

CORPORATE GOVERNANCE IN VIETNAM – A SYSTEM IN TRANSITION

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Abstract

This paper looks at the development of company law and corporate governance in Vietnam – a transitional economy in South East Asia. It argues that corporate governance is a newly introduced concept but has become increasingly important in Vietnam, especially by the introduction of the new company legislation in 2005.

1. The Historical Background of Vietnamese Company Law and Corporate Governance¹

Historical influences have the potential to leave their mark on corporate governance practices and the development of a corporate governance system.² Before considering the existing Vietnamese corporate governance system, it is necessary to understand the history of Vietnamese company law and its corporate governance law regimes. The historical development of company law and corporate governance law regimes in Vietnam can be divided into three stages: the period of French colonization, the period 1945-1990, and, since 1990 up to the present. By a brief examination of the historical development of company law and corporate governance regimes in Vietnam, this section of the paper comes to three fundamental conclusions. First, the history of Vietnamese company law is dominated by legal borrowings. Second, the contemporary corporate governance law regime is partly shaped by the past. Last, politics were

¹ As to the development of company law in Vietnam, see Bui Xuan Hai, *Vietnamese Company Law: The Development and Corporate Governance Issues*, Bond Law Review, Australia, (2006) Vol. 18(1);

² Sir Adrian Cadbury, 'Foreword' in Thomas Clarke (ed), *Theories of Corporate Governance: the Philosophical Foundations of Corporate Governance* (2004) ix; Lucian Arye Bebchuk and Mark J. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' in Jeffrey N. Gordon and Mark J. Roe, *Convergence and Persistence in Corporate Governance* (2004) 69, 69.

most influential in causing the absence of corporate elites and corporate governance for some decades.

Corporate forms and company law did not exist in Vietnam until the French occupation in the late 19th century.³ Following the French legal tradition, Vietnamese company legislation in this period appeared in civil and commercial codes. Hence, corporate forms and their corporate governance rules were prescribed by the *North Civil Code* 1931 and the *Central Vietnam Commercial Code* 1942. The two Codes provided for two company forms as copies of French company models: (1) human associations (*cong ty hop nhan – société de personnes or sociétés de personnes ou par interest*) and (2) capital associations (*cong ty hop co – sociétés de capitaux*).⁴

After declaring independence in 1945, the Vietnamese government continued to implement company laws which were enacted under French colonial rule.⁵ In July 1954, after nine years of struggle against the French, the Geneva Agreement for peace in Indochina was signed. Accordingly, Vietnam was temporarily divided into two regions - the North and the South - with the 17th parallel as the common border. This resulted in the twenty-one year partition of the country, and, subsequently, the Vietnam War.

³ For a discussion of the history of state and law in Vietnam, see generally, Vu Quoc Thong, *History of Vietnamese Law (Phap che su Viet Nam)* (1971) 45-8.

⁴ See further, Article 22 of the *Central Vietnam Commercial Code* 1942; Articles 1238, 1247, 1257, 1261, 1263, 1264, and 1265 of the *North Civil Code* 1931. See also Le Tai Trien, *Summary of Commercial Law (Luat Thuong mai toat yeu)* (vol.2) (1959) 18. It should be noted that when these terms are translated from Vietnamese into English, the meanings are not exactly kept. For details of these company forms, see Articles 1238, 1247, 1257, 1261, 1263, 1264, and 1265 of the *North Civil Code* 1931.

⁵ After the Democratic Republic of Vietnam (the D.R.V) (*Viet Nam Dan Chu Cong Hoa*) was established on 2 September 1945, President Ho Chi Minh enacted the *Decree No 47/SL*, dated 10 October 1945, to allow temporary implementation of the former laws enacted both by French rulers and the Nguyen dynasty if they did not oppose the independence of democratic republic institutions of Vietnam. See Le Minh Tam, *Building and Improving the Vietnamese Legal System: Issues of Theory and Practice (Xay dung va hoan thien he thong phap luat Viet Nam: Nhung van de ly luan va thuc tien)* (2003) 87.

In the North, the Labour Party of Vietnam (*Dang Lao dong Viet Nam*) became the single leading party of the state.⁶ A centrally-planned economy based on socialist ownership was gradually introduced to replace the private economic sectors; hence, private business entities were converted to socialist economic organizations.⁷ Consequently, from the late 1950s, the North's economy was a command economy dominated by state-owned organizations and cooperatives without private business entities. Without a market economy and business freedom, company forms as well as company law did not exist in North Vietnam.

