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Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam

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By
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I. INTRODUCTION

The Vietnamese government initiated an economic reform program called Doi Moi in 1986 to convert from a centralized planned economy to a market economy.1 As part of this program, in order to encourage investment from abroad, Vietnam enacted the sweeping Law on Foreign Investment (FIL) in 1987.2 The FIL established a liberal framework to maximize the ability of Vietnam to attract much-needed foreign capital. The government focused on infrastructure development, which is traditionally funded through local government bodies and other public sources such as the World Bank.3 Vietnam also decided to seek private financing. In late 1993, following the lead of many South Asian nations, the government issued a decree permitting privately owned and operated infrastructure projects through an investment form known as Build-Operate-Transfer (BOT).4

Financiers created BOT in the 1980s as a form of project financing to fund infrastructure projects. Under a BOT contract, the project developer builds the

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1. Ngo Quan Xuan, Vietnam: Potential Market and New Opportunities, 19 FORDHAM L.J. 32, 32-33 (1995). The Vietnamese Representative to the United Nations identified the three goals of Doi Moi as shifting from a highly centralized planned economy to a market economy, democratizing social life, and creating open-door cooperative relationships between Vietnam and other nations.

2. Law on Foreign Investment in Vietnam, promulgated Dec. 29, 1987 [hereinafter FIL]. The National Assembly of Vietnam enacted the FIL "[w]ith a view to expanding economic cooperation with foreign countries, developing the national economy, stepping up export on the basis of effective exploitation of natural resources, labour and other potentialities . . . ." Preamble of FIL.

3. Trends in foreign aid have changed in the 1990s. Donor countries and development agencies have shifted away from the previous approach of providing grants and loans for showcase projects. Current programs focus on improving human welfare. The World Bank conforms with this trend as recent programs have been geared towards establishing training programs and stimulating small business growth. Howard W. French, Donors of Foreign Aid Have Second Thoughts, N.Y. TIMES, April 7, 1996, at E5.

infrastructure project, operates it for a number of years to recoup expenses and collect some profit, and then transfers ownership to the host government. Overcoming fears of foreign control over its infrastructure, Vietnam incorporated BOT into its legal system to help build essential public projects. Despite these ambitious goals, however, the current BOT Regulations have failed to attract foreign investment. 5

This Comment will examine Vietnam’s BOT laws to identify inadequacies and suggest changes that will benefit both Vietnam and foreign investors. Current BOT Regulations provide only a broad outline for BOT governance. They delegate substantial discretionary power to numerous government bodies to provide the details necessary for implementation. Without those details spelled out in the regulations, however, investors cannot establish the viability of BOT projects in Vietnam or control the legal risks of investment. Theoretically, investors could negotiate these terms for each BOT project. This would, however, impose substantial transaction costs and could entail enacting legislation for each project. The Vietnamese government should address some of the deficiencies in the current BOT laws to encourage foreign investment in infrastructure.

Once Vietnam enacts legal changes in its BOT regime, it must continue to implement structural changes in its legal system. Historically, Vietnam has relied upon a system of local and national bureaucracies which govern through discretionary action that has resulted in inconsistency and corruption. 6 The current reforms are moving Vietnam towards the rule of law by codifying statutes, thereby removing some discretion from government bodies. Drafting laws, while a valuable step, cannot suffice where structural mechanisms for implementation and enforcement are unreliable. The transformation to the rule of law mandates that Vietnam reform its administrative and judicial structure. Effective adoption of the rule of law also requires the acceptance of different legal theories. Although investors will enter the Vietnamese market before the legal system reaches a stage of development equivalent to those of the West, Vietnam must continue developing its legal structures to implement and enforce its new laws.

This Comment will address both statutory and structural changes necessary to encourage BOT investment in Vietnam. The country has embarked on an aggressive path towards developing a market economy. Although no country

5. The first BOT license was granted to two Malaysian firms in August 1995 for the development of a water treatment plant. First BOT Licensed, BUSINESS VIETNAM, Aug. 1995, available in LEXIS, NEWS library, ASIAPC file. A second project was approved by the Vietnam National Maritime Bureau on March 4, 1995, to develop a deepwater port. Approval notwithstanding, the investors of this project have not yet received the license from the State Committee for Co-operation and Investment. Jimmy Yeow, Vietnam: Tredia Bags $637M Vietnam Port Project, BUSINESS TIMES (MALAYSIA), Mar. 27, 1995, available in LEXIS, NEWS library, ASIAPC file.

has yet harmonized the conflicting ideologies of communist rule and market economics, the experience of countries such as China indicates the potential for investment in Vietnam. To further infrastructure development through BOTs, Vietnam should improve and clarify its BOT laws and regulations while continuing the development of its legal system. Investors may now be able to guarantee favorable terms through direct negotiation with Vietnam. The current changes in Vietnam should not discourage such transactions, but further development of the laws and legal systems governing BOTs is needed to increase investment. Part II of this Comment will provide background on Vietnam. Part III will discuss project finance and BOT contracts, including the prospects for BOT use in Asian countries. Statutory changes necessary for the success of the BOT law will be presented in part IV, while part V will examine structural developments such as the adoption of the rule of law and the improvement of administrative agencies and dispute resolution mechanisms which will ultimately prove central to Vietnam's success.

II.

VIETNAM

The Socialist Republic of Vietnam came into existence following unification on July 2, 1976. The current Constitution was adopted in 1992 and defines the political structure of Vietnam. Three separate entities represent various political interests within Vietnam. The Vietnamese Government takes responsibility for state management. The Communist Party of Vietnam (VCP), although subject to the laws and Government of Vietnam, provides leadership through policy formation. The third organization, the Fatherland Front, represents popular viewpoints.

Numerous government bodies have the authority to pass laws in Vietnam. The National Assembly is the supreme legislative body of Vietnam. National Assembly members generally receive nomination from the Government, the VCP, or the Fatherland Front, and are elected for five year terms. Assembly members elect the President from within the National Assembly. The National Assembly has the power to amend the Constitution and pass laws. The highest administrative body is the Government, an executive body of the National Assembly headed by the Prime Minister. The Government can pass resolutions and decrees that have the force of law. Other national committees

8. Id. at 15.
9. Id. Article 4 of the Constitution states that "The Communist Party of Vietnam . . . is the force leading the State and society." Id. at 23.
10. Id.
11. Id. at 13.
12. Id. at 13-14.
13. Id. at 19.
and regional or local government bodies enact regulations. Without an established hierarchy, the investor must examine relevant laws and regulations at all levels.

