

CORPORATE GOVERNANCE IN VIETNAM : A SYSTEM IN TRANSITION

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I. *The Historical Background of Vietnamese Company Law and Corporate Governance*¹

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 colonisation, the period 1945-1990, and that from 1990 up to the present.

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

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¹ As for 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.

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 For further details see, 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 precisely retained. 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 the temporary

of struggle against the French, the Geneva Agreement for peace in Indochina was signed. Accordingly, Vietnam was temporarily divided into two regions — North and South — with the 17th parallel as the common border. This resulted in the 21-year partition of the country, and, subsequently, the Vietnam War.

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 organisations.⁷ Consequently, from the late 1950s, the North's economy was a command economy dominated by state-owned organisations and cooperatives without private business entities. Without a market economy and business freedom, neither company forms nor company law existed 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 be implemented 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 tư phân*); (4) limited liability associations (*hội trách nhiệm hữu hạn*), and, (5) shareholding associations (*hội công tư* or *hội cổ phần*) as 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 nationwide.

From 1975 to 1990, as a result of the socialist economic policies of the Communist Party, no private businesses or company law existed in Vietnam, hence corporate governance was not a topic in law or in the 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 country, and the main objective was also a command economy without private economic entities.⁹ The state owned most national property while a market economy and private commerce were 'officially discouraged'.¹⁰ Under the so-called socialist economic reform, the private business entities of the South were re-organised to match the models of the North, as state-private cooperation enterprises or state-owned enterprises.¹¹ Business freedom and private

implementation of the former laws enacted both by French rulers and the Nguyen dynasty if they did not oppose the independence of the democratic republic institutions of Vietnam. See Le Minh Tam, *Building and Improving the Vietnamese Legal System: Issues of Theory and Practice (Xây dựng và hoàn thiện hệ thống pháp luật Việt Nam: Những vấn đề lý luận và thực tiễn)* (2003) 87.

⁶ This was the name of the Communist Party during the period 1951 — 1976; see Le Mau Han, *National Congresses of the Communist Party of Vietnam (Các Đại hội của Đảng Cộng sản Việt 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, for further details see, Vu Van Mau, *Lectures of Law, Vol. I (Pháp luật diện giảng)* (1973) 36 -7.

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

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 nationalised and converted into 650 state-owned enterprises: see World Bank, *Vietnam Business: Vietnam Development*

economic forms were neither recognised under law nor the Communist Party's policies.

As a consequence of the Party's command economic policies and the serious economic damage after the Vietnam War, Vietnam faced a serious socio-economic crisis in the late 1970s and 1980s. This, together with the collapses of some East European socialist regimes in the 1980s, pushed the Communist Party to seek 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* aimed to liberalise the economy, increase the potential for economic development, and encourage the development of the 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 the rights of business freedom and create the legal foundations of the so-called socialist-oriented market economy (*kinh te thi truong theo dinh huong xa hoi chu nghia*).¹³

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 (Luat Dau tu nuoc ngoai tai Viet 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 (Luat Cong ty)*, the *Law on Private Enterprises 1990 (Luat Doanh nghiep tu nhan)*, the *Law on Encouragement of Domestic Investment 1994 (Luat Khuyen khich dau tu trong nuoc)*, and the *Co-operative Law 1996 (Luat Hop tac xa)* were enacted by the National Assembly. Since then, domestic and foreign investors have had the right to operate business under various 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) (*cong ty trach nhiem huu han*) and shareholding companies (*cong ty co phan*) (SCs).¹⁵ In order to enhance business freedom and create a convenient business environment for the private economic sector, the *Enterprises Law 1999 (Luat Doanh nghiep)* 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

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 For further details see, 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).

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*.

associations. The implementation of this Law was 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 the inflexible corporate governance structures, unclear functions of the management board and the managing directors, and “poor” investor protection mechanisms.¹⁷ The *Enterprise Law 1999* was subsequently 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 the management organisation 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 and forms the foundation of the Vietnamese corporate governance system.

II. *Internal Governance Structures of Vietnamese Companies under the Enterprise Law 2005*

Since Vietnamese company law provides different internal governance structures for limited liability companies (LLCs) and shareholding companies (SCs), this section examines these systems in separate sub-sections. This section concludes that the *Enterprise Law 2005* provides different fixed internal governance structures for company types with mandatory powers and functions for each corporate governance body.¹⁹

1. **Internal Governance Structures of Limited Liability Companies (LLCs)**

Under the *Enterprise Law 2005*, LLCs are classified into two forms: (i) LLCs with two or more shareholders;²⁰ and (ii) single-member LLCs. Unlike company laws of other jurisdictions, the 2005 Law provides different internal governance structures for LLCs.

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

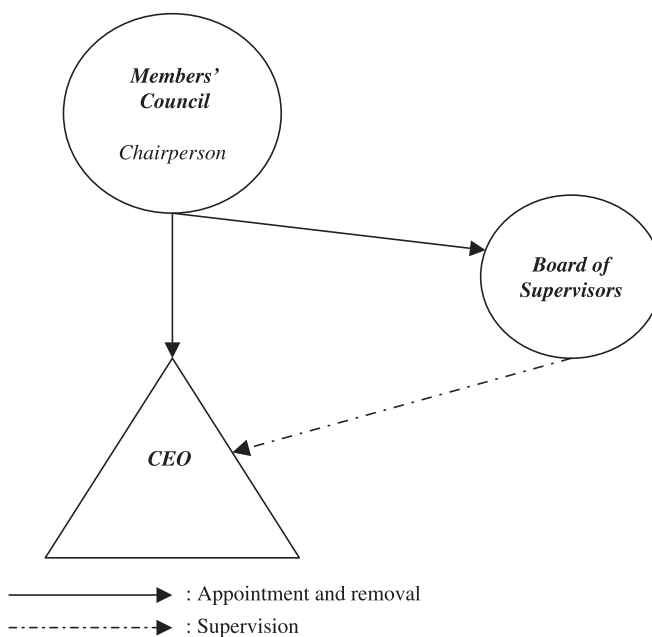
¹⁷ For a discussion of weaknesses of corporate governance rules in the *Enterprise Law 1999*, see generally, the Central Institute for Economics Management (CIEM), Gesellschaft für Technische Zusammenarbeit (GTZ) and the United Nations Development Programme (UNDP), *High Time for another Breakthrough?: 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 For the internal governance structures of Vietnamese companies, see generally, Bui Xuan Hai, 'A Comparison of Internal Governance Structures of Vietnamese Shareholding Companies and Leading Models around the World (*Số sánh cấu trúc quản trị nội bộ của CTCP Việt Nam với các mô hình điển hình trên thế giới*)' (2006) 37 *Legal Science Journal (Tạp chí Khoa học Pháp lý)* 14 - 21.

