation; Trade Remedies; Consumer Protection; Competition Policy; Unfair Competition Investigation; and Antitrust Investigation. From a human resource perspective, since 2007, VCA has more than doubled its staff from 40 to 85 (in 2009), with increasing numbers trained in law and/or economics.<sup>81</sup>

The VCA has responsibilities with respect to trade, competition law and consumer protection. With respect to competition, the VCA's responsibilities are, in part, as follows:

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<sup>79</sup> See, e.g., *id.*

<sup>80</sup> See Vietnam Competition Authority Website (2012). Retrieved from [http://www.qlct.gov.vn/Web/Content.aspx?distid=405&lang=vi-VN](http://www qlct.gov.vn/Web/Content.aspx?distid=405&lang=vi-VN) (last accessed 2 February 2013).

<sup>81</sup> *Id.*; Quang, C. X. (2011), 'Unfair Competition Practices: Experiences from Vietnam', presentation at Gathering Evidence on Unfair Trade Practices in ASEAN: Challenges & Impacts.

To accept and conduct investigations of competition restriction practices for referral to the VCC;  
 To conduct investigations and handle cases of unfair competition practices and other acts that violate the Law;  
 To evaluate requests for exemptions and submit them to the MIT or to the Prime Minister for decision;  
 To supervise the process of economic centralization; and  
 To build up and manage a system of information about dominant and monopoly enterprises in the market, competition principles applied to associations and exemption cases.<sup>82</sup>

The VCA therefore investigates and adjudicates matters related to unfair competition. However, with respect to competition restriction acts, the VCA only investigates while adjudication is the responsibility of the VCC.

In 2009–10, the VCA conducted two official investigations of competition restriction acts (excluding mergers) and 18 ‘pre-litigation’ investigations. It is not clear what a pre-litigation investigation entails, but it appears that the VCA may conduct such an investigation as a prelude to a preliminary investigation under Article 86 of the Law. In 2009–10, the VCA received eight notification dossiers and over 30 dossiers requesting some form of consultation related to economic concentrations. All of the notified economic concentrations were approved as falling below the relevant market share thresholds. No applications for exemptions with respect to prohibited economic concentrations were filed with the VCA during this period. Finally, in 2009–10, the VCA investigated 42 unfair competition cases and issued final decisions with respect to 37 of them.<sup>83</sup>

The VCC is established as an independent state enforcement body whose members are nominated by the Prime Minister, based on recommendations by the Minister of MIT. According to the VCC Decree, the VCC has the following responsibilities:

To organize dealing with competition cases related to practices in restraint of competition;  
 To establish a council to deal with and settle particular competition cases;

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<sup>82</sup> Based on the VCA Decree; Vietnam Competition Authority (2010) and Vietnam Competition Authority’s website (2012).

<sup>83</sup> See Vietnam Competition Authority (n 75).

To request concerned organizations and individuals to provide information and documents necessary for performance of the assigned duties;

To make decisions on application, replacement or revocation of administrative preventive measures upon receipt of the file of a competition case;

To resolve complaints regarding competition cases concerning practices in restraint of competition; and

To perform other duties and powers.<sup>84</sup>

### 4.3 Structure of Competition Law and Sector Regulation

The Law officially came into effect on July 1, 2005. In addition to the Law, a number of decrees have been passed that are relevant, in particular:

Decree No. 110/2005/ND-CP of August 24, 2005 on Management of Multi-Level Sale of Goods;

Decree No. 116/2005/ND-CP of September 15, 2005, Detailing the Implementation of a Number of Articles of the Competition Law (Decree 116);

Decree No. 120/2005/ND-CP of September 30, 2005, Detailing the Procedure to deal with the Violation of the Competition Law;

The VCC Decree; and

The VCA Decree.