The complexity of Vietnam's legal structure gains heightened importance in the BOT context. Although the State Committee for Cooperation and Investment (SCCI) is the government body with primary responsibility for regulating foreign investment, numerous national government bodies also promulgate provisions affecting BOTs. In practice, each BOT must be approved by a number of government bodies at the national and at the local level. Because each body acts independently, the investor must locate and review each set of regulations and customize her proposal to meet all requirements.

In addition to its complex government system, Vietnam must endure the consequences of its early stage of economic development. Vietnam has the fifth lowest income in the world and is the poorest nation in Asia. In 1993, Vietnam had a population of 71.3 million people with a GNP per capita of $170. Despite Vietnam's poverty level, illiteracy rates are only 12%, far below that of many more advanced countries. This highly educated workforce along with low wage rates, and the availability of natural resources make Vietnam a desirable target for foreign investment.

III. PROJECT FINANCE AND BOT AGREEMENTS

Developing countries have decreased their dependence on public funds from international development organizations such as the World Bank and the International Monetary Fund (IMF) for infrastructure development over the past two decades. The focus has shifted to private capital sources due to present capital demands in excess of public resources. Three of four World Bank

17. BOT Decree, supra note 4.
20. Id. Other less developed Asian nations include Nepal (GNP per capita $190), Lao PDR (GNP per capita $280), India (GNP per capita $300), Mongolia (GNP per capita $390), and China (GNP per capita $490). Id.
21. WORLD BANK, SOCIAL INDICATORS OF DEVELOPMENT: 1995, 371 (1995). The illiteracy rate is far below that of all other low-income Asian countries including Nepal (74%), India (52%), China (27%), and Myanmar (19%). WORLD DEVELOPMENT REPORT, supra note 19, at 162.
22. The increasing number of World Bank and International Monetary Fund publications discussing the use of private investment for development evidences this phenomenon. See, e.g., INTERNATIONAL MONETARY FUND, OCCASIONAL PAPER 33, FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES (1985); DEENA R. KHATKHATE, WORLD BANK, WORLD BANK DISCUSSION PAPERS 177, THE REGULATORY IMPEDEMENTS TO THE PRIVATE INDUSTRIAL SECTOR DEVELOPMENT IN ASIA (1992); WORLD BANK, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (1992) (studying current legal frameworks for foreign investment regimes worldwide and establishing guidelines for legal treatment of private foreign investment to encourage private investment).
Group affiliated organizations actively promote private investment for infrastructure projects. Project finance, and most recently, BOT agreements, have become increasingly popular instruments for private investment.

Vietnam's capital requirements have forced the government to seek both public and private funds. In 1994, Vietnam began familiarizing itself with the requirements of international organizations like the World Bank and the IMF. Vietnam had received little or no aid from these organizations in over ten years, and had experienced difficulty using the aid it had received. In fact, local bureaucrats have resisted some public projects in favor of private financing hoping to retain greater control over the investments. Given both the prior history of public aid in Vietnam and the government's desire to retain control over its infrastructure projects, private investment will remain a priority of the Vietnamese government.

A. Project Finance

Project finance developed in the mid-1970s as a means of providing private capital sources for economic development. Through this investment method, the project developers attain non-recourse financing on the basis of the future cash flows from the project, using only the assets of the project as collateral. This means of financing has gained importance in the infrastructure development of developing countries. Investors can structure the project to both minimize liability through non-recourse loans and attain the substantial capital required to complete major infrastructure projects.

The primary benefit of project finance is this ability to limit the financial risk of the investor. Foreign investment in developing countries involves many risks including political instability, expropriation or nationalization, revolution, war or terrorism, government interference, government alteration of laws and regulations, increased taxes, export restrictions, availability of local goods, services and labor, availability of licenses and permits, currency risk, delay in com-

24. Manfred Ernst & Naja Ngoc-Nha Pham, Financing Infrastructure in Developing Economies: Benefits, Risks, Sources, EAST ASIAN EXECUTIVE REPORTS, Mar. 15, 1994. The International Bank for Reconstruction and Development (IBRD) promotes private investment to bolster its funding for infrastructure projects, the International Finance Corporation (IFC) provides financial assistance and promotes private investment, and the Multilateral Investment Guarantee Agency (MIGA) provides political risk insurance to encourage private investment. Id.


26. Id. In 1993, Vietnam received pledges for $1.8 billion of overseas direct aid; the country, however, could absorb only $400 million. Requirements such as recipient government matching restrict Vietnam's ability to accept funds as a result of the government's budgetary constraints. Id.

27. Id.


29. Peter K. Nevitt, PROJECT FINANCING 3 (5th ed. 1989). "A financing of a particular economic unit in which a lender is satisfied to look initially to the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and to the assets of the economic unit as collateral for the loan." Id.
pletion, and government insolvency.\textsuperscript{30} As a developing country, Vietnam should address legal risks when possible to encourage investment.

A new form of project finance emerged in the mid-1980s to stimulate further infrastructure development. This scheme known as Build-Operate-Transfer or Build-Own-Transfer (BOT) privatizes infrastructure development.\textsuperscript{31} A BOT plan involves the building of an infrastructure project by a private investor, the ownership and operation of the structure by the private developer or investors for a period of time to recoup debt and receive a profit, and the eventual transfer of the structure to the host government.\textsuperscript{32} South Asian countries have increasingly relied upon these privatization schemes due to inadequate government resources and the local capital markets' inability to obtain the capital necessary to develop basic infrastructure.\textsuperscript{33}

\textbf{B. Use of BOT in Developing Countries}

BOT benefits developing countries by facilitating foreign private investment and providing access to advanced technology. BOT ensures government control over infrastructure at the end of the operation period. During the private ownership period, government control is limited to the regulations and agreement governing the project. Often countries in a more advanced stage of development forbid foreign private control of their infrastructure and, therefore, do not grant BOT agreements. Countries in an early stage of development, however, must improve infrastructure to stimulate economic growth.\textsuperscript{34} Adopting BOT laws allows a country to regain control of infrastructure after the government and local capital markets have grown without jeopardizing present development. Toward that end, a number of Asian countries have adopted BOT laws within the past ten years as a means of developing local infrastructure.

\textit{1. The Philippines}

The Philippines is one of several Asian countries that have enacted BOT laws. The Philippines aggressively sought investment in infrastructure and

\textsuperscript{30} NEvrrTT, \textit{supra} note 29, at 4-5; Rauner, \textit{supra} note 28, at 160-161; Scott L. Hoffman, \textit{A Practical Guide to Transnational Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations}, 45 Bus. Law. 181, 198-203 (1989). Numerous financial risks are also involved; however, this Comment will focus solely on legal risks.