²⁰ For a definition of this company type, see Article 38 of the *Enterprise Law 2005* (hereinafter, the EL 2005).

FIG. 1. INTERNAL CORPORATE GOVERNANCE STRUCTURE OF AN LLC WITH TWO OR MORE MEMBERS



A. Limited Liability Companies with Two or More Shareholders

Under the *Enterprise Law 2005*, the mandatory governance structure of a multiple-shareholder LLC consists of a members' council (*hoidong thanh vien* — hereinafter, MC); a chairperson of the MC (*chutich hoidong thanh vien*); a CEO (*giam doc* or *tong giam doc*), and, if the company has more than 10 shareholders, a board of supervisors (*ban kiem soat*) (see Figure 1).²¹

(1) The Members' Council (MC) and its Chairperson

The members' council (MC) — consisting of all natural shareholders and representatives of the shareholders who are organisations — is the highest decision-making body of the company.²² The MC is ordinarily convened at least once a year but a meeting can be called at any time on the request of the chairperson of the MC or a shareholder (or group of shareholders) holding at least 25 percent of the share capital.²³ A meeting is effective if all participating members represent at least 75 percent of the share capital.²⁴ The chairperson, who is elected by the MC, is responsible for preparing meeting agendas, convening meetings, and signing documents on behalf of the MC.²⁵ The statutory powers of the chairperson prescribed in

²¹ Article 46 of the EL 2005.

²² Article 47 of the EL 2005.

²³ Article 50 of the EL 2005.

²⁴ If the first meeting fails, other meetings can be convened with lower requirements; see more in Article 51 of the EL 2005.

²⁵ Article 49 of the EL 2005.

the Law may be expanded by the company's constitution.

Under the *Enterprise Law 2005*, the MC is mandated many powers and appears as a body of both ownership and management, possibly comparable to the board of management of an SC, and is involved more directly in managerial decisions.²⁶ In this way, the shareholders of a Vietnamese LLC enjoy more statutory powers than do their counterparts in Anglo-American jurisdictions. The MC can decide on company matters by either a meeting or an alternative means as prescribed in the company's constitution.²⁷ Depending on the matter and provisions of the constitution, a resolution of the MC is passed if it is approved by at least 65 or 75 percent of the voting rights of the attending shareholders.²⁸ Nevertheless, a higher requirement for passing a resolution may be stipulated in the company's constitution as a way of enhancing minority shareholder protection

(2) The Chief Executive Officer (CEO)

The CEO selected by the MC runs the daily operations of the company with powers prescribed in the Law, the constitution, and the employment agreement.²⁹ A major task of the CEO is to implement resolutions of the MC; nevertheless, he/she also has the right to decide on matters regarding daily operations of the company, and, appoint company managers/officers who are not under the power of the MC. The Law, however, does not give the CEO the right to request the chairperson of the MC to convene a meeting of shareholders to deal with matters that occur in the company's operations. Furthermore, the Law does not provide for communication mechanisms between the CEO and the MC. This restriction of management information flow is not helpful.

(3) The Board of Supervisors (BOS)

An LLC with more than 10 shareholders must form a board of supervisors (BOS).³⁰ However, the *Enterprise Law 2005* does not provide any provisions for the formation, operation, powers, and functions of the BOS. Thus, these matters must be prescribed in the company's constitution, and, in this way, controlling shareholders may undermine supervisory issues and ignore the participation of minority shareholders.

In short, the *Enterprise Law 2005* provides the internal governance structure of a multiple-shareholder LLC including three bodies: the MC, a CEO, and a BOS. Whilst the Law prescribes the statutory powers, functions, and operation of the MC, the CEO, and the MC's chairperson in detail, it does not provide those for the BOS.

B. Internal Governance Structures of One-Shareholder Limited Liability Companies (LLCs)

The *Enterprise Law 2005* provides for two types of single-member LLCs, organisation-owners versus human owners, with two different mandatory internal governance structures.

a. Single-Organisation-Owned Limited Liability Companies (LLCs)

The mandatory governance structure of this company type is more complicated than that of

²⁶ For powers of the MC, see Clause 2 of Article 47 of the EL 2005. See also, Nguyen Dinh Cung and Scott Robertson, *Corporate Governance in Vietnam* (Policy Brief # 36, William Davidson Institute, University of Michigan (2005)) 7.