As part of the process of drafting the Law, Vietnam reviewed the competition legislation of over 30 countries<sup>85</sup> and had the benefit of considerable international technical assistance. While elements of the Law are based on foreign competition laws and/or the model laws and guidelines of organizations such as UNCTAD, the ICN and ASEAN, there are some significant distinctions as well.<sup>86</sup> This is to be expected given that Vietnam is distinguished from most, if not all, of its peers by its socialist-oriented

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<sup>84</sup> Article X of VCC Decree.

<sup>85</sup> Tran, A. S. (2003), 'The Progress of Drafting Competition Law', The Second APEC Training Course on Competition Policy. Retrieved from <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/TranAnh.pdf> (last accessed 2 February 2013).

<sup>86</sup> See Furse, M. (2009), *Antitrust Law in China, Korea and Vietnam*, Oxford: Oxford University Press. Retrieved from <http://www.oup.com/us/catalog/general/subject/Law/AntitrustCompetitionLaw/?view=usa&ci=9780199285860> (last accessed 2 February 2013); and Tran (n 85).



market economy. Additional deviations from these laws, models and guidelines may be linked to Vietnam's status as a developing country with recently enacted competition law, since these factors relate to challenges such as the VCA's capacity constraints and concerns over the availability and accuracy of market data. As Vietnam's competition policy enters into its law and policy revision phase<sup>87</sup> and some of these challenges are addressed, it is reasonable to expect that the Law may be amended to be more consistent with international standards.

The Law consists of 123 articles, divided into the following chapters: General Provisions (Articles 1–7); Control of Competition Restriction Acts (Articles 8–38); Unfair Competition Acts (Articles 39–48); Competition Management Agency, Competition Council (Articles 49–55); Investigation, Handling of Competition Cases (56–121); and Implementation Provisions (Articles 122–3). Many of these articles are further elaborated on in the decrees noted above, with Decree 116 focusing on many of the Law's substantive competition provisions.

Below is a brief overview of the Law's substantive provisions dealing with competition restriction acts. These are defined as 'acts performed by enterprises to reduce, distort and prevent competition on the market'<sup>88</sup> and include competition restriction agreements, and abuse of dominant or monopoly positions and economic concentrations.

Competition restriction agreements are defined in Article 8 to include:

- Agreements on directly or indirectly fixing goods or service prices;
- Agreements on distributing outlets, sources of supply of goods, provision of services;
- Agreements on restricting or controlling produced, purchased or sold quantities or volumes of goods or services;
- Agreements on restricting technical and technological development, restricting investments;
- Agreement on imposing on other enterprises conditions on signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts;
- Agreements on preventing, restraining, disallowing other enterprises to enter the market or develop business;
- Agreements on abolishing from the market enterprises other than the parties of the agreements;

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<sup>87</sup> Giang, P. C. (2010), 'Development of Vietnam Competition Policy', prepared for APEC Competition Policy and Law Group Meeting, 28 February–1 March 2010. Retrieved from [http://www.apecp.org.tw/doc/Workshop/w2010/10\\_cplg1\\_010.pdf](http://www.apecp.org.tw/doc/Workshop/w2010/10_cplg1_010.pdf) (last accessed 2 February 2013).

<sup>88</sup> Competition Law, Article 3.

- Conniving to enable one or all of the parties of the agreement to win bids for supply of goods or provision of services.

The Law provides that agreements falling within the scope of clauses 6–8 of Article 8 are always prohibited, whereas agreements falling within the scope of Article 8's remaining clauses are only prohibited if the relevant parties have a market share of 30 percent or more on the relevant market.<sup>89</sup> Where this market share threshold is met, the parties may apply for an exemption of a fixed duration on the basis that the prohibited agreement rationalizes the organizational structure or business model or raises business efficiency, promotes technical and technological advances, raises the quality of goods and services, promotes the uniform application of quality standards and technical norms of products of different kinds, harmonizes business, goods delivery and payment conditions which have no connection with prices and price factors, enhances the competitiveness of small- and medium-sized enterprises (SMEs), or enhances the competitiveness of Vietnamese enterprises on the international market.<sup>90</sup>

With respect to dominant enterprises, the Law defines unilateral dominance to exist where an enterprise has a market share of 30 percent or more or where it is capable of restricting competition considerably.<sup>91</sup> Article 22 of Decree 116 states that this latter threshold will be determined based on the financial capacity of the enterprise; the financial capacity of the organizations and individuals that have established the enterprise; the financial capacity of the organizations and individuals with the right to control or govern the operations of the enterprise in accordance with the provisions of the law or the charter of the enterprise; the financial capacity of the parent company; technological capability; ownership of or right to use objects of industrial property; and scale of distribution network. Articles 13 and 14 set out the prohibited activities of dominant and monopoly enterprises respectively.