\textsuperscript{31} NEvrrTT, \textit{supra} note 29, at 290; Patrick D. Harder, \textit{Infrastructure Privatization in South Asia}, 15 Constr. Law. 34, 36 (1995); \textit{Industry and Energy Dept., World Bank and United States Agency for International Development, Occasional Paper No. 2} (April 1994). Numerous variations have developed including Build-Own-Operate (BOO), Build-Own-Operate-Transffer (BOOT), and Build-Lease-Transfer (BLT). These variations generally alter the ownership period or form. For example, Build-Own-Operate does not specify a transfer to the local government after a set period of time, unlike BOT. \textit{Id.}

\textsuperscript{32} An Investor's Guide to Vietnam, \textit{supra} note 18, at 11.

\textsuperscript{33} See Harder, \textit{supra} note 31, at 35. (Also noting the demand for social services as a further limit on the use of government funds for infrastructure projects).

\textsuperscript{34} W. Gary Vause, \textit{Doing Business with Vietnam - Prospects and Concerns for the 1990s}, 4 Fla. Int'l L.J. 231, 280-1 (1989). ("Clearly, the prospective foreign investor must weigh carefully the costs, delays and other inconveniences that will be occasioned by Vietnam's infrastructure.")
adopted a program to attract foreign investment in 1987.\textsuperscript{35} On July 9, 1990, the government promulgated the first Philippine BOT law.\textsuperscript{36}

The initial Philippine BOT law established a rigid structure that resulted in limited success. Under this law, the government solicited bids for Congressionally designated priority projects.\textsuperscript{37} The contractor then built and operated the facility, charging fees or tolls for no more than fifty years before transferring the facility to the government.\textsuperscript{38} Although the government approved projects in the electric power and telecommunications sectors, the BOT law failed to attract interest in other areas.\textsuperscript{39}

In 1994, the Philippine government amended the BOT law to increase foreign investment.\textsuperscript{40} The amendment added flexibility to BOT schemes by increasing the number of permissible variations.\textsuperscript{41} Investors may now negotiate with the Philippine government for projects beyond those on the Congressionally approved list. The government also liberalized permissible returns, eliminating the prior law's 12% rate of return ceiling.\textsuperscript{42} In addition, BOT projects of over one billion pesos may qualify for government incentives.\textsuperscript{43} The Secretary of Finance established a "one-stop" shop for BOT projects in a further effort to facilitate foreign investments in 1994.\textsuperscript{44} By August 1994, interest had increased and a number of projects in various sectors had begun the bidding or contracting stages.\textsuperscript{45}

2. Other Asian Experiences with BOT

Other developing countries in Asia encourage the use of BOT arrangements for infrastructure development. Indonesia and Thailand both continue to encourage investment despite past difficulties. In Indonesia, although the government authorizes BOT in the power sector, the government's artificially low electricity rate has stymied investment.\textsuperscript{46} In Thailand, a dispute over toll rates with the Thai government caused an investor to sell his interest in a BOT. That highly publicized incident and a conflict over the routing of a separate Thai BOT in 1995 have discouraged potential investors.\textsuperscript{47} Despite these setbacks,
BOT continues to provide a valuable means of infrastructure investment.\textsuperscript{48} Vietnam must recognize the potential legal pitfalls and avoid the mistakes of its neighbors to take full advantage of BOT development.

3. Vietnam

Like these other Asian countries, Vietnam is developing its legal system to attract foreign investment.\textsuperscript{49} The availability of natural resources and an educated work force make Vietnam an attractive investment site.\textsuperscript{50} Concentrated wealth in Vietnam's major cities also creates potential markets for foreign investors. Thus, foreign investors should welcome the opportunity to enter the Vietnamese market as they have in other Asian countries.

Although this Comment focuses on the legal inadequacies in Vietnam, one cannot overlook the effect of the country's current stage of economic development. A significant barrier to investment in Vietnam may arise from the lack of a domestic market for infrastructure projects. Until per capita income and local industry increase, many will have neither the means nor the need for such things as toll roads or telecommunications services. The experience of China and Eastern European countries has shown, however, that potential investors can benefit from entering the Vietnamese market.

IV. VIETNAM'S BOT LAW

Since the Vietnamese adopted the policy of \textit{Doi Moi} in 1986, the country has continued its aggressive pursuit of economic development. In 1991, the Vietnamese government drafted the Strategy for Socio-Economic Stabilization and Development Until the Year 2000.\textsuperscript{51} The basis of that plan was to ensure social welfare and development of the Vietnamese people through sustained economic growth.\textsuperscript{52} The government views the nation's economic success as the foundation for improving Vietnam's general welfare.

In conjunction with these economic policies, the Vietnamese government enacted the Law on Foreign Investment in Vietnam (FIL) on December 29,
1987.53 This law established the basic framework for foreign investment in Vietnam. The Vietnamese government estimates that to achieve its goals of modernization it must receive foreign investment between $50 and $55 billion U.S. by the year 2000.54 Because these figures are three times above current investment levels, Vietnam must continue to liberalize its policies.

Vietnam's increasingly open market has positioned it to take advantage of foreign investment. Political impediments to such investments are decreasing as the country aggressively pursues its policies of economic development. The United States, for instance, lifted the trade embargo against Vietnam on February 3, 1994, and established diplomatic relations on July 11, 1995.55 Vietnam also became a member of the Association of Southeast Asian Nations (ASEAN) and receives substantial capital from investment by other Asian countries.56 Despite recent changes towards modernization, Vietnam's undeveloped infrastructure remains a substantial barrier to its continuing economic growth.57 Accordingly, in an effort to "encourage investments in construction and development of infrastructure in Vietnam," the government issued the Decree on Build-Operate-Transfer Contracts (BOT Decree) and Regulations on Investments in the Form of Build-Operate-Transfer Contracts (BOT Regulations) on November 23, 1993.58 The State Committee for Co-operation and Investment (SCCI) issued the Circular on Build-Operate-Transfer on February 28, 1994 to further clarify and expand the initial regulations.59

A. The Current BOT Laws

The Vietnamese BOT Regulations promulgated on November 23, 1993, set the framework for forming BOT projects. The investor establishes a BOT company and builds and operates the project for a period of time, followed by an uncompensated transfer of the project to the Vietnamese government.60 Some features of the BOT law are as follows:

- The Vietnamese government will protect the ownership rights of invested capital.61

53. FIL, supra note 2.
54. Xuan, supra note 1, at 37.
57. Xuan, supra note 1, at 36. In 1995, Vietnam had an average of 0.03 km of transportation road per square kilometer, compared with the 3 km per square kilometer in other countries in the region. Id.
58. BOT Decree, supra note 4; BOT Regulations, supra note 4.
60. BOT Regulations, supra note 4, art. 1.
61. BOT Regulations, supra note 4, art. 2, ¶ 1.
• BOT projects receive preferential tax treatment including exemption from taxes for the first four years beginning with the first profit making year of the business, then are taxed on only 50% of their profits for the next four years. 62