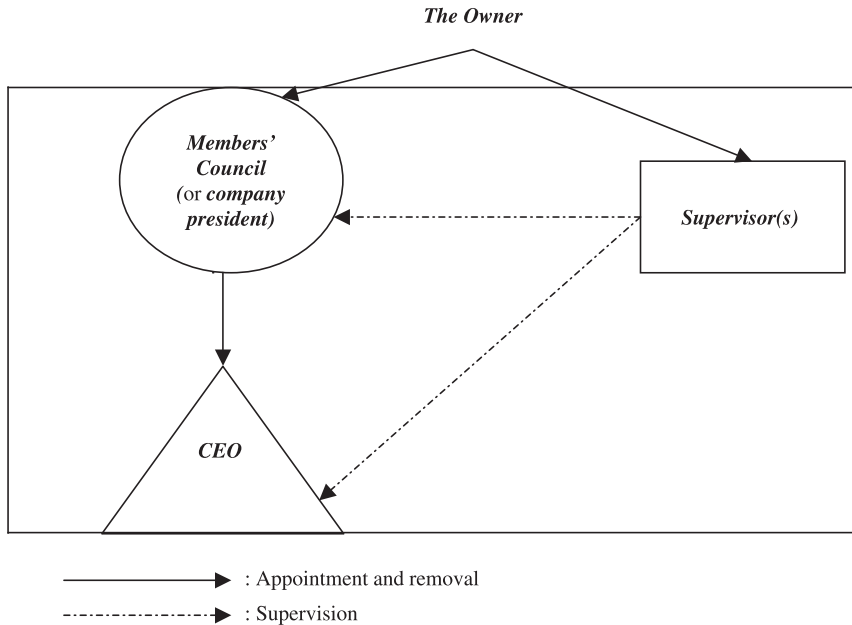
²⁷ See Article 54 of the EL 2005.

²⁸ Clauses 2, 3 of Article 52 of the EL 2005.

²⁹ Article 55 of the EL 2005.

³⁰ Article 46 of the EL 2005.

FIG. 2. INTERNAL GOVERNANCE STRUCTURE OF A SINGLE-ORGANISATION-OWNED LLC



a one-natural-shareholder-owned LLC and consists of the following three constituents (see Figure 2):

(1) *The Company President and the Members' Council*

The power of the members' council (MC) of a multiple-shareholder LLC (discussed above) is divided between the owner and its authorised representatives (*nguoi dai dien theo uy quyen*) of a single-organisation-owned LLC. The *Enterprise Law 2005* does not formally consider the company owner as the highest decision-making body of the company but the owner is mandated powers that are similar to those of the members' council of a multiple-shareholder LLC. The Law requires the owner to appoint one or more authorised representatives to exercise the owner's powers and obligations as laws provided for.³¹

(i) If only one authorised representative is appointed, this person is the company president (*chu tich cong ty*),³² and the internal governance structure of the company consists of a company president, a CEO, and a supervisor (*kiem soat vien*).³³ The powers, obligations, and duties of the company president are provided for by the Law, and may be expanded by the company's constitution. The company president acts on behalf of (i) the owner in exercising the owner's rights and obligations (with the approval of the owner), and, (ii) the company in exercising the company's rights and obligations.

³¹ Article 67 of the EL 2005.

³² For details, see Article 69 of the EL 2005.

³³ It should be noted that '*kiem soat vien*' in Vietnamese can be translated into English as 'supervisor' or 'controller'. In this thesis, the term is translated as 'supervisor'.

(ii) If two or more authorised representatives are appointed, the corporate governance structure of the company includes: a members' council (*hoi dong thanh vien* — MC) including all authorised representatives, a CEO, and supervisors.³⁴ In this model, the MC has powers and functions identical to the company president of the above governance structure (see Figure 2). Each member of the MC has a voting right, and a resolution is passed if it is approved by more than half the members.

(2) Chief Executive Officer

The CEO of a single-organisation-owned LLC is selected by either the MC or the company president to run the daily operations of the company.³⁵ The powers and duties of the CEO are the same as those of the CEO of an LLC with two or more shareholders, as discussed above.³⁶

(3) Supervisors

The *Enterprise Law 2005* does not provide a statutory collective supervisory body as a board of supervisors for this company type but the owner can appoint no more than three supervisors to oversee the management. The main function of supervisors is to monitor and check (if necessary) the work of the MC, the company president, and the CEO in operating the company.³⁷

In the mandatory governance structures discussed above, the *Enterprise Law 2005* does not state the owner as a corporate decision-making body in the governance structure. Nevertheless, the owner has many powers as prescribed by the Law, which may also be expanded through the company's constitution.³⁸ This may result in potential interference of the owner, especially the governmental agency as the sole owner of state-owned companies, in the company management.

b. One-Natural-Person-Owned Limited Liability Companies

Compared to single-organisation-owned LLCs, the internal governance structure of a single-natural-shareholder LLC is much simpler. The mandatory internal governance structure of this company type comprises a company president (*chu tich cong ty*) and a CEO.³⁹ The company owner is established as the company president, and the powers and obligations of the president are also as those of the company owner, with the supreme power to decide upon any matter of the company. The CEO is selected by the owner to run the daily operations of the company. However, unlike other LLCs, the *Enterprise Law 2005* does not provide statutory powers and functions for the CEO. Neither does the law provide any rules for the supervision mechanisms of the company.

In conclusion, the *Enterprise Law 2005* provides different statutory internal governance structures for LLCs owned by single and multiple shareholders with particular mandatory powers of corporate governance bodies. These powers may be expanded, but not decreased, by the company's constitution.

³⁴ Clause 3 of Article 67 of the EL 2005.

³⁵ Clause 1 of Article 70 of the EL 2005.

³⁶ See and compare, Clause 2 of Article 55 and Clause 2 of Article 70 of the EL 2005.

³⁷ Article 71 of the EL 2005.

³⁸ For details, see Clause 1 of Article 64 of the EL 2005.

³⁹ Article 74 of the EL 2005.