Article 15 is an unusual feature of Vietnam's competition policy since it specifically addresses firms operating in 'state monopolized domains'. In part, it provides that the government shall determine prices and quantities in those areas and mandates further government control over enterprises producing and supplying public-utility products or services. However, Article 15 states that enterprises so controlled by the state are subject to the general provisions of the Law where they act outside of these areas.

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<sup>89</sup> Id, Article 9.

<sup>90</sup> Id, Article 10.

<sup>91</sup> Id, Article 11. Thresholds for multi-party dominant provisions are also stated in this Article.

Economic concentrations are defined under the Law to include mergers, consolidations, acquisitions, joint ventures and other acts of economic concentration prescribed by law. These terms are further defined in the Law and Decree 116.<sup>92</sup> Economic concentrations are prohibited where the parties' combined market share exceeds 50 percent of the relevant market unless an exemption applies or where, after economic concentration, the relevant enterprises are still SMEs.<sup>93</sup> An exemption may be granted by the MIT if one or more of the parties is in danger of dissolution or bankruptcy; an exemption may be granted by the Prime Minister if the economic concentration has the effect of expanding exports or contributing to socio-economic development and/or technical and technological advance.<sup>94</sup>

Article 20 of the Law provides for mandatory notification of economic concentrations where the relevant parties' market shares are between 30–50 percent inclusive unless, after implementation, the parties would be SMEs. Notified concentrations are prohibited from being implemented until the VCA confirms that the economic concentration is acceptable.<sup>95</sup>

The determination of the relevant market and calculation of the relevant market share(s) are crucial to regulation of competition restriction acts under the Law. Procedures for defining relevant product and geographic markets as well as for determining turnover and market share are set out in Decree 116.

Finally, Article 39 of the Law should be noted as it deals with unfair competition acts, including conduct such as constraints on business, disturbing another enterprise's business activities and other prescribed unfair practices. Given that conduct falling under this article can be addressed without reference to the VCC and the article's more relaxed evidentiary burdens,<sup>96</sup> it is quite possible that the VCA may deal with matters under Article 39 that might otherwise have been considered as competition restriction acts under the Law.<sup>97</sup>

With respect to sector-specific competition regulation, as noted above, Article 15 addresses the regulation of certain state sectors. Additionally,

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<sup>92</sup> Articles 16 and 17 of Competition Law and Section 5 of Decree 116.

<sup>93</sup> Competition Law, Article 18.

<sup>94</sup> *Id.*, Article 19.

<sup>95</sup> *Id.*, Article 24.

<sup>96</sup> E.g., there is no requirement under this article to demonstrate market shares.

<sup>97</sup> By example, Thailand has investigated at least one matter as unfair trading which might otherwise have been considered as an abuse of dominant position (AP Honda).

where there is any disparity between the Law and any other law in relation to competition-restricting practices or unfair competition acts, Article 5 states that the Law shall prevail. There are already a number of sector-specific laws that address competition issues.<sup>98</sup> In this regard, the VCA has already entered into five Memoranda of Understanding (MOUs) with sector-specific regulators<sup>99</sup> and conducted or participated in numerous seminars, meetings and conferences on sector-specific competition issues. It will be interesting to observe the practical application of these MOUs and arrangements in other sectors going forward, particularly as sectors become more market focused and SOE domination is reduced.