In the South, contrary to the development of the North, a market economy was encouraged to develop. The company legislation enacted before 1945 continued to implement until the *Commercial Code 1972 (Bo Thuong luat)* was effective. Upgrading the former law, this Code provided for five corporate forms (the so-called 'hội'):⁸ (1) partnerships (*hội hợp danh*); (2) simple share capital associations (*hội hợp tư đơn thương*); (3) joint capital associations (*hội dự phần*); (4) limited liability associations (*hội trách nhiệm hữu hạn*), and, (5) shareholding associations (*hội công tư* or *hội cổ phần*) as a shareholding companies. Yet with the reunification of Vietnam after the victory of the North in April 1975, and as a result of the Communist Party's command economic policies, the *Commercial Code 1972* of the South was abolished. Disappointingly, business freedom, corporate elites and company law were completely absent in the whole country

From 1975 to 1990, as a result of the socialist economic policies of the Communist Party, private businesses and company law did not exist in Vietnam. Thus, corporate governance was not a topic in law and literature. This, for instance, is mirrored in the socialist *Constitution 1980*, under which the Communist Party continued to be the sole party to lead the state and the country, and, a command economy without private economic entities was also a main objective.⁹ The

⁶ This was the name of the Communist Party in the period 1951 - 1976; see Le Mau Han, *National Congresses of the Communist Party of Vietnam (Cac Dai hoi cua Dang Cong san Viet Nam)* (2002) 56, 85.

⁷ Building a centrally-planned economy was a stated objective in the *Constitution 1959*; see Articles 9, 10, and 12 of the *Constitution 1959*.

⁸ The *Commercial Code 1972* consisted of 1051 articles in five books (*quyển*). For the enactment of the Code, see further, Vu Van Mau, *Lectures of Law, Vol. I (Phap luat dien giang)* (1973) 36 -7.

⁹ See Articles 15, 18, 25, 26, and 33 of the *Constitution 1980*.

state owned most national property while a market economy and private commerce were ‘officially discouraged’.¹⁰ Under the so-called socialist economic reform, private business entities of the South were re-organized to match models of the North, as state-private cooperation enterprises or state-owned enterprises.¹¹ Business freedom and private economic forms were recognized by neither laws nor the Communist Party’s policies.

As a consequence of the Party’s command economic policies and the serious economic damages after Vietnam War, Vietnam faced a serious social-economic crisis in the late 1970s and 1980s. This, together with collapses of some East European socialist regimes in 1980s, pushed the Communist Party to seek for new policies and economic reforms (*Đổi Mới*) in the late 1980s.

In December 1986, the Communist Party adopted sweeping economic reforms, the so-called *Đổi Mới* or “renovation” policy,¹² in which it abandoned the command economy and started building a multi-sectored market economy. *Đổi Mới* aims to liberalize the economy, increase the potential for economic development, and encourage the development of private economic sectors. Since *Đổi Mới*, Vietnam’s transition economy has grown rapidly and the legal system, including the law on business associations, has been reformed to enhance rights of business freedom and create legal foundations of the so-called socialist-oriented market economy (*kinh te thi truong theo dinh huong xa hoi chu nghia*).¹³

¹⁰ See also, John Gillespie, 'Corporations in Vietnam' in Roman Tomasic (ed), *Company Law in East Asia* (1999) 297, 299.

¹¹ For example, by early 1978, 1,500 private enterprises of South Vietnam with 130,000 workers had been nationalized and converted into 650 state-owned enterprises: see World Bank, *Vietnam Business: Vietnam Development Report 2006*, 9.

¹² ‘*Đổi mới*’, the official term used in Vietnam, is often understood by foreign scholars as the ‘renovation’ or ‘renewal’ policy.

¹³ See further, Brian Van Arkadie & Raymond Mallon, *Vietnam: A Transition Tiger?* (2003). For a discussion of the transition process of Vietnam, see generally, Adam Fforde and Stefan de Vylder, *From Plan to Market: the Economic Transition in Vietnam* (1996). It should be noted that the so-called socialist-oriented market economy - officially used by the Communist Party and the government - appears to be an abstract concept in Vietnamese language. A key element of the concept is the dominant role of state-owned enterprises in the economy and the role of the Party in leading the country: see generally, Communist Party of Vietnam (*Dang Cong san Viet Nam*), *Official Documents of the Tenth National Congress (Van kien Dai hoi Dang toan quoc lan thu X)* (2006).