2. The Internal Governance Structure of a Shareholding Company

The mandatory governance structure of a shareholding company consists of four governance bodies: (1) the shareholders' meeting (*dai hoi dong co dong* — hereinafter, SM); (2) a board of management (*hoi dong quan tri* — hereinafter, BOM); (3) a CEO (*giam doc* or *tong giam doc*), and (4), if the company has more than 11 shareholders being natural persons or one (or more) institutional shareholder(s) holding more than 50 percent of the equity capital, a board of supervisors (*ban kiem soat* — hereinafter, BOS) (see Figure 3).⁴⁰

(1) Shareholders' Meeting (SM)

The *Enterprise Law 2005* sets out detailed provisions relating to procedures of, and other matters concerning, shareholders' meetings (SM).⁴¹ The SM, comprising all shareholders with the right to vote, is the highest decision making body of an SC.⁴² The *Enterprise Law 2005* retains many powers of the company for the SM, and such mandated powers can be expanded by the company's constitution.⁴³ The SM can be convened in an ordinary (at least once a year) or extraordinary mode via a call by the BOM, the BOS, or a shareholder (or a group of shareholder) under particular circumstances provided for by the 2005 Law and the company constitution. A meeting of shareholders must be attended by shareholders holding at least 65 percent of the voting shares.⁴⁴

A resolution can be passed by the shareholders at a meeting or by collecting written votes conducted by the BOM. At meetings, depending on the matter, a resolution is adopted if it is approved by at least 65 or 75 percent of the total voting shares of all attending shareholders.⁴⁵ If a resolution is passed via the written votes of shareholders, it must be approved by at least 75 percent of total votes.⁴⁶ These high requirements may help to protect the minority shareholders of the company.

Additionally, the *Enterprise Law 2005* allows a shareholder, a member of the BOM, the CEO, and the BOS to request a court to review and cancel a resolution of the shareholders if (i) the order and procedures for convening the meeting were unlawful, or (ii) the procedures for issuing the resolution or its contents break laws or/and the company's constitution.⁴⁷ These rules may help protect investors and keep the company operating lawfully.

(2) The Board of Management (BOM)

The board of management (BOM), with from three to eleven members elected by the SM, has an essential role in the corporate governance of an SC.⁴⁸ The board shares decision-making

⁴⁰ See Article 95 of the EL 2005.

⁴¹ For the shareholders' meeting of LLCs, see Articles 47, 50 - 54. For the shareholders' meeting of SCs, see Articles 96 -107 of the EL 2005.

⁴² Clause 1 of Article 96 of the EL 2005. According to the EL 2005 (Article 78), an SC must have ordinary shares and may have preference shares. Preference shares can be voting preference (*uu dai bieu quyet*), dividend preference (*uu dai co tuc*), redeemable preference (*uu dai hoan lai*), and other preference shares as provided for in the company's constitution. Redeemable and dividend preference shareholders are not entitled to vote at shareholders' meeting. For details, see Articles 81- 83 of the EL 2005.

⁴³ See Clause 2 of Article 96 of the EL 2005.

⁴⁴ Article 102 of the EL 2005.

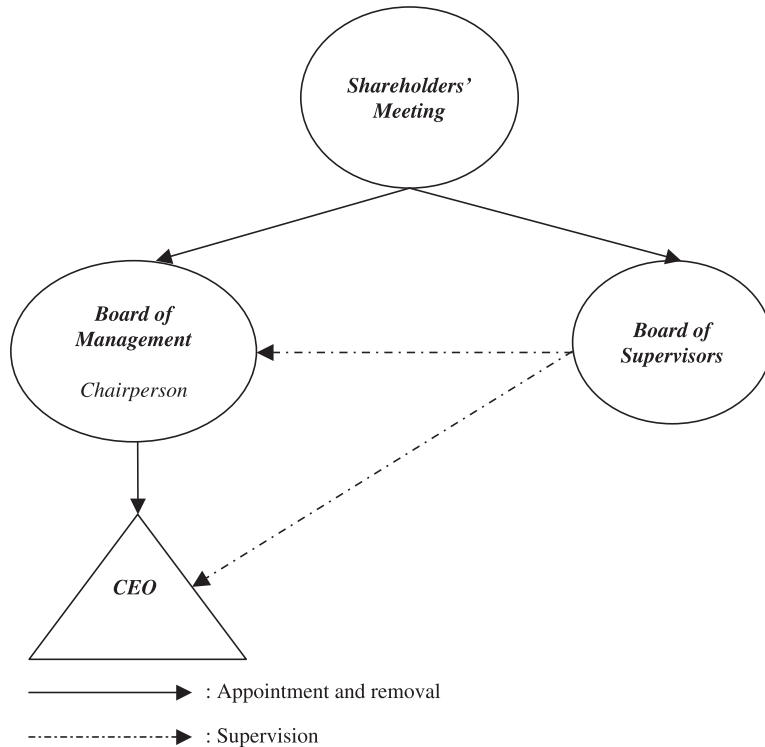
⁴⁵ Clause 3 of Article 104 of the EL 2005.

⁴⁶ For collecting the written votes of shareholders, see Article 105 of the EL 2005.

⁴⁷ Article 107 of the EL 2005.

⁴⁸ Articles 108, Clause 1 of Article 109 of the EL 2005.

FIG. 3. INTERNAL GOVERNANCE STRUCTURE OF A SHAREHOLDING COMPANY



power with the SM and appears as a decision-making and management body. The board manages the company and has authority to deal with all matters in the name of the company, except those that fall within the powers of the SM as prescribed in the Law and the company's constitution.⁴⁹ This means that the matters of a company not under the powers of the SM can fall to the BOM. The *Enterprise Law 2005* prescribes a list of statutory matters (some similar to those of the MC of LLCs) that the board can decide or propose to the SM.⁵⁰ The statutory powers of the board can be divided into four major areas: (i) making decisions concerning management matters; (ii) selecting the CEO and other senior managers; (iii) supervising the daily management, and, (iv) proposing matters under the power of the SM.

The board can adopt a decision via a meeting, collecting written votes, and other ways provided for by the company's constitution. The board's meetings are convened in an ordinary (at least once every three months) or extraordinary manner, as called for by the chairperson. The chairperson must convene an irregular board meeting requested by the BOS, the CEO, at least two board members, or five managers, or other circumstances provided for by the constitution.⁵¹ If the chairperson fails to convene a requested meeting, he/she is responsible for

⁴⁹ Article 108 of the EL 2005.