• The Vietnamese government guarantees convertibility of revenue into foreign currency. 63

• Tolls and other revenue sources must be stipulated in the BOT contract, with any future changes beyond set ceilings allowed only through a proposal to the State Committee for Co-operation and Investment (SCCI). 64

• BOT selection may be conducted through bidding, selection, or direct negotiation. 65

• The BOT company may exist for 20 years or “[w]here necessary, it may be extended for a longer period.” 66

• Upon completion of the specified time period, the BOT project must be transferred in entirety to the Vietnamese government without compensation. 67

• Disputes between the BOT company and ancillary contractors are handled through negotiation and conciliation. Unresolved disputes may be referred to an arbitration body agreed upon by the parties. 68

• Disputes between the BOT company and the Vietnamese government are resolved through negotiation and conciliation. Remaining disputes are referred to an ad-hoc arbitrator. 69

Despite the promulgation of the BOT laws, Vietnam has attracted few projects since 1993. The first BOT license was issued in August 1995 to two Malaysian firms to build a water treatment plant in Ho Chi Minh City. 70 Ensuing delays and negotiations over land use rights, however, hindered the progress of this leading project. 71 Potential investors cite problems such as an insufficient domestic market to recoup expenditures on large infrastructure projects, lack of stability of land use laws, and the unwieldy Vietnamese bureaucracy as

62. BOT Regulations, supra note 4, art. 3, ¶ 1. Cf. FIL, supra note 2, arts. 26-28. Corporate tax rates for foreign invested enterprises range from 15% to 25%. Some joint ventures receive preferential treatment exempting them from profit tax for two years from the first profit-making year and reduce profit tax by 50% for the following two years, also allowing for carry-over losses for up to five years. The government allows further reduction of profit tax in encouraged industries. BOT Regulations, supra note 4, art. 3, ¶ 1.

63. BOT Regulations, supra note 4, art. 5. Vietnam does not, however, protect exchange rates. Recent inflation will deter investment as a result unless the government makes an effort to monitor inflation in the future.

64. BOT Regulations, supra note 4, art. 9.

65. BOT Regulations, supra note 4, art. 11.

66. FIL, supra note 2, art. 15.

67. BOT Regulations, supra note 4, art. 13.

68. BOT Regulations, supra note 4, art. 15.

69. Id.

70. First BOT Licensed, supra note 5.

barriers to future BOT investment. Because Vietnam does not allow private ownership of land but instead grants land use rights, the BOT Regulations provide for the mortgaging of these rights. BOT companies must rely on these rights as collateral when obtaining financing, thereby heightening the need for legal stability. Although some of the barriers to BOT success depend upon economic and financial factors, Vietnam should not ignore legal hurdles. Foreign investors will require greater legal surety and stability to undertake large-scale, long-term infrastructure projects. Vietnam can address these issues through further development of the BOT laws.

B. Proposed Changes to the BOT Law

Under the current law, foreign investors face an uncertainty that increases the risk of investing in Vietnam. Given the nation's emphasis on infrastructure development, Vietnam would benefit from certain amendments to the BOT law. Investors may be in good position to negotiate favorable terms for an individual project and should not forgo the opportunity to take advantage of Vietnam's aggressive attempts to attract investment. The Vietnamese government, meanwhile, can and should facilitate investment activity by amending the BOT laws. Five of the most valuable changes involve: protecting against expropriation or nationalization; adopting a stabilization mechanism; clarifying toll rate regulations; expanding the time frame for BOT projects; and increasing information access. Addressing these issues would improve the legal structure for BOT investment in Vietnam and would reduce some of the current investment risk.

1. Expropriation or Nationalization

Private investors require protection of their investments prior to undertaking a project. A guarantee that the host government will not expropriate the project or will adequately compensate for expropriation is especially important for infrastructure development. Because of its high-profile nature, infrastructure becomes an obvious target for expropriation. Further, potential legal or political instability in developing nations increases the likelihood of expropriation.

The investor may look to the market for mechanisms such as insurance to reduce political risk. Various national and international agencies, as well as some private entities, offer political risk insurance to protect against numerous situations including expropriation and war. In practice, however, political risk insurance provides limited coverage, leaving the investor exposed to risk. Given the inadequacies of market-based solutions such as political risk insur-

72. Grant, supra note 71.
73. Nevitt, supra note 29, at 4.
74. E. Waide Warner, Jr. & Emily Altman, Credit Agreements and Collateral Agreements in International Infrastructure Projects, in Project Financing: 1996 (Practicing Law Institute ed., 1996). Examples of national and multilateral institutions offering political insurance include the Overseas Private Investment Corporation (OPIC) and the Multilateral Investment Guarantee Agency (MIGA). Id.
75. Id.
To reduce investor risk, Vietnam should harness its legislative resources to cope with the problem of expropriation.

The current Vietnamese BOT law fails to address the issue of expropriation. No provisions exist to ensure adequate compensation for expropriated assets. The Law on Foreign Investment in Vietnam (FIL) states that the government will not expropriate or nationalize investment capital. Although this indicates Vietnam's intention not to expropriate, it fails to provide any remedy if the government later decides to exercise its eminent domain power.

The majority of developing countries provide assurances for adequate compensation in the case of expropriation. Since 1979, most foreign investment laws adopted by developing countries have set a standard of "prompt, adequate, and effective" compensation for expropriation. Bilateral Investment Treaties have also recently adopted this language. This standard has been adopted from international law, and is gaining widespread acceptance.

Vietnam has failed to follow this norm, placing it at a disadvantage relative to other developing countries. Vietnam could effectively reduce investor risk by adopting compensation standards in the case of expropriation. Although the government does not intend to expropriate investment, sovereign powers permit such actions. Since Vietnam has not ceded its sovereign power of expropriation, the law must provide for compensation to protect foreign investors.

2. Stabilization Clause

Vietnam's rapidly evolving legal system increases the risk of investing in long-term BOT projects. Any change in the laws or regulations during the life of a BOT project can potentially alter the circumstances surrounding the project and affect its ultimate viability. Although not a complete expropriation, these changes are sometimes labeled "creeping appropriations" due to the resulting restrictions on a project.

The Vietnamese government should consider adopting a stabilization clause as part of its BOT law to mitigate the risk of creeping appropriations. One kind of stabilization clause would guarantee that the laws and regulations in effect at the time of signing the BOT agreement would remain viable for the life of the project. Absent such legislation, the investor could negotiate for the inclusion of a stabilization clause within the BOT agreement pertaining to each individual project to safeguard against subsequent changes in the law.