Under *Đổi Mới* policies, a multi-sectored market economy and business freedom were two objectives in the *Constitution 1992*.¹⁴ In order to open up the economy, Vietnam passed the *Law on Foreign Investment in Vietnam 1987 (Luật Đầu tư nước ngoài tại Việt Nam)* in December 1987 to admit foreign investors into many areas of the economy. Similarly, to encourage the development of private economic sectors, the *Company Law 1990 (Luật Công ty)*, the *Law on Private Enterprises 1990 (Luật Doanh nghiệp tư nhân)*, the *Law on Encouragement of Domestic Investment 1994 (Luật Khuyến khích đầu tư trong nước)*, and the *Co-operative Law 1996 (Luật Hợp tác xã)* were enacted by the National Assembly. Since then, domestic and foreign investors have the right to operate business under various business forms such as limited liability companies, shareholding companies, proprietors, private enterprises, partnerships, co-operatives, and joint venture companies.

With just 46 articles, the *Company Law 1990*, which was largely based on French law and former corporate statutes, provided for two popular company forms: limited liability companies (LLCs) (*công ty trách nhiệm hữu hạn*) and shareholding companies (*công ty cổ phần*) (SCs).¹⁵ In order to enhance business freedom and create a convenient business environment for the private economic sector, the *Enterprises Law 1999 (Luật Doanh nghiệp)* was passed to replace the *Company Law 1990* and the *Law on Private Enterprises 1990*. Relying on the former company statutes and borrowing increasingly corporate legal rules from Western jurisdictions, especially Anglo-American law, the *Enterprises Law 1999* provided various forms of business associations. The implementation of this Law had been much more successful than the former laws as, for example, shown by the increased number of companies registered.¹⁶ There are, however, certain problems with the corporate governance regime provided by this Law, such as inflexible corporate governance structures, unclear functions of the management board and the

¹⁴ See Articles 15, 16, 21, 25, 57, and 58 of the *Constitution 1992*.

¹⁵ For definitions of a limited liability company and shareholding company, see Articles 25 and 30 of the *Company Law 1990*.

¹⁶ See Task Force for Implementing the Enterprises Law (*To công tác thi hành Luật Doanh nghiệp*), *Some Common Disputes in the Implementing the Enterprises Law (Một số tình huống tranh chấp điển hình phát sinh trong quá trình thực hiện Luật Doanh nghiệp)* (2003) 5.

managing directors, “poor” investor protection mechanisms.¹⁷ The *Enterprise Law 1999* was then replaced by another corporate statute after just six years of implementation.

Under the *Đổi Mới* policies of the Communist Party, in order to upgrade the law on business associations and create a convenient legal environment for investors in the context of international economic integration, especially the WTO’s accession, in November 2005, the National Assembly of Vietnam enacted the new *Enterprise Law*. This Law came in force on 1st July 2006 to replace the *Enterprise Law 1999*, the *State Enterprise Law 2003*, and provisions on management organization and operation of FDI (foreign direct investment) companies in the *Law on Foreign Investment in Vietnam 1996*.¹⁸ Even though the *Enterprise Law 2005* is largely based on the *Enterprise Law 1999*, it also contains other legal principles borrowed from Anglo-American law. This Law is the most important corporate legislation that forms the foundation of the Vietnamese corporate governance system

In conclusion, this section has shown that the Vietnamese company laws (including corporate governance rules) derived from French law, and its development has been largely influenced by the Communist Party’s policies and legal borrowings. The section has also explained that the contemporary corporate governance law regime is, to some extent, shaped by the previous company law and legal transplants. It is contended that the command economic policies of the Communist Party caused the lack of company laws and laws on private business entities in the North from the late 1950s and the whole country from 1975 to 1990. However, the *Đổi Mới* policies of the Party started in the late 1980s were a fundamental factor for the re-emergence of business freedom, company law, and corporate governance in the transitional economy of Vietnam.¹⁹

¹⁷ For a discussion of weaknesses of corporate governance rules in the *Enterprise Law 1999*, see generally, Central Institute for Economics Management (CIEM), Gesellschaft für Technische Zusammenarbeit (GTZ) and United Nations Development Programme (UNDP), *High Time for another Breakthrough?: Review of the Enterprise Law and Recommendations for Change (Thời điểm cho sự thay đổi: Đánh giá Luật Doanh nghiệp và kiến nghị)* (2004).