⁵⁰ Clause 2 of Article 108 of the EL 2005.

any losses that may occur, and the requester has the right to convene a board's meeting. A meeting must be attended by at least three-quarters of the members and a board's decision is adopted if approved by a majority of participating members. If the numbers of votes for and against are equal, the vote of the chairperson is decisive.⁵²

It is an improvement of the *Enterprise Law 2005* in comparison to the *Enterprise Law 1999* when the 2005 Law provides that the CEO and members of the BOS have the right to attend and discuss, but not to vote, at all meetings of the BOM. This is a significant way for supervisors to monitor the board, and for the CEO to make proposals and obtain the opinions of the board in running the company. On the other hand, a board member has the right to request the CEO and other managers to provide information and materials related to the operation of the company.⁵³ This may assist the board in overseeing the daily management.

The head of the BOM is a chairperson (*chu tich hoi dong quan tri*), who — unlike under the 1999 Law — is elected by either the SM or the BOM in accordance with the company constitution.⁵⁴ The chairperson of the board can also be the CEO of the company, unless otherwise provided for by the constitution. A major mandatory function of the chairperson involves chairing meetings of the board and the SM, planning the board's operation, and supervising the implementation of the board's decisions.⁵⁵ Nevertheless, the company's constitution can allocate wider powers to the chairperson. Consequently, as other corporate governance bodies, the powers of the chairperson can vary from company to company.

(3) Chief Executive Officer (CEO)

An SC must have a CEO selected by the BOM to run the daily operations of the company.⁵⁶ Interestingly, unlike the 1999 Law and company laws of some other jurisdictions, the *Enterprise Law 2005* provides that the CEO of an SC cannot concurrently be the CEO of another enterprise in order to prevent any conflict of interests.⁵⁷ The CEO has statutory powers to manage and decide on matters regarding the daily operations of the company, implement the decisions of the BOM, and select managers and officers who are not under the power of the board.⁵⁸ Beside the statutory powers prescribed in the Law, the powers of the CEO can be expanded by the company constitution.

(4) The Board of Supervisors (BOS)

The *Enterprise Law 2005* provides that a board of supervisors (*ban kiem soat* — BOS) must be established in an SC with more than 11 natural shareholders or of which more than 50 percent of the share capital is held by one or more organisation shareholder(s).⁵⁹ Unlike Anglo-American jurisdictions, where a supervisory body often belongs to a board of directors, the supervisory body of a Vietnamese SC is a body elected by shareholders and separated from the BOM.⁶⁰

⁵¹ Clauses 3, 4, 5 of Article 112 of the EL 2005.

⁵² Clause 8 of Article 112 of the EL 2005.

⁵³ Clause 1 of Article 114 of the EL 2005.

⁵⁴ See and compare Article 111 of the EL 2005 and Clause 1 of Article 81 of the *Enterprise Law 1999*.

⁵⁵ Clause 2 of Article 111 of the EL 2005.

⁵⁶ Article 116 of the EL 2005.

⁵⁷ Clause 2 of Article 116 of the EL 2005.

⁵⁸ For the powers, duties, and obligations of the CEO, see Clause 3 of Article 116 of the EL 2005.

⁵⁹ Article 95 of the EL 2005.

⁶⁰ See Clause 2 (c) of Article 96 and Article 121 of the EL 2005.

Supervisors elect one of their members as chief of the BOS. Nonetheless, the *Enterprise Law 2005* does not state the powers and duties for this position. More than half the BOS members must reside permanently in Vietnam and at least one supervisor must be an accountant or auditor. Interestingly, in order to assure the independence of the BOS, company managers and their relatives cannot become supervisors of the company.⁶¹

A major function of the BOS involves supervising the BOM and CEO in managing and running the company.⁶² In particular, the BOS (i) checks the reasonability, reliability, legality, truthfulness and carefulness of the management in directing and managing the company, and, (ii) evaluates the business reports, annual financial reports, and management reports of the BOM. The *Enterprise Law 2005* also ensures that supervisors have access to management information. For example, a supervisor has the statutory right to attend meetings of the BOM, and the CEO has to report to the BOM and the BOS in the same manner.⁶³ Supervisors also have the right to access the company's files and working locations of the company managers and employees. Furthermore, the BOM, its members, the CEO and other managers have to provide, without delay, full materials for the BOS as requested. In addition to the statutory powers provided for by the Law, the company's constitution can also enlarge the powers of the BOS. Compared to the 1999 Law, the principles discussed above are an improvement of the *Enterprise Law 2005*.

The *Enterprise Law 2005* has enhanced the supervisory mechanisms in SCs. However, it does not provide for the operation of the BOS as a collective corporate body, and does not specify how this body adopts a decision. Furthermore, the efficiency of a BOS's operations depends upon various factors. A survey conducted by MPDF in 2004 found that 36 percent of the respondents believe that the BOS "just exists on paper" because it is required by law.⁶⁴

In short, the mandatory internal governance structure of an SC under the *Enterprise Law 2005* comprises four constituents: the general meeting, a BOM, a CEO, and a BOS with respective statutory powers and functions. Besides the statutory powers prescribed in the Law, the company's constitution can expand, but not decrease, the powers of the above corporate governance bodies.

3. Problems that Need to Be Addressed

A. Mandatory Internal Governance Structures for Company Types: A Lack of Flexibility and Efficiency

The first working postulate presumes that "good" corporate governance requires the efficiency and accountability of the board (or internal governance structure). However, internal governance structures of company types under the *Enterprise Law 2005* lack flexibility, efficiency, and accountability.

Firstly, unlike company laws of some other jurisdictions such as the U.S., the U.K, and

⁶¹ For the definition of a manager's relatives, see Clause 1 (b) of Article 122 of the EL 2005.

⁶² See Article 123 of the EL 2005.

⁶³ Article 124, Clauses 7 of Article 112 of the EL 2005.

⁶⁴ Nguyen Van Lan — MPDF, 'Corporate Governance Practice in Vietnam: Initial Research Results (Thuc tien quan tri doanh nghiep o Viet Nam: Mot so ket qua nghien cuu ban dau)' (Paper presented at the IFC/OECD International Corporate Governance Meeting: Why Corporate Governance Matters for Vietnam, Hanoi, Vietnam, 6 December, 2004).