76. FIL, supra note 2, art. 21. ("In the course of its investment in Vietnam, the invested capital and assets of a foreign organization and private person shall not be requisitioned and expropriated by administrative measures; The enterprise with foreign invested capital shall not be nationalized.") Although the FIL discusses expropriation, it is not clear that this law would govern a BOT project.

Alternatively, a stabilization clause could provide protection from legislative change for a fixed period of time. This type of agreement balances the need for Vietnam to continue its legal development with the goal of increasing investor security. For example, the agreement could freeze the law for a period of ten years, subject to review of the investor’s contract at that time. This time frame allows the investor to realize some profits while recognizing that changes within the country may have occurred that warrant a review and update of the relevant law.

Another means of ensuring stability is to refer to the law of another nation. The BOT agreement could refer to a developed and detailed legal system, thereby reducing or eliminating legislative changes during the life of the project. Understandably, host countries will often prefer to apply their own law. Vietnam, however, may wish to consider allowing BOT agreements to refer to foreign law, since legal stability is at a premium given the long-term nature and the substantial size of BOT projects.

Protection from changing legislation may be especially important for long-term projects started during the current era of rapid legal change in Vietnam. As the legal system matures, the need for such assurances will diminish, and in the future this type of arrangement could be phased out. At present, however, the investor has no control over the legal system, and cannot predict changes during the life of the BOT project.

3. Toll Rate Provisions

Vietnam’s BOT Regulations require the BOT contract to specify tolls or fees. The BOT company must notify the State Committee for Co-operation and Investment (SCCI) thirty days prior to any changes in the rate. If the BOT company wishes to increase rates above the ceiling stated in the contract, it must submit a proposal to the SCCI.

Despite the centralized approach taken in the BOT Regulations, the SCCI eschewed this authority, shifting it to the state body overseeing the project. The Circular on Build-Operate-Transfer (Circular) issued by the SCCI requires that the BOT company negotiate with the state body authorizing the contract.

80. Bondzi-Simpson, supra note 78, at 91. The investment laws of Ukraine, Uzbekistan, Turkmenistan and Russia provide ten-year stabilization clauses. Id.
81. Bondzi-Simpson suggests that a permanent freezing of the law violates constitutional and international law principles, therefore, a ten-year benchmark is a suitable compromise. Id.
83. Id.
84. BOT Regulations, supra note 4, art. 9.
85. Id.
86. Id.
Neither the BOT Regulations nor the Circular provides guidelines for evaluating rate changes. Without established guidelines, a foreign investor finds herself at the Vietnamese government’s mercy. Once a project is started, the investor cannot pull out without sustaining substantial losses. Unexpected delays or changes caused by the government or other forces may significantly increase projected costs. Inflation also creates substantial risk if tolls cannot be appropriately adjusted. The investor cannot predict the outcome of negotiations given the decentralized bureaucratic decision-making process and unestablished regulations. Further, the unequal position of the parties gives the Vietnamese government leverage, preventing fair and equitable resolution.

Vietnam and potential investors can learn from recent problems in Thailand over BOT rates. A Japanese company operating a toll road project had set rates when agreements with the government were ratified. Once the road was built, however, the company had no leverage against the government’s demand for lower rates. The company sold its interest to cut its losses as it could neither enforce the initial agreement nor renegotiate an acceptable rate.

The Vietnamese BOT Regulations state that any disputes between the BOT company and the Vietnamese government must be referred to an ad-hoc arbitrator if negotiations fail. Without any published regulations, however, an arbitrator has no basis for decision. Again, the investor cannot foresee the consequences and has no recourse.

The Vietnamese government must address the issue of toll rate disputes to reduce investor risk and establish the rule of law to govern such disputes. BOT projects are financed on the basis of future cash flows from tolls and fees. Although the parties determine initial estimates, a system that fails to adapt to unforeseeable events places the entire risk on the investor. Without written regulations, the investor does not know what adjustments to expect and will be reluctant to enter the Vietnamese market.

4. Time Frame and Transfer to Vietnamese Government

Duration of a BOT company and terms of transfer are codified by law. The Vietnamese BOT Regulations do not specify the duration of BOT projects; instead, they refer to the FIL. Under the FIL, companies funded by foreign

89. Id.
90. Id. Indonesia represents another example of difficulties arising from rate issues. See supra note 46 and accompanying text. In that case, the low electricity rates set by the government precluded development of power plants through BOT as investors could not make a profit.
91. BOT Regulations, supra note 4, art. 15, ¶ 2.
92. Market demand for the project will also substantially affect future cash flow. GNP per capita levels among the lowest in the world seem to preclude projects that require further national development to raise demand. The concentration of wealth in a number of cities and the influx of investment into other developing countries such as China, however, should encourage potential investors to enter the Vietnamese market.
93. BOT Regulations, supra note 4, art. 13, ¶ 1.
investment may remain for twenty years, subject to extension where necessary.\textsuperscript{94} At the end of that period, the BOT company must transfer the BOT project to the Vietnamese government without compensation.\textsuperscript{95} Vietnam thus placed a blanket twenty year duration restriction on general foreign investment. Although the FIL allows for increased duration "[w]here necessary," it fails to define the scope of the exception.\textsuperscript{96}

The Vietnamese government should build greater flexibility in these regulations to address specific characteristics of BOT projects. Since BOT projects receive financing on the basis of future cash flows, most of these capital-intensive endeavors must operate for substantial periods of time following completion to allow the investor to pay off debt and receive some profit.

The most obvious starting point for reform would be to adjust the maximum duration of BOT projects. For instance, the Philippine BOT law sets the maximum duration of BOT projects at 50 years.\textsuperscript{97} Given the often limited rates that can be charged for infrastructure such as roads and water, and the currently low income per capita of the Vietnamese people, the government should extend the maximum duration to make BOTs financially feasible. Further, if the Vietnamese government lengthens the permissible BOT duration, the prospect of uncompensated transfer may be acceptable.

Alternatively, the Vietnamese government could approach the duration issue by adopting a set profit level. If the BOT company failed to meet the profit levels, the developer should have the right to extend the project's duration.\textsuperscript{98} Allowing a fixed percentage of profits reduces the investor's risk, making BOT investment in Vietnam more attractive.\textsuperscript{99}

The government should also consider adopting other variations of BOT to increase the law's flexibility. The Philippines' most recent revision to its BOT law incorporated structures such as build-own-operate, contract-add-operate, and rehabilitate-own-operate.\textsuperscript{100} Since Vietnam cannot achieve rapid development without sufficient infrastructure, the government could facilitate investment by varying the investment options.