¹⁸ Article 171 of the Law.

¹⁹ It should be noted that the *Company Law 1990* was enacted by the National Assembly on 21 December 1990 and effective on 15 April 1991.

2. Corporate Governance: a new concept in Vietnam's transitional economy

A. Corporate governance, as Ford, Ramsay, and Austin note, 'is a very broad topic.'²⁰ In the literature, corporate governance is examined in various ways focusing upon, for example, its mechanisms, objectives, functions, and corporate participants; hence, there is a range of definitions of corporate governance in the literature, and none of them supplies a globally applicable definition.²¹ Different definitions of corporate governance can also be found in corporate governance codes both nationally and internationally.

John Farrar claims that the term '*corporate governance*' was used for the first time about four decades ago by Richard Eells in *The Governance of Corporations*.²² He traces the origins of the term 'governance' to note that the term comes from the Latin words *gubernare* and *gubernator*, 'which refer to steering a ship and to the steerer or captain of a ship'.²³

In literature, corporate governance can be used in a narrow or a broad manner. A narrow definition is often concerned with (i) corporate management structure issues such as relationships between the board and managers, and (ii) the interests or objectives of a corporate participant group. However, a broader definition often views corporate governance in terms of a set of complex relationships between various company participants and the full range of objectives of corporate governance.

²⁰ See H. A. J. Ford, P. R. Austin and I. M. Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) 175.

²¹ See also, Standards Australia, *Australian Standards: Good Corporate Governance (AS 8000-2003)* (2003) 8; and Robert Baxt, Ian Ramsay and Geof Stapledon, 'Corporate Governance in Australia: The Evolving Legal Framework and Empirical Evidence' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (2002) 159-160-1.

²² See John Farrar, *Corporate Governance: Theories, Principles, and Practice* (2005, 2nd ed) 3. Some scholars believe that corporate governance was first discussed in the 1930s and earlier..

²³ See John Farrar, *ibid* 3. Professor Farrar notes that the word 'governance' comes from the old French word '*gouvernanace*', meaning control and the state of being governed. In the *Oxford English Dictionary* (2002), 'governance' means the activity of governing a country or controlling a company or an organization; the way in which a country is governed or a company or institution is controlled.

Shleifer and Vishny state that ‘corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment’.²⁴ Ford and Ramsay consider this to be a narrow definition.²⁵ An alternative narrow definition, for example, is that of Ford, Austin, and Ramsay themselves because they briefly describe corporate governance as the management of corporations and ‘mechanisms by which managers are supervised’.²⁶ Their definition emphasises on how to run a company and supervise the company managers’ activities in the “best” interests of the company. However, these scholars also note that corporate governance involves various aspects of relationships between corporate participants such as shareholders, directors, and other company officers.²⁷

In 1992, a U.K. committee chaired by Sir Adrian Cadbury developed an influential definition of corporate governance.²⁸ By viewing corporate governance in a systematic perspective with emphasis on the links between company participants, the Cadbury Committee’s report described corporate governance as ‘the system or process by which companies are directed and controlled’.²⁹ This definition is widely supported, for example, by Australian Stock Exchange (ASX) and Standards Australia (AS 8000-2003) - which also states that corporate governance is the system by which companies are directed and managed.³⁰

In the broadest sense, as Tomasic, Bottomley and McQueen contend, corporate governance can be understood as the formal and informal control and regulation of companies by outsiders.³¹ According to Sheikh and Rees, corporate governance ‘is concerned with establishing a system

²⁴ See Andrei Shleifer and Robert W. Vishny, *A Survey of Corporate Governance* (1996), NBER Working Paper 5554, April 1996. Available at the website of SSRN at <http://ssrn.com/abstract=10182>, last visited 25 July 2006.

²⁵ See Ford, Austin and Ramsay, above n 20, 175.

²⁶ Ibid 175.

²⁷ Ibid.

²⁸ See Christine A. Mallin, *Corporate Governance* (2004) 21-2, 26-7.

²⁹ See R. P. Austin, H. A. J. Ford and I. M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 14-5. Committee on the Financial Aspects of Corporate Governance, *The Code of Best Practice* (London 1992) (Sir Adrian Cadbury, Committee Chair).