Australia,⁶⁵ the *Enterprise Law 2005* provides for different mandatory internal governance structures based on company types. Hence, the internal governance structure depends on the legal form of a company. The internal governance structure of an LLC differs from that of an SC; while the internal governance structure of a multiple-shareholder LLC also differs from that of a single-member LLC. Consequently, when a company changes its legal form (company type), it has to change the internal governance structure as prescribed by the Law. This procedure appears costly and inflexible.

Secondly, unlike the U.S., Germany, and Australia, the mandatory internal governance structure of a Vietnamese company depends on the number of shareholders when setting up a mandatory board of supervisors.⁶⁶ Under the *Enterprise Law 2005*, if an LLC has more than 10 shareholders, or an SC has more than 11 natural shareholders or at least one organisation-shareholder holding more than 50 percent of the equity capital, they are required to have a BOS. Furthermore, the internal governance structure of a single-member LLC depends on the status of the equity investor. If the owner is a natural-person, the company's mandatory internal governance structure differs from that when the owner is an organisation.

Thirdly, compared to those of the U.S. and Germany, the internal governance structures of Vietnamese companies are more complex, particularly those of single-member LLCs. Cally Jordan comments that there is no reason for Vietnamese law-makers to differ between single and multiple members LLCs,⁶⁷ and then mandate different internal governance structures for these company types. Mandatory governance structures of single-organisation-owned LLCs tend to be designed for companies that are government-owned, but not for non-state owners. The owner is not set up as a constituent of the internal governance structure of a single-organisation-owned company, but still retains many powers as the supreme decision-making body of the company beside a members' council — already an ownership's representative body. This illustrates an issue of the *Enterprise Law 2005* — namely, the lack of clarity and accountability.

The mandatory internal governance structures under the *Enterprise Law 2005* are even more problematic as they do not allow a company to form an appropriate governance structure, and, in particular, other corporate governance bodies. For instance, an LLC cannot set up a BOM because there is no rule permitting the company to do so, not any provision to allow fixed governance bodies to share their statutory powers.⁶⁸ By contrast, common law jurisdictions often allow shareholders to decide internal governance structures.⁶⁹ Australian

⁶⁵ For a discussion of board structures in Australia, see generally, Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2nd ed, 2002) 262-91. For a discussion of board structures in the U.K., see generally, Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (7th ed, 2003) 294-326.

⁶⁶ See Articles 46 and 95 of the EL 2005.

⁶⁷ Center for Information, Library and Research Science (CILRS — *Trung tam thong tin, Thu vien va Nghien cuu khoa hoc*) of the National Assembly and Mekong Private Development Facility (MPDF) of the International Finance Corporation (IFC), *Synthesising Analyses, Assessments, and Comments on the Unified Enterprise Law and the Common Investment Law (Tong hop cac phan tich, danh gia va binh luan ve: Du an Luat Doanh nghiep thong nhat va Luat Dau tu chung)* (2005) 42.

⁶⁸ For a discussion of this issue, see Phan Huy Hong, 'Commentary and 10 Selected Proposals for the Draft of the (Unified) Enterprise Law (*Binh luan va 10 kien nghi chon loc ve Du thao Luat Doanh nghiep thong nhat*)' (2005) 4 *Legal Sciences Journal (Tap chi Khoa hoc phap ly)* 3, 11-2.

⁶⁹ See also, Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2003) 23(4) *University of Pennsylvania, Journal of International Economic Law* 791-871. Available at the website of SSRN at <http://ssrn.com>

Justice Neville Owen states accurately that:

Any attempt to impose governance systems or structures that are overly prescriptive or specific is fraught with danger. By its very nature corporate governance is not something where 'one size fits all.' ... It would be impracticable and undesirable to attempt to place them all within a single strait-jacket of structures and processes. A degree of flexibility and an acceptance that systems can and should be modified to suit the particular attributes and needs of each company is necessary if the objectives of improved corporate governance are to be achieved.⁷⁰

The American Law Institute identifies two goals of governance structures: managerial flexibility and accountability to shareholders, and proposes flexible rules of governance structures to permit a company to respond rapidly to change in the business or social environment.⁷¹ The flexible regulatory approach of corporate law of common law jurisdictions has proffered the possibility for substantially increased experimentation of companies, and appears more flexible and efficient in corporate governance practices.⁷²

In conclusion, mandatory internal governance structures with fixed constituents for each company type under the *Enterprise Law 2005* show problems, and may result in a lack of flexibility and efficiency of corporate governance practices. They do not support "good" corporate governance in Vietnamese companies.

B. The Legal Representative of a Company

A company is an artificial legal entity, and must have people to act on its behalf. Unlike the corporation law of Australia and some other countries,⁷³ the *Enterprise Law 2005* requires the company's constitution to decide upon the legal representative (*nguoì dai dien theo phap luat*) of the company. According to Vietnamese law, the legal representative is the only person who has statutory powers to represent the company (such as signing in contracts and documents on behalf of the company), unless he/she properly delegates this authority to other people.⁷⁴ In contrast, the *Corporations Act 2001* (Cth) of Australia stipulates that 'any 2 directors of a company that has 2 or more directors, or the director of a proprietary company that has only 1 director, may sign, draw, accept, endorse, or otherwise execute a negotiable instrument.'⁷⁵ Under Australian corporations law, a company can execute a document without using a common seal when it is signed by two directors, or a director and a company secretary, or the sole director of the company.⁷⁶

[//ssrn.com/abstract=419881](http://ssrn.com/abstract=419881), visited 20 February, 2007, at 19.

⁷⁰ Report of the HIH Royal Commission (Owen Report) (2003) 105. For a discussion of this issue, see generally, Jean Jacques du Plessis, James McConvill and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2005) 11-2.

⁷¹ See generally, the American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Vol. 1, 1994) 77-78.