#### **4.4 Recent Cases**

Until recently, there has been very little relevant published information with respect to VCA investigations or VCC decisions other than a few press releases and media reports. However the recently released VCA Annual Report was a breakthrough, providing information on a number of matters investigated by the VCA. An overview of these cases provides a useful background for any examination of the effectiveness of Vietnam's competition law and policy. Information provided below is derived from press articles, VCA press releases and the VCA Annual Report.

##### **4.4.1 Vinapco**

The Vietnam Air Petrol Company ('Vinapco') was formed in 1993 to supply jet fuel to Vietnam Airlines and, at the time when the relevant conduct occurred, was the only company licensed to supply jet fuel for commercial aviation. Vinapco and Jetstar Pacific Airlines ('Jetstar') signed a contract for the supply of jet fuel for 2008. The agreement called for a pumping fee of VND 593,000 per ton. On March 20, 2008, Vinapco unilaterally attempted to increase the pumping fee to VND 750,000 per ton. Vinapco argued that the price increase was necessary in response to global price fluctuations. Jetstar did not accept the new rate since it

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<sup>98</sup> CUTS (2009b), 'Module on Competition Law and Sector Regulations'. Retrieved from [http://www.cuts-hrc.org/index.php?option=com\\_content&view=article&id=135:strengthening-the-competition-authorities-in-vietnam&catid=47](http://www.cuts-hrc.org/index.php?option=com_content&view=article&id=135:strengthening-the-competition-authorities-in-vietnam&catid=47) (last accessed 2 February 2013) provides detailed descriptions of the competition-related competition regulatory issues relating to telecommunications, banking and electricity. Other sectors that have been noted as raising sector-specific competition regulatory issues include maritime, aviation and pharmacies. See Pham (n 25) and Vu (n 49).

<sup>99</sup> Giang (n 87); CUTS (n 70); Pham (n 25).

was concerned that the new rate was not being applied to its competitor, Vinapco's parent company, Vietnam Airlines.

On April 1, 2008, Vinapco unilaterally cut off Jetstar's fuel supply. Vinapco's actions caused delays to Jetstar's flights and reportedly affected more than 5000 passengers. Vinapco was quickly ordered by the Minister of Transport to continue supplying Jetstar despite the price dispute.

Within a few days of the incident, on its own initiative, the VCA opened a preliminary investigation with respect to the matter and on April 3, 2008 sent official notice to Vinapco asking for an explanation of its actions. On May 28, 2008, VCA opened an official investigation which ended in December of that year.

In January, 2009, the matter was referred to the VCC, which opened a hearing on April 14, 2009. The VCC determined that Vinapco had abused its dominant position and infringed clauses 2 and 3 of Article 14 of the Law. The VCC fined Vinapco approximately VND 3.4 billion or 0.05 percent of Vinapco's 2007 turnover, despite a maximum monetary penalty under these provisions of 10 percent of annual turnover in the year preceding the infringement. A VCC official was reported as stating that the relatively small fine should be interpreted as a warning to Vinapco.<sup>100</sup>

In December, 2010, the Hanoi People's Court decided against Vinapco's appeal of the VCC's decision and stated the penalty was appropriate.

In addition to being the VCC's first major case, the Vinapco decision was important both for the attention it brought to the Law and the VCA and because it demonstrated that the Law would be enforced against an SOE.

#### **4.4.2 Vietnam Brewery Limited**

In 2007, the VCA received a complaint from a competitor that Vietnam Brewery Limited (VBL) was abusing its dominant position to deter competitors. VCA opened an official investigation into this matter and determined that, despite the complaint's allegation of a narrower geographic market, the relevant market was national in scope. On this basis, while the relevant contracts that VBL signed with its customers had exclusionary clauses that prima facie infringed the abuse provisions of the Law, the VCA determined that VBL was not dominant and terminated the investigation.

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<sup>100</sup> See Vietnam News (2009), 'Vinapco Told to Abide by Rule to Ask Airlines to Pay Fuel Bills'. Retrieved from [http://www.vietnamnews.biz/Vinapco-told-to-abide-by-rule-to-ask-airlines-to-pay-fuel-bills\\_926.html](http://www.vietnamnews.biz/Vinapco-told-to-abide-by-rule-to-ask-airlines-to-pay-fuel-bills_926.html) (last accessed 2 February 2013).