³⁰ Australian Stock Exchange (ASX) Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003) 3; Standards Australia, *Australian Standards: Good Corporate Governance (AS 8000-2003)* (2003) 8. Nevertheless, Standards Australia also notes that definitions of corporate governance are many and varied.

³¹ See Roman Tomasic, Stephen Bottomley and Rob Mc Queen, *Corporations Law in Australia* (2002, 2nd ed) 262.

whereby directors are entrusted with responsibilities and duties in relation to the direction of a company's affairs'.³² Yet, according to another approach, corporate governance can be defined the set of relationships between a company's management, its board of directors, shareholders, and other stakeholders.³³

Another example of broad definitions of corporate governance is by the Organisation for Economic Co-operation and Development (OECD) in its *Principles of Corporate Governance* (revised 2004) – a code followed by numerous economies. The OECD states that:

Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.³⁴

To sum up, although the term “corporate governance” can be described in various ways by a number of definitions, all notions of corporate governance are concerned with two key issues: first, *how*, and second, *for whom* a company is controlled and managed. In this way, we can see that the concept of corporate governance is directly linked to a further enquiry: for whom is a company governed and what objectives of “good” corporate governance are.

B. Literally, it appears impossible to find an equivalent term to ‘corporate governance’ as understood in advanced economies in the Vietnamese language. Consequently, some Vietnamese scholars, for example Bich, attempt to suggest the different alternative abstract terms in Vietnamese to describe corporate governance.³⁵ Terms that refer to directing, controlling, and managing a company used in Vietnamese literature can be, for example, “*quản trị công ty*”,

³² See Saleem Sheikh and William Rees, *Corporate Governance & Corporate Control* (2000, reprinted) 5.

³³ See also, Joanna R. Shelton, ‘Introduction’ in the OECD, *Corporate Governance in Asia: A Comparative Perspective* (2001) 11.

³⁴ Organisation for Economic Co-operation and Development (OECD), *The OECD Principles of Corporate Governance* (2004) 11.

³⁵ See, eg, Nguyen Ngoc Bich, *The Enterprises Law: Capital and Management in Shareholding Companies (Luật Doanh nghiệp: Von và quản lý trong công ty cổ phần)* (2004). In his scholarship, Bich argues that it seems impossible to seek an equivalent term to “corporate governance” in the Vietnamese language, and he suggests the term “*lèo lái công ty*.” Nonetheless, this term is also quite abstract in the Vietnamese language. *Ibid* 6, 223-5.

‘quản lý – điều hành công ty’, ‘quản trị doanh nghiệp’, and ‘quản trị kinh doanh’. Literally, ‘quản trị công ty’ may be understood as company management, and other Vietnamese terms as managing a company, enterprise management, and business management respectively. In other words, these terms in the Vietnamese language may be understood as a narrow conception of corporate governance. In Vietnamese company laws, the understanding of the terms “quản lý” and “điều hành” differ. Whilst the former refers the activity of making corporate-decisions, the latter is used to mention activities of day-to-day management of a company.³⁶ Historically, Vietnamese law-makers were often concerned with management structures of enterprises rather than corporate governance mechanisms as seen in advanced economies.³⁷ In the literature, some Vietnamese scholars such as Doanh, Huy, and Nghia call the internal governance structure of a company ‘the organizational model for corporate management’³⁸ or ‘management apparatus’.³⁹

However, according to the most common view, “corporate governance” can be roughly translated into Vietnamese as “quản trị công ty” even though it refers to the administration of a company in the Vietnamese language.⁴⁰ The term “quan tri cong ty”, for example, has been used by the Vietnam Chamber of Commerce and Industry (VCCI) – the largest organisation of Vietnamese businesses,⁴¹ and by the Ministry of Finance in the *Code of Corporate Governance*

³⁶ For using of terms ‘quản lý’ and ‘điều hành’ in Vietnamese law, see, eg, Articles 80 and 85 of the *Enterprises Law 1999*; Articles 108 and 116 of the *Enterprise Law 2005*.

³⁷ See generally, Ministry of Planning and Investment of Vietnam (MPI), *The Assessment Report on the Implementation of the Enterprises Law (Bao cao tom tat danh gia tinh hinh thi hanh Luat Doanh nghiep)* (2003) (unpublished). For a discussion of corporate governance mechanisms; see further, R. P. Austin, H.A.J. Ford and I. M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 9-13.