⁷² See also, Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2003) 23(4) *University of Pennsylvania, Journal of International Economic Law* 791-871. Available at the website of SSRN at <http://ssrn.com/abstract=419881>, visited 20 February, 2007, at 29.

⁷³ For a discussion of the authority to act for a company under the company law of Australia and New Zealand, see generally, P. R. Austin and I. M. Ramsay, *Ford's Principles of Corporations Law* (13th ed, 2007) 758-63.

⁷⁴ See Clause 3 of Articles 86 and 91, and Clause 1 of Article 93 of the *Civil Code 2005 (Bo luat Dan su)*.

⁷⁵ Section 198B(1) of the *Corporations Act 2001* (Cth).

The *Enterprise Law 2005* provides that the legal representative of an LLC is either the chairperson of the MC or the CEO, while that of an SC is either the chairperson of the BOM or the CEO. These provisions appear to be flexible, but inappropriate. It means that the chairperson of the MC, who is the head of an ownership body and not involved in the daily management, can be the legal representative of an LLC. If so, the powers of the CEO are restricted by the chairperson and the CEO may have no authority to decide on contracts and sign documents on behalf of the company. This can adversely affect the company's business and present difficulties in daily management.

C. The Mandatory Supervision

Efficient supervisory mechanisms are important to “good” corporate governance. However, the *Enterprise Law 2005* does not provide any provisions for the formation, operation, powers, and functions of the mandatory BOS of a multiple-shareholder LLC. These matters must be prescribed in the company's constitution, and, accordingly, controlling shareholders may undermine supervisory issues and ignore the participation of minority shareholders. The *Enterprise Law 2005* requires that a BOS must be established when an SC has more than 11 natural shareholders or one (or more) organisation shareholder(s) holding more than 50 percent of the equity capital.⁷⁷ Thus, it could be assumed that an SC that may have 10 natural shareholders holding 51 percent and 490 organisation shareholders holding 49 percent of the share capital would have no mandatory supervisor. In public companies with many shareholders, mandatory supervisory mechanisms are necessary to protect minority investors. Accordingly, it is inappropriate that an SC with 500 shareholders has no supervisor. This is an erroneous provision of the 2005 Law.

III. Corporate Governance: A New Concept in Vietnam's Transitional Economy

1. Corporate Governance in Vietnam : Conceptual Understanding

There seems to be no equivalent term to ‘corporate governance’ as understood in advanced economies in the Vietnamese language. Consequently, some Vietnamese scholars, for example Bich, attempt to suggest alternative abstract terms in Vietnamese to describe corporate governance.⁷⁸ Terms that refer to directing, controlling, and managing a company used in Vietnamese literature are, for example, “*quản trị công ty*”, “*quản lý — điều hành công ty*”, “*quản trị doanh nghiệp*”, and “*quản trị kinh doanh*”. “*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.

⁷⁶ For further details see, sub-sections 127(1) and 127(2) of the *Corporations Act 2001* (Cth).

⁷⁷ Article 95 of the EL 2005.

⁷⁸ See, e.g. Nguyen Ngoc Bich, *The Enterprises Law: Capital and Management in Shareholding Companies* (*Luat Doanh nghiệp: Von va quan ly trong cong ty co phan*) (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.

Whilst the former refers to the activity of making corporate decisions, the latter is used to mention the activities of the day-to-day management of a company.⁷⁹ Historically, Vietnamese law-makers were often concerned with the management structures of enterprises rather than corporate governance mechanisms as seen in advanced economies.⁸⁰ In the literature, some Vietnamese scholars such as Doanh, Huy, and Nghia cite the internal governance structure of a company as ‘the organisational model for corporate management’⁸¹ or ‘management apparatus’.⁸²

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.⁸³ 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,⁸⁴ and by the Ministry of Finance in the *Code of Corporate Governance for Listed Companies*.⁸⁵ ‘*Quản trị công ty*’ is the term that is used as a formal translation of “corporate governance” at international conferences organised 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).⁸⁶

As discussed in Section 1, during times of command economic policies, corporate forms and corporate governance were not topics in either law or the 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

⁷⁹ For the use of terms ‘*quản lý*’ and ‘*điều hành*’ in Vietnamese law, see, e.g. Articles 80 and 85 of the *Enterprises Law 1999*; Articles 108 and 116 of the *Enterprise Law 2005*.

⁸⁰ 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 hình thi hành Luật Doanh nghiệp)* (2003) (unpublished). For a discussion of corporate governance mechanisms; for further details see, R. P. Austin, H. A. J. Ford and I. M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 9-13.

⁸¹ 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.

⁸² 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.

⁸³ 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.

⁸⁴ See generally, e.g. 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, Organisational Structure and Operation of Enterprises with Oriented Thought to Make the Unified Enterprise Law 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 nghiệp voi cac tu tuong chi dao xay dung Luật Doanh nghiệp thống nhất và Luật Đầu tư chung)* (2005, unpublished).

⁸⁵ *Decision No. 12/2007/QĐ-BTC*, dated 13 March, 2007, by the Minister of Finance on the 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.

⁸⁶ There have been several international conferences organised in Vietnam concerning the issues of transitional economies and corporate governance under co-operation between Vietnamese authorities with international institutions.

economy.

Until some years ago, corporate governance had not been important in businesses, policy making, or the 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.'⁸⁷ 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.⁸⁸

It was recently 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.⁸⁹

In the last several years, with the rapid growth of private companies and foreign investment, the (state-owned enterprise) SOEs' equitisation 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, while in 2007, Vietnam received around US\$ 25,6 billion from foreign investors.⁹⁰ In addition, as of the end of 2000, Vietnam had only 35 thousand private firms; however, by the end of 2007 there were more than 200 thousand companies or so with a significant increase in equity capital.

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

⁸⁷ Cited in the 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.

⁸⁸ See generally, Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (revised edition ed, 1968)

⁸⁹ The 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.

⁹⁰ Source: *The Saigon Times Weekly*, 12 January, 2008, at 10.