Another alternative would allow investors to establish agreements that provide some level of compensation at the time of transfer if the company fails to recoup a set percentage of profits. This would still allow Vietnam to benefit from foreign technology through BOT projects while securing the interest of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{94} FIL, supra note 2, art. 15. ("[A]n enterprise with foreign invested capital shall not exceed twenty (20) years.").
\item \textsuperscript{95} BOT Regulations, supra note 4, art. 13, ¶ 3. This time period includes development of the project, which may prove considerable given the scope of infrastructure projects.
\item \textsuperscript{96} FIL, supra note 2, art. 15.
\item \textsuperscript{97} REPUBLIC ACT No. 6957, § 2(a) (Phil.).
\item \textsuperscript{98} Warner & Altman, supra note 74.
\item \textsuperscript{99} The Philippine BOT regime currently caps profit levels at 12%.\textsuperscript{100} INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION, TAXES AND INVESTMENT IN ASIA AND THE PACIFIC 14 (vol. 3). Because of the unpredictable nature of demand, placing a limit on profits prevents the company from charging exorbitant rates on basic infrastructure. Vietnam could adopt a similar limit in its BOT law and specify a negotiated profit limit in each project agreement.
\item \textsuperscript{100} REPUBLIC ACT No. 7718 (Phil.).
\end{itemize}
\end{footnotesize}
potential investors. Although Vietnam's long-term expenditures would increase with this proposal, the trade-off of stimulating short-term growth may offset future expenses.

5. **Information Access**

A valuable characteristic of any legal system is the clarity and accessibility of its laws. Such access reduces transaction costs, further encouraging foreign investment. The need for clear and accurate information is especially acute in a country like Vietnam. With a rapidly evolving legal system, potential and current foreign investors must stay abreast of new developments. Investors with experience in Vietnam recognize that significant changes can occur within one year. 101 Currently, a foreigner cannot easily find the national laws nor the legislative acts of committees and state level government bodies. The Vietnamese government should ensure timely publication and dissemination of the country's laws and regulations if it expects foreign lawyers to approve investment plans.

For instance, Indonesia has aggressively attempted to ensure access to legal information. One goal of Indonesia's current law reform project, the Economic Law and Improved Procurement Systems Project (ELIPS Project), 102 is to reduce transaction costs by publishing the laws on CD Rom disk. 103 This would allow people to access Indonesia's laws quickly and easily where currently, its laws and decrees are often published months or years after promulgation, if at all. 104

By publishing detailed laws and regulations, potential investors will be able to anticipate the legal consequences of actions in Vietnam. Ambiguous and inaccessible laws create questions and apprehension in potential investors, impeding foreign investment. Accessibility would also enhance the role of enforcement and provide comprehensible guidelines for arbitrators to follow. The opening of Vietnam's economic market must be accompanied by increased access to its legal system, and the publication of laws is a valuable first step.

V. **IMPLEMENTATION AND ENFORCEMENT**

Vietnam must couple the BOT laws with effective means of administration and enforcement. Whether Vietnam can and will adopt the rule of law is central to this discussion. Historically, Vietnamese law has been individualized and arbitrary. 105 Excessive bureaucratic discretion led to a corrupt system of bribery.

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101. *Half-Speed Ahead: Small and Slow is Motto of Investors in Vietnam*, ASIAN WALL ST. J. WKLY., Mar. 25, 1996, at 1. ("What was valid for a firm a year ago often no longer is.").
103. Id. at 20-21.
104. Id.
105. Following liberation from French colonial rule, the Vietnamese Communist Party "ruled almost unfettered due to the fragmented and porous legal structure. It was the rule of men, not the rule of law. The French colonial law, which had classified individuals based on their relationship to property, gave way to [VCP] policy, which focused on class and nationalism. The [VCP] often did
at all levels of government. The rapid development of the legal system under *Doi Moi* indicates a willingness to adopt the rule of law to attract foreign investment. Where legal theories conflict, however, successful transformation may prove difficult. It is also unclear whether communist control can co-exist effectively with the rule of law. Since the rule of law and the mechanisms for implementation and enforcement of Vietnamese laws, primarily agencies and the judicial system, are vital to Vietnam’s continued growth, each will be examined in turn.

A. The Rule of Law

The current concept of law in Vietnam varies significantly from Western ideas. The Vietnamese Constitution functions as a statement of VCP policy and does not protect individual rights.\(^{106}\) Vietnamese laws also limit individual redress since vague statutes allow for broad interpretation. The problem is exacerbated in Vietnam since different levels of government must implement and interpret national laws.\(^{107}\) As a result, corruption and bribery flourish at local levels.\(^{108}\) Although investors cannot expect to find a fully developed legal system, greater structural clarity is necessary to reduce the reliance on bribery and enhance the notion of the rule of law.

The Vietnamese legal system has historically been influenced by China, the Soviet Union, and France. Since its independence, however, Vietnam has rejected the rights-based colonial law in favor of Confucian and Marxist ideologies.\(^{109}\) The Vietnamese government’s current legal reforms appear to embrace the rule of law. This reformation conflicts with Vietnamese legal theory and may ultimately collide with communist rule.

The development of individual rights runs counter to the two bases of Vietnamese legal theory. First, that societal goals outweigh individual goals; and second, that government discretion is preferable to the rule of law.\(^{110}\) The success of a new rights-based legal system will depend on acceptance of different legal values by both the populace and the ruling party. Since the theoretical basis for current legal reforms is foreign to the Vietnamese, rapid transformation to the rule of law is unlikely unless the Vietnamese adopt new laws and alter the underlying premise of their legal system.\(^{111}\)

\(^{106}\) McGrath, *supra* note 14, at 2122.

\(^{107}\) Id. at 2117-18.


\(^{109}\) Id. at 371.

\(^{110}\) Id. at 333-34.

\(^{111}\) The interplay between law and society cannot be ignored. Legal importation from other cultures often fails in light of societal values or takes an unique interpretation to conform with local expectation. For example, the American government introduced various due process rights into the Japanese legal system following World War II. While rights such as protection from illegal search and seizure and the right to an attorney are familiar to Americans, these rights do not resemble their...
The Vietnamese Communist Party (VCP) may also impede transformation to the rule of law. Current reforms are being implemented by the Vietnamese government, and the 1992 Constitution states that the VCP must operate within the law. Despite Constitutional provisions, the amount of influence that the VCP possesses allows it to retain control. In fact, absent effective review mechanisms, the VCP's declaration that it is subject to the rule of law remains a symbolic gesture.