#### **4.4.3 Non-life insurance cartel**

On September 15, 2008, the Vietnam Insurance Association held a conference at which 15 insurance companies signed agreements for cooperation in relation to cargo insurance, vessel insurance, vehicle insurance and terms on insurance premium rates for physical damage to cars. Among other matters, the companies had agreed to raise motor vehicle insurance fees. Four other insurance companies later joined these agreements.

After complaints by customers and other insurance companies, the VCA initiated a preliminary investigation in November, 2008 and then commenced an official investigation leading to a referral of the matter to the VCC. The VCA determined that the signatory companies had a combined share of 99.79 percent of the Vietnamese market against physical damage to cars and that the agreement constituted price fixing.

On July 29, 2010, the VCC penalized the 19 insurance companies a total of approximately VND 1.7 billion (approximately 0.025 percent of revenues) and required them to pay a fee of VND 100 million. In its July 29, 2010 press release, the VCA noted that it had proposed a fine lower than 10 percent in part because this was the first cartel case and that it would serve as a warning. The press release suggested that the 10 percent threshold would likely be more closely adhered to going forward and warned against failure to cooperate in investigations.

This decision also received significant media attention and was the VCC's first cartel decision. It is notable that the cartel participants also included significant SOEs.

#### **4.4.4 Megastar**

In April, 2010, a joint complaint was filed with the VCA by six cinema operators: Galaxy JS Company; Saigon Movies-Media JS Company; the Saigon Movie JS Company; the 212 Movies JS Company; the Dong Nai Cinema and Movie Distribution Center; and Hanoi Movies One-member Limited Company. The complaint alleged that Megastar Media Co. Ltd. ('Megastar') abused its dominant position in relation to distribution of imported movies. In part, the complaint reportedly alleges that Megastar had exclusive rights to distribute a majority of foreign films in Vietnam and that changes to its fee structure resulted in significant losses to certain of its downstream competitors and, in some cases, increased ticket prices for consumers.

On June 18, 2010, the VCA commenced an official investigation. The Law provides that this investigation should have lasted 180 days with up to two extensions of up to 60 days each. On December 16, 2010, a VCA official was reported as stating the VCA would extend the investigation for 60 days. On February 21, 2011, another VCA official was reported as

stating that the investigation was still proceeding, suggesting that VCA had extended the investigation again. Shortly before writing, a VCA official indicated that the matter was still under investigation.

This matter raises a number of interesting and complex issues, including concerns with market definition and available data, and will prove an interesting test of the VCA's capabilities.

#### **4.4.5 PV Drilling/PVDI**

In 2009, the State Securities Commission requested a consultation with respect to the proposed merger of PV Drilling Company and PVDI Company. PVDI was 51 percent owned by PV Drilling, with the remainder owned by its employees and other parties. The VCA determined that the proposed transaction was not subject to notification as the parties' combined market share was 25 percent. However the VCA has also indicated that it had considered the financial difficulties of the entities and that the proposed merger of a parent with its subsidiary would not have a significant impact on market structure or competition.

#### **4.4.6 Mirae Fiber/Mirae**

In October, 2009, the VCA received a request for consultation from Mirae Stock Company with respect to the proposed merger of Mirae Fiber and Mirae Joint Stock Company. The VCA concluded that the proposed transaction was not subject to notification as the parties' combined market shares would be less than 30 percent post-closing.

#### **4.4.7 Prudential/AIA**

In April, 2010, the VCA received a consultation request from Prudential Plc Group and American International Group (AIG) regarding Prudential's proposed acquisition of AIA Group Limited, a subsidiary of AIG. The VCA determined that the parties' Vietnamese subsidiaries had a combined 46.64 percent share of the relevant market for life insurance and that the proposed transaction was therefore subject to notification under the Law. In June, 2010, the parties notified the VCA that the transaction had been cancelled.