³⁸ Le Dang Doanh, ‘Legal Consequences of State-Owned Enterprise Reform’ in Ng Chee Yuen, Nick J. Freeman, and Frank H. Huynh (eds), *State –owned Enterprise Reform in Vietnam: Lessons from Asia* (1996, reprinted) 71.

³⁹ Nguyen Van Huy and Tran Van Nghia, ‘Government Policies and State-owned Enterprise Reform’ in Ng Chee Yuen, Nick J. Freeman, and Frank H. Huynh (eds), *State –owned Enterprise Reform in Vietnam: Lessons from Asia* (1996, reprinted) 58.

⁴⁰ See Nick J. Freeman, ‘Promoting Good Corporate Governance in Vietnam: a New Element in the Economic Reform Agenda’ in Ho Khai Leong (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (2005) 334.

⁴¹ See generally, eg, Vietnam Chamber of Commerce and Industry (VCCI) and Mekong Private Sector Development Facility (IFC/MPDF), ‘Good Corporate Governance: A Prerequisite for Sustainable Business’ (2005) 10(13) *Business Issues Bulletin* 1; Vietnam Chamber of Commerce and Industry (VCCI - Phong Thuong mai va Cong nghiep Viet Nam), *Comprehensive Report on Researching and Assessing Legislation on Establishment, Organizational Structure and Operation of Enterprises with Oriented Thought to Make the Unified Enterprise Law*

for Listed Companies.⁴² ‘Quản trị công ty’ is the term that is used as a formal translation of “corporate governance” at international conferences organized by Vietnamese authorities and international institutions such as the United Nations Development Programme (UNDP), the Organisation for Economic Co-operation and Development (OECD), the International Finance Corporation (IFC), the Asian Development Bank (ADB), and the World Bank (WB).⁴³

As discussed in the previous section, during the times of command economic policies, corporate forms and corporate governance were not a topic in either law or literature for some decades. The *Đổi Mới* policies started in the late 1980s, and more particularly, the introduction of the *Company Law 1990*, which allowed people to establish private companies for profit objectives, was a critical step for corporate governance to become an important issue in the transitional economy.

Until some years ago, corporate governance had not been important in businesses, policy making, and literature. Mr. Fred Burke, the CEO of Vietnam’s branch of a U.S. law firm, Baker & McKenzie, comments that although basic corporate governance principles are prescribed by the *Enterprise Law*, ‘Vietnam is still learning what governance is.’⁴⁴ The separation of ownership and management as Berle and Means developed seven decades ago appears to be ignored by Vietnamese entrepreneurs, who are often shareholder-managers of companies.⁴⁵

and the Common Investment Law (*Bao cao tong hop Nghien cuu ra soat cac van ban phap luat ve thanh lap, to chuc va hoat dong cua doanh nghiep voi cac tu tuong chi dao xay dung Luat Doanh nghiep thong nhat va Luat Dau tu chung*) (2005, unpublished).

⁴² Decision No. 12/2007/QĐ-BTC, dated 13 March 2007, by the Minister of Finance on promulgation of the *Code of Corporate Governance for Listed Companies* in the Stock Exchange and Securities Trading Centers. This Code (Article 2.1) provides that corporate governance is a system of rules to ensure that a company is directed and controlled effectively for the interests of company stakeholders.

⁴³ There have been several international conferences organized in Vietnam on the issues of transitional economies and corporate governance under co-operation between Vietnamese authorities with international institutions.

⁴⁴ Cited in Vietnam Chamber of Commerce and Industry (VCCI) and Mekong Private Sector Development Facility (IFC/MPDF), ‘Good Corporate Governance: A Prerequisite for Sustainable Business’ (2005) 10(13) *Business Issues Bulletin* 2.

⁴⁵ See generally, Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (revised edition ed, 1968)

Recently, it is stated in the *Business Issues Bulletin* of the Vietnam Chamber of Commerce and Industry (VCCI), which is published with support from the Mekong Private Sector Development Facility (MPDF) of the International Finance Corporation (IFC) that

Corporate governance is still a new concept in Vietnam. In a recent IFC-MPDF study of 85 large Vietnamese companies, less than 25% believed that businesspeople in Vietnam understand the basic concepts and principles of corporate governance. In-depth interviews with company directors revealed that there is still some confusion over the difference between corporate governance and operational management. As a result, few Vietnamese companies have good corporate governance systems. A large majority of the directors interviewed in the study concurred that Vietnamese firms should improve their corporate governance practices.⁴⁶

In the last several years, with the rapid growth of private companies and foreign investment, the (state-owned enterprise) SOEs' equitization process, the occurrence of some serious criminal cases regarding corporate governance, and the international economic integration, corporate governance has become an increasingly important topic in Vietnam. As of the end of 2007, around 9,500 FDI (foreign direct investment) projects had been licensed with a registered total capital of about US \$ 98 billion particularly, in 2007, Vietnam received around US\$ 25,6 billion from foreign investors.⁴⁷ In addition, as of the end of 2000, Vietnam had only 35 thousand private firms; however, by the end of 2007 there were about more than 200 thousand companies with a significant increase in equity capital.