The Vietnamese government itself is struggling with the balance between communist control and the rule of law. A Party split between the hard-line and those that encourage further reform has resulted from Vietnam's attempt to reconcile Marxist ideology with economic revision. Despite aggressive reform since 1987 to encourage foreign investment, one cannot predict whether this courtship will continue. The recent campaign to eliminate foreign commercial advertising may foreshadow further restrictions in the future. In fact, the VCP embarked on an adventurous journey when it liberalized foreign investment, as no communist country has successfully established the rule of law.

In some regards, Vietnam's legal transformation resembles that of China, which moved to enhance the role of law. In practice, however, Communist Party policies frequently overshadow the law. Politicians interpret the laws for personal interest, making law the tool of the Communist Party and the socialist state. Successful adoption of the rule of law in Vietnam will depend both on the willingness of the VCP to conform, and on the development of viable imple-

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Japanese counterparts in practice. The courts in Japan construe these laws to fit Japanese cultural values that place group harmony over individual protection. As a result, search and seizure is rarely found illegal and criminal defendants typically see their attorneys only once or twice a week for fifteen minute sessions.

112. MAGENNIS & HAI, supra note 7, at 7.


114. Gillespie, supra note 105, at 372.


116. The Vietnamese government has shown signs of reining in foreign investment. Recent policy documents emphasize the importance of state enterprises in the country's development plans. It is unknown whether Vietnam's experiment with market economics will continue given these rumblings. The VCP continues to dominate the Vietnamese government and may decide to revert to a centralized economy. These ruminations, however, may be a reflection of the growing pains and adjustments associated with current reforms. Investors should pay heed to these signals. However, only with time can we determine whether these acts reflect bumps in the road to reform or a dead end.

117. The Limits of Openness in Vietnam, N.Y. TIMES, Apr. 9, 1996, at A20. The Vietnamese government called foreign advertising a "social evil." Id.

118. Id.


mentation and enforcement mechanisms. Merely enacting laws without reinforcing the institutional framework would be ineffectual.\footnote{Clarke, \textit{supra} note 119, at 3. ("[P]assing laws is not enough. Statutes can be effective only within an appropriate institutional framework. Where the framework does not exist, statutes and the policies they embody will wither and die.").}

\section*{B. Administrative Agencies}

If the Vietnamese government hopes to attract investment through BOT, it must clarify the BOT laws and eliminate conflicting administrative interpretations. The Vietnamese government recognizes the inconsistencies resulting from decentralized power. These conflicts between national and local government have created discrepancies that affect foreign investment.\footnote{MAGENNIS \& HAI, \textit{supra} note 7, at 22.} These inconsistencies will continue so long as each individual agency promulgates regulations to govern BOT projects. The Constitution attempts to remedy this problem by granting the National Assembly the power to repeal local legislation and unseat local politicians.\footnote{\textit{Id.}} Vietnam has not, however, attempted to harmonize investment regimes. Until investors can determine their legal rights and obligations, they will be hesitant to risk investment.

Vietnamese administrative agencies are also to blame for current inefficiencies. Since Vietnam opened its doors to foreign investment in 1988, the country has attracted approximately $19 billion in pledges; the government has spent, however, only a quarter of that figure.\footnote{John Chalmers, \textit{Vietnam Prepares for Foreign Investment Slowdown}, Reuters World Service, Mar. 28, 1996, available in LEXIS, WWBUS file.} Vietnam's inadequate infrastructure hinders investment,\footnote{\textit{Id.}} but the blame lies primarily with the "pervasive, unwieldy and often inconsistent government bureaucracies" that investors must deal with to invest in Vietnam.\footnote{\textit{Half Speed Ahead: Small and Slow is Motto of Investors in Vietnam, supra note 101, at 1.}}

The Vietnamese government established the SCCI to oversee foreign investment in 1989.\footnote{\textit{Country Profile: Indochina, supra note 25, at 8.}} The government did not, however, contemplate a one-stop agency for foreign investors. Instead, the BOT Regulations grant authority to various government bodies to promulgate guidelines for implementing the Regulations.\footnote{See BOT Regulations, \textit{supra} note 4, art. 18.} Currently, the investor must enter into a contract with a specific State body which would then oversee the project.\footnote{See Circular, \textit{supra} note 59, ch. I, \S 5.} Under these Regulations, "ministries, general departments or departments, and provincial or municipal people's committees" have the authority to enter into a BOT contract.\footnote{See Circular, \textit{supra} note 59, ch. I, \S 6.} A BOT project must therefore be negotiated with various government entities, causing delay, frustration, and expense for the foreign investor.\footnote{Yeow, \textit{supra} note 5.} The licens-

\footnote{121. Clarke, \textit{supra} note 119, at 3. ("[P]assing laws is not enough. Statutes can be effective only within an appropriate institutional framework. Where the framework does not exist, statutes and the policies they embody will wither and die.").}
\footnote{122. MAGENNIS \& HAI, \textit{supra} note 7, at 22.}
\footnote{123. \textit{Id.}}
\footnote{125. \textit{Id.}}
\footnote{126. \textit{Half Speed Ahead: Small and Slow is Motto of Investors in Vietnam, supra note 101, at 1.}}
\footnote{127. \textit{Country Profile: Indochina, supra note 25, at 8.}}
\footnote{128. See BOT Regulations, \textit{supra} note 4, art. 18.}
\footnote{129. See Circular, \textit{supra} note 59, ch. I, \S 5.}
\footnote{130. See Circular, \textit{supra} note 59, ch. I, \S 6.}
\footnote{131. Yeow, \textit{supra} note 5.}
ing process for joint ventures in Vietnam takes between eight months and several years.\textsuperscript{132} Given the greater complexity of BOT projects, one can imagine the bureaucratic hurdles currently in place.

The Vietnamese government should streamline the approval process for BOT investment by creating a true one-stop agency. This would reduce the transaction costs of investing in Vietnam and remedy the problem of competing statutory interpretations. The government could achieve this result by limiting the power of other agencies and routing all BOT projects through the SCCI. The new SCCI would then become responsible for obtaining all necessary licenses and approvals for the project and would also take primary responsibility for project oversight.\textsuperscript{133} Improving administrative processes would eliminate the bottleneck that obstructs investment.

C. Dispute Resolution

Adequate dispute resolution and enforcement mechanisms are central to the adoption of the rule of law. The Vietnamese have recently changed their judicial and arbitration systems. The government has answered the call for adequate means of resolving the disputes of foreign investors by creating various institutions. These have included Economic Courts established in 1994\textsuperscript{134} and Economic Arbitration Centers in 1996.\textsuperscript{135} The ability of these bodies to resolve BOT disputes has not yet been tested.