#### **4.4.8 Tan Mai/Dong Nai**

In 2008, the VCA received a notification of the proposed consolidation of Tan Mai and Dong Nai Paper Stock Companies into the newly created Tan Mai Group. The VCA states that it approved the economic concentration after conducting an analysis of the newsprint industry in Vietnam. The VCA reports that the new entity will be unlikely to harm competition, but will be better placed to compete with importers. Given that the VCA's

comments raises issues of national treatment, it is unfortunate that market share or market structure information was not provided. However, since the VCA cleared the economic concentration and has reported that no economic concentration was subject to exemption, it can be assumed that the parties' combined market share did not exceed 50 percent.

#### 4.5 Barriers to Improvement and Future Outlook

There have been a number of challenges identified with respect to the effectiveness and development of competition law and policy in Vietnam. Some are specific to Vietnam, whereas others may be pertinent to other developing countries or ASEAN member states. These challenges include:<sup>101</sup>

- Issues with the Law – lack of objectives, overly vague, excessive discretion to regulator, insufficient penalties for failure of firms to cooperate, insufficient regulations and guidelines, implications of international anti-competitive behavior, lack of leniency policy, qualified by reference to national interest;
- Issues with the Regulators – actual or perceived lack of independence, inadequate capacity, resource concerns, lack of restrictive competition cases, transparency;
- Issues with the Economy/Regulatory Environment – sector-specific regulation, dominance of SOEs/national champions, government control over key sectors/industrial policy, perceived or actual distinctions between treatment of SOEs and private enterprises, inadequately developed legal system; and

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<sup>101</sup> E.g., see Vu (n 49); Mehta, P. (2006), 'Competition Policy and Law in CLV Countries', speaking notes. Retrieved from <http://www.pradeepsmehta.com/Presentations/CPL%20in%20CLV%20countries%20for%20US-ASEAN%20BCouncil-PSM.doc> (last accessed 2 February 2013); Pham, D. N. (2007), 'Transplanted Competition Law: From the Receiving Perspective', for 4th East Asia Conference on Competition Law and Policy, March 17, 2007. Retrieved from [http://www.jftc.go.jp/eacpf/06\\_04\\_main.html](http://www.jftc.go.jp/eacpf/06_04_main.html) (last accessed 2 February 2013); Furse, M. (2010), 'Competition Law in Vietnam: A Critique', *World Competition Law and Economics Review*, 1, 163–76. Retrieved from <http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=6&values=Journals~~World+Competition~Volume+33+%282010%29~Issue+1> (last accessed 2 February 2013); Vietnam Competition Authority (n 75); Hoang (n 69); Tran (n 72); Phan, C. T. (2008), 'Leniency Program and its Impact on Cartel Dismantlement', *Vietnam Legislative Study Journal* (in Vietnamese), February.



- Other – lack of awareness and support among businesses or the general public, inexperience in participating in a competitive economy, unreliable or insufficient data.

While transparency remains a concern, as noted above, the VCA recently published its 2010 Annual Report, a groundbreaking document providing details with respect to a number of cases, the VCA's activities and an assessment of areas of concern and measures taken. The 2010 report may herald an overall increase in transparency that will be welcomed by all stakeholders. The Annual Report notes a number of the concerns listed above and addresses these and others in its work plan for 2011, including identifying, among others, the following priorities:

- Preparing a report for proposed amendments to the Law including a five-year review of enforcement;
- Completing pending investigations and conducting three to four investigations of competition restraint cases, with priority for abuse of dominance in high-risk sectors;
- Promoting cooperation and continued collaboration among relevant domestic agencies;
- Providing assistance to parties preparing complaint dossiers and advice to enterprises to help adjust their behavior in order to ensure compliance with the Law; and
- Investigating markets that are highly concentrated to establish a database for proactive detection of competition concerns.