The importance of corporate governance is now considered by both policy makers and entrepreneurs. In the legislative dimension, the introduction of the *Enterprise Law 2005* and the *Securities Law 2006* improving regulations regarding investor protection and disclosure is a

⁴⁶ Vietnam Chamber of Commerce and Industry (VCCI) and Mekong Private Sector Development Facility (IFC/MPDF), 'Good Corporate Governance: A Prerequisite for Sustainable Business' (2005) 10(13) *Business Issues Bulletin* 1, 1.

⁴⁷ Source: *The Saigon Times Weekly*, 12 January 2008, at 10.

significant example. Research into corporate governance by the Central Institute for Economic Management (CIEM), the VCCI, the MPDF, and some international institutions such as the World Bank and the UNDP have also shown the rising importance of corporate governance in transition Vietnam.

Vietnam has a “poor” corporate governance regulation framework. Vietnam’s “hard law” including legislation and company constitutions is a fundamental source of the regulation framework; nevertheless, a statute has to rely on subordinate legislation in the implementation. Accounting and auditing standards promulgated by the government as “hard law” also need to be improved to meet international standards and promote “good” corporate governance with the efficient engagement of professional associations of accountants and auditors. In addition, there is a lack of important sources of corporate governance regulation as in advanced economies such as codes of corporate governance and listing rules by securities regulators. In order to create an effective corporate governance regulatory framework, the lack of corporate governance rules should be implemented by the efficient engagement of not only governmental and non-governmental agencies, but also shareholders and companies themselves.

In short, since the introduction of economic reforms and company law is less than two decades, most Vietnamese entrepreneurs and scholars are not yet familiar with corporate governance mechanisms as understood in advanced economies. However, there are a number of reasons for corporate governance becoming increasingly important in the transitional economy of Vietnam.

3. Vietnamese Corporate Governance: An Insider System?

The literature classifies corporate governance structures into insider-based corporate governance systems (bank-oriented systems) on one hand, and outsider-based corporate governance systems (market-oriented systems) on the other.⁴⁸ According to Nestor and Thompson, an outsider

⁴⁸ See generally, eg, Stilson Nestor and John K. Thompson, 'Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?' in OECD (ed), *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 21-8; Weil, Gotshal & Manges LLP (on behalf of the European Commission, *Comparative Study of Corporate Governance Codes Relevant to the European Union and its Members* (2002) 32; Roman Tomasic, 'Comparing

system often has four basic features: (i) dispersed equity ownership with large institutional investors; (ii) the recognised primacy of shareholders' interests in the corporate law; (iii) a strong emphasis on the legal protection of minority shareholders; and (iv) strong requirements for disclosure.⁴⁹

However, in an insider system, ownership and control are relatively closely held by identifiable and cohesive groups of "insiders" who have longer-term stable relationships with the company.⁵⁰ These insider groups, consisting of as shareholders, creditors, banks, and suppliers, are often small and have significant connection to each other. Groups of "insiders" may act together to control management and the company, thus, agency problems is not as important as it is in the outsider system. In the literature, most of the economies around the world can be classified as insider corporate governance systems, and many of them are probably considered as the so-called family-based or state-based corporate governance structures as a sub-category.⁵¹

So, is the Vietnamese corporate governance system an insider system? This section argues that Vietnamese corporate governance can be described as an insider-based corporate governance system on the grounds of the dominance of state-owned enterprises (SOE) with privileges from the state, family-run companies.