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 must rely on subordinate legislation in the implementation. The accounting and auditing standards promulgated by the government as “hard law” must also 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 lacking 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 old, 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 why corporate governance is becoming increasingly important in the transitional economy of Vietnam.

2. 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.⁹¹ According to Nestor and Thompson, an outsider 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.⁹²

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.⁹³ These insider groups, consisting of shareholders, creditors, banks, and suppliers,

⁹¹ See generally, e.g. Stilson Nestor and John K. Thompson, ‘Corporate Governance Patterns in OECD Economies: Is Convergence Underway?’ 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 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 blockholder 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. Rebello, ‘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.

⁹² Stilson Nestor and John K. Thompson, ‘Corporate Governance Patterns in OECD Economies: Is Convergence Underway?’ in OECD (ed.), *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 21.

are often small and have significant connections to each other. Groups of “insiders” may act together to control management and the company, meaning agency problems are not as important as they are in an outsider system. In the literature, the majority of world economies 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.⁹⁴

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.

Firstly, despite starting economic reforms two decades ago and increasingly reforming the state-economic sector in various ways, such as via equitisation, leasing, selling, and restructuring, Vietnam’s SOEs still account for around 38 percent of GDP, and dominate the transitional economy.⁹⁵ In addition, influenced by command economic policies over a long period, SOEs appear still to rely on and enjoy various forms of privileges from, particularly for incentive and subsidy schemes, the government.⁹⁶

Secondly, 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 researches such as by the VCCI, the Committee for Drafting the Unified Enterprise Law 2005, and Gillespie have found that the 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.⁹⁷ These findings are similar to those by the CIEM some years ago,⁹⁸ and are also consistent with the research conducted by the OECD into the corporate governance of Asian firms, concluding that about ‘two-thirds of listed companies, and a substantial number of private companies, are family-run.’⁹⁹

⁹³ 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.

⁹⁴ Stilson Nestor and John K. Thompson, ‘Corporate Governance Patterns in OECD Economies: Is Convergence Underway?’ in OECD (ed.), *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 27.

⁹⁵ For the statistics of SOEs, see the General Statistics Office of Vietnam at <http://www.gso.gov.vn>;

⁹⁶ See, e.g. the Vietnam Chamber of Commerce and Industry (VCCI) and the 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.

⁹⁷ 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.

⁹⁸ 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.

⁹⁹ See OECD, *White Paper on Corporate Governance in Asia* 2003, 11. For a discussion of the expropriation of outside investors by insiders, and 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.

IV. *Some Comments from the Japanese Side*

As Professor Hai mentions in Section 1 of this paper, the Vietnamese Enterprise Law is a mixture of French Company Law and Anglo-American Law. The reason why the Enterprise Law accepted the Anglo-American Law in 1999 is that the Asian Development Bank set loan conditions including substantive company law reforms. To comply with the conditionalities imposed by the ADB, consultants and legal advisers (mainly from Australia, Canada and New Zealand) were invited to Vietnam and involved in the drafting procedure of that law. Consequently, several normative standards were borrowed from common law countries (mainly Canada and New Zealand)¹⁰⁰.

This situation is similar to the Japanese Company Law Amendment in 1950, which was conducted under the instructions of the GHQ/Supreme Commander for the Allied Powers. The Japanese Commercial Law 1950 retained the civil law statutory framework (mainly based on the German Corporation Act of 1884), while borrowing normative standards from US corporation law. At that time we accepted several US models, like the installation of a board of directors, authorised capital and shareholder protection mechanisms (including shareholder derivative suits, appraisal rights and information rights).

Based on this, the similarity between both legal systems, Vietnamese and Japanese, is much greater than the first glance suggests. In Vietnam, the regulatory objectives of Enterprise Law 2005 are stock company, limited liability company, partnership, proprietorship, state owned enterprise and foreign company. The Vietnamese partnership is similar to its Japanese counterparts (Gomei-kaisha and Goshi-kaisha), because the partnerships of both jurisdictions have a legal personality and are composed of unlimited liability member(s) with/without limited liability member(s). State owned enterprises and foreign companies are also regulated by the Japanese Company Act if there is no special law on these types of companies. Only a proprietorship is outside the range of the Japanese Company Act, which is mainly regulated by the Japanese Commercial Code.

The second similarity is in the corporate governance system of stock companies of both jurisdictions. Like the Vietnamese Enterprise Law, the Japanese Company Act stipulates Shareholders' Meetings, Board of Directors, Representative Director (s) and Board of Supervisors as statutory organs of a Stock Company. The Board of Directors in Japan has the same function as the Board of Management in Vietnam, because the main function of the Board of Directors is to manage the company and to supervise the operation of executive directors. [E1] In particular, the functions of supervisors of both jurisdictions are almost the same and criticism of both organs is also similar. We have to reconsider the real functions of the supervisory organ in corporate governance, especially the ability and potential of the Board of Supervisors to monitor business operations of the CEO or directors.

The importance of corporate governance is significantly enhancing in Vietnam because of the rocketing number of listed companies on the Vietnamese stock exchanges (Ho Chi Minh Stock Exchange and Hanoi Securities Trading Center). The number of listing stocks on these exchanges is now almost 300, while it was only 2 when the Ho Chi Minh City Securities Trading Center (predecessor to the Ho Chi Minh Stock Exchange) was officially put into

¹⁰⁰ Gillespie, *supra* note 98, 158-9.

operation and executed its first trading session on July 28th 2000. As histories of corporate governance in other jurisdictions indicate, listed companies have been subject to serious corporate scandals and in this respect, Vietnam would be no exception. According to Japanese experiences of corporate scandals, the shareholder derivative suit plays an important role in protecting shareholders and investors. The Vietnamese Enterprise Law stipulates shareholder derivative suits for Limited Liability Companies but not Stock Companies and this must be improved in the near future. In that occasion, Japanese experiences of shareholder derivative suits, especially the history of the legislation and a lot of court decisions would help the enactment and implementation of the derivative suits in Vietnam.