A few comments are worth making regarding some of the specific issues commonly raised in connection with Vietnam's competition law and policy. With respect to the regulators' dependence and links to the government, it has previously been observed that close government links to competition law may be beneficial, particularly where the competition regime is nascent, differs from the entrenched culture and/or where the enforcement of the competition law may face significant opposition.<sup>102</sup>

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<sup>102</sup> See, e.g., Gal, M. (2004), 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons From Developing Countries*, Geneva: UNCTAD. Retrieved from [http://unctad.org/en/Docs/ditccplp20041ch1\\_en.pdf](http://unctad.org/en/Docs/ditccplp20041ch1_en.pdf) (last accessed 2 February 2013); Pham (n 25). In addition to noting examples from other countries, Pham also observes that, at least in the short term, the regulators' close ties to the Trade Ministry may be of benefit since that 'is the only place where knowledge and expertise on competition issues is available'.

A concern related to dependence of the VCA on the government is the implications of Article 4. However, Vietnam is not alone in incorporating concepts of national interest, public interest or other objectives not strictly related to market efficiency in its competition policy.<sup>103</sup> It is not obvious what the implications of Article 4 or regulator dependence on government will have on the effectiveness of Vietnam's competition policy. However, it is encouraging that the VCC's first major decision held an SOE accountable for an abuse of dominance.

Vietnam's progress with respect to specific provisions of the Law, the VCA's caseload and public awareness must be considered in the appropriate context. Numerous officials have stated that, in the first few years of its existence, the VCA focused on advocacy and promotion of competition law.<sup>104</sup> Since then, the VCA has focused more on enforcement and, in the period from 2007–09, investigated 39 unfair competition matters, with decisions being reached in 31 of these matters.<sup>105</sup> In 2009–10, the VCA conducted official investigations in four competition restriction cases and preliminary investigations in 18 such cases, as well as receiving eight dossiers for notification of economic concentrations and over 30 requests for consultation with respect to economic concentration.<sup>106</sup> Clearly positive steps are being taken towards greater operational performance. With the VCA's current focus on developing market information and reviewing its procedures and legislation, a number of the challenges noted above may be addressed over the next few years.

In general, given the nature of Vietnam's political economy, it should be expected that the nature and implementation of its competition policy will differ in a number of ways from international norms. While many of the concerns and barriers to improvement noted by commentators are valid, they often do not appear to fully take into account the distinguishing features of Vietnam's political economy or fully appreciate that competition policy is still a relatively new concept in Vietnam – and one that goes against historical business and government practices.

Relevant officials have acknowledged many of these concerns and indicated that there are plans to address a number of them.<sup>107</sup> Evidence suggests that Vietnam is committed to the Doi Moi transformation of its

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<sup>103</sup> See Pham (n 25).

<sup>104</sup> For example, see Giang (n 87).

<sup>105</sup> Quang (n 81).

<sup>106</sup> See Vietnam Competition Authority (n 75).

<sup>107</sup> For example, see Vietnamnet (2010), 'Experts Discuss Competition Law'. Retrieved December 29, 2010, from <http://english.vietnamnet.vn/en/politics/3254/experts-discuss-competition-law.html> (last accessed on 26 March 2013).

economy and is working hard to implement its competition policy with a view to international standards and practices.

After years of preparation and a slow and measured start, competition policy in Vietnam appears to be approaching a new stage of development. While numerous challenges remain, as Vietnam's competition policy enters what Giang referred to as the 'third phase', its focus should shift to law and policy revision.<sup>108</sup> During this period, it is expected that additional cases will be investigated and adjudicated, based on the experience the VCA and VCC have gained over the last few years and utilizing the enhanced capacities of these institutions. Further, it is expected that this period will generate Vietnam's proposed legislative and procedural responses to the challenges faced by its competition policy since the enactment of the Law. These initiatives are contemplated and addressed in the VCA Annual Report. It will be interesting to see how competition policy in Vietnam develops over this period and whether Vietnam's more evolved competition policy affects its political economy or whether the reverse will prove true.

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<sup>108</sup> Giang (2010).

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