Corporate Governance Principles: China, Australia and the OECD' in Roman Tomasic (ed), *Corporate Governance: Challenges for China* (2006) 1, 10; and Low Chee Keong, 'Introduction- the Corporate Governance Debate' in Low Chee Keong (ed), *Corporate Governance: An Asia- Pacific Critique* (2002) 3, 4-6. For a discussion of market systems and block- holder systems, see generally, William W. Bratton and Joseph A. McCahery, 'Comparative Corporate Governance and the Theory of the Firm: the Case Against Global Cross Reference' (1999) 38(2) *Columbia Journal of Transnational Law* 213 -97; available at the website of SSRN at <http://ssrn.com/abstract=205455>, last visited 24 March 2007, at 5-10. For a classification of internal corporate governance structures, see generally, Ann B. Gillette, Thomas H. Noe and Michael J. Rebelló, 'Board Structures Around the World: An Experimental Investigation' (2004) ; available at the website of SSRN at <http://ssrn.com/abstract=436683>, last visited 15 February 2007. In their work, Gillette, Noe and Robello label four corporate governance structures: the two-tiered board; the single-tier board with a one-vote watchdog majority and multiple insiders; the single-tier board with a one-vote insider majority; and the board with just one insider: *ibid* at 5.

⁴⁹ Stilpon Nestor and John K. Thompson, 'Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?' in OECD (ed), *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 21.

⁵⁰ *Ibid* 24. See also, Roman Tomasic, 'Comparing Corporate Governance Principles: China, Australia and the OECD' in Roman Tomasic (ed), *Corporate Governance: Challenges for China* (2006) 1, 10.

⁵¹ Stilpon Nestor and John K. Thompson, 'Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?' in OECD (ed), *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 27.

First, despite starting economic reforms two decades ago and increasingly reforming the state-economic sector with various forms such as equitization, leasing, selling, and re-structuring, Vietnam's SOEs still account for around 38 per cent of GDP, and dominate the transitional economy.⁵² In addition, influenced by command economic policies in a long period, SOEs appear still to rely on and enjoy various forms of privileges from, particularly incentive and subsidy schemes, the government.⁵³

Second, most private Vietnamese companies are small and owned by “insiders”, especially family members. While SOEs are often managed by government officials under close state administration, private firms are largely run by family members as controlling shareholders. Some research such as by the VCCI, the Committee for Drafting the Unified Enterprise Law 2005, and Gillespie has found that governance structures of Vietnamese companies differ from the bifurcated ownership and management structures stipulated in the law, and most internal company structures resembled family hierarchies.⁵⁴ These findings are similar to those by the CIEM some years ago,⁵⁵ and are also consistent with the research conducted by the OECD into corporate governance of Asian firms with a conclusion that about ‘two-thirds of listed companies, and substantially all private companies, are family-run’.⁵⁶

⁵² For statistics of SOEs, see General Statistics Office of Vietnam at <http://www.gso.gov.vn>;

⁵³ See, eg, Vietnam Chamber of Commerce and Industry (VCCI) and Mekong Private Sector Development Facility (IFC/MPDF), 'Effective Implementation: The Next Step for the New Enterprise and Investment Laws' (2006) 16 *Business Issues Bulletin* 4.

⁵⁴ See the Vietnam Chamber of Commerce and Industry (VCCI), UNDP-VIE/01/025 Project, and the Committee for Drafting the Unified Enterprise Law 2005, *Summary Report on Debates over the Unified Enterprise Law Project*, (2005, unpublished); John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (2006) 271.

⁵⁵ John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (2006) 268, 270-2; Central Institute for Economic Management (CIEM), *Assessment Review of the Company Law, the Law on private enterprises and Decree 66/HDBT dated 2 March 1992 (Danh gia tong ket Luat Cong ty, Luat Doanh nghiep tu nhan va Nghi dinh 66/HDBT ngay 2/3/1992)* (1999) 70-1.

⁵⁶ See OECD, *White Paper on Corporate Governance in Asia* 2003, 11. For a discussion of expropriation of outside investors by the insiders, and of upgrading corporate governance in East Asia; see generally, Gordon Walker and Terry Reid, “Upgrading Corporate Governance in East Asia” – Part I, (2002) 17 (3) *Journal of International Banking Law* 59-66, and Part II, (2002) (4) *Journal of International Banking Law* 96-101.

In conclusion, because of the re-emergence of company law and private corporate elites only since 1991, corporate governance has become a concept that has increasingly been addressed by Vietnamese corporate regulators and that is being increasingly used by those who are managing and controlling companies, especially those who are seeking or have listed on the stock exchange. Further, the Vietnamese corporate governance system is an insider system because most private firms are family-run and operating in a transitional economy with the dominance of SOEs.