Unlike the American judicial system, the Vietnamese Constitution does not provide for a separation of powers.\textsuperscript{136} The highest judicial body in Vietnam is the Supreme People's Court.\textsuperscript{137} The National Assembly elects the Chief Justice,\textsuperscript{138} while the Standing Committee of the National Assembly interprets the Constitution and the laws of Vietnam.\textsuperscript{139} The courts do not have the power to interpret the Constitution or laws and judges may face suspension if their orders conflict with the interpretations of the Standing Committee.\textsuperscript{140}

...
The BOT Regulations distinguish disputes between the BOT company and subcontractors, and those between the BOT company and the Vietnamese government.\textsuperscript{141} Disputes arising between the BOT company and contractors must first go through negotiation and conciliation.\textsuperscript{142} Any remaining disputes are settled through arbitration by agreement of the parties.\textsuperscript{143} Appropriate arbitration bodies include Vietnamese arbitration bodies, ad-hoc arbitrators, a third country's arbitration body, or an international arbitration tribunal.\textsuperscript{144} Negotiation and conciliation are also prerequisites in disputes between a BOT company and the government. When conciliation fails, however, only an ad-hoc arbitrator is available.\textsuperscript{145}

It is unclear whether the government plans to amend the BOT law to allow resolution through other entities. Since the drafting of the BOT Regulations, Vietnam has established three dispute resolutions mechanisms that could benefit BOT investors. Economic courts began hearing cases in July 1994,\textsuperscript{146} the Vietnam International Arbitration Center (VIAC) was created in April 1993,\textsuperscript{147} and Economic Arbitration Centers were established in April 1996.\textsuperscript{148}

The Economic Courts replaced State Arbitration Bodies in 1994.\textsuperscript{149} Currently, BOT companies cannot settle disputes in Economic Courts. Even if the government gives jurisdiction over BOT claims to the Economic Courts, the value of this institution remains questionable. The Ministry of Justice appoints the judges, reducing the hope for neutral resolution.\textsuperscript{150} Further, the lack of enforcement mechanisms renders any decision meaningless.

The government established the VIAC in 1993.\textsuperscript{151} The VIAC has jurisdiction over disputes where one or more parties is foreign and the parties agree to settlement through VIAC.\textsuperscript{152} Since the government considers a BOT company a Vietnamese juridical person, it does not fall within VIAC jurisdiction.\textsuperscript{153} Foreign investors may also question the neutrality of this forum, as language requirements ensure that all arbitrators will be Vietnamese citizens.\textsuperscript{154} Moreover, as the Economic Court must enforce the decisions, the same possible problems of enforcement persist.

\textsuperscript{141.} BOT Regulations, supra note 4, art. 15, ¶ 1, 2.
\textsuperscript{142.} BOT Regulations, supra note 4, art. 15, ¶ 1.
\textsuperscript{143.} Id.
\textsuperscript{144.} Id.
\textsuperscript{145.} BOT Regulations, supra note 4, art. 15, ¶ 2.
\textsuperscript{146.} Vietnam: Court Established to Handle Economic Disputes, supra note 134.
\textsuperscript{147.} Decision on the Establishment of the Vietnam International Arbitration Center, No. 204/TTg, Hanoi, April 28, 1993 [hereinafter Arbitration Center Decision].
\textsuperscript{148.} Justice Vietnam, supra note 135.
\textsuperscript{150.} Vietnam: Court Established to Handle Economic Disputes, supra note 134.
\textsuperscript{151.} Arbitration Center Decision, supra note 147.
\textsuperscript{152.} Statutes of the Vietnam International Arbitration Center, (Issued in conjunction with Decision No. 204/TTg dated 28 April 1993 of the Prime Minister of the Government), art. 3.
\textsuperscript{153.} See BOT Regulations, supra note 4, art. 1, ¶ 2.
\textsuperscript{154.} Craig & Polkinghorne, supra note 149. foreigners are invited to act as arbitrators, but arbitration hearings must be conducted in Vietnamese, effectively reducing the pool of potential arbitrators. Id.
Most recently, the government re-established Economic Arbitration Centers.\textsuperscript{155} The government has not eliminated the problems, however, as arbitrators will be appointed by the government, and enforcement through the court system remains unavailable.\textsuperscript{156}

Vietnam has joined some international conventions on international arbitration. In September 1995, Vietnam acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{157} Vietnam also ratified the International Center for the Settlement of Investment Disputes (ICSID) Convention in October 1994.\textsuperscript{158} While this should improve enforcement, domestic courts still retain a major role.

Perhaps the most significant problem for BOT projects involves disputes with the host government. Vietnam has not ratified the Washington Convention of 1966 concerning dispute resolution between the government and a foreign party. Government overseers make decisions regarding critical aspects of each BOT project. Vague or unpublished regulations make dispute resolution unreliable. Furthermore, without a mechanism for administrative review, investors will not receive a fair adjudication. Under current law, the grounds for judicial review of administrative action are limited to illegality or \textit{ultra vires}.\textsuperscript{159} Since agencies enjoy significant discretion, in practice, investors can never seek judicial review of decisions. In addition, a system without separation of powers cannot provide independent review of administrative decisions.\textsuperscript{160} Use of the BOT laws will remain negligible until investors receive protection from government action.

The Vietnamese should provide adequate means for resolving disputes surrounding BOT projects. Although referring to international bodies to settle disputes may run contrary to Vietnam's desire for domestic development, reliance on such entities may prove valuable during this evolutionary stage. Vietnam could require initial resolution of all disputes through domestic mechanisms, while allowing an international body to review all decisions. In so doing, Vietnam would retain primary jurisdiction that allows the country to build experience and bolster investor confidence in Vietnamese courts and arbitration, while foreign investors would gain the assurance of unbiased review. Although this approach may prove burdensome, in the nascent years of Vietnam's legal systems the benefits of investor confidence may outweigh the costs.

\textsuperscript{155} Justice Vietnam, supra note 135.
\textsuperscript{156} Id.
\textsuperscript{159} Gillespie, \textit{supra} note 105, at 364.
\textsuperscript{160} Id. at 373.

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Economic development cannot progress without adequate infrastructure. Vietnam has recognized its need to develop its domestic infrastructure as a central part of its development plan, and has promulgated the BOT laws to encourage private funding of these projects. Despite this aggressive attempt to fuel economic development, few investors have shown interest in the current Vietnamese BOT regime. Vietnam must recognize and address the legal and structural weaknesses that have stymied investment through BOTs if it hopes to attract foreign infrastructure developers.

Vietnam’s legal system is currently at an early stage of development. Adoption of Doi Moi and the flurry of laws enacted since 1986 appear to initiate Vietnam’s transformation to the rule of law. While communist rumblings indicate some displeasure with current reforms, the country cannot develop without foreign capital. Foreign interest in China and Eastern Europe indicate substantial potential of new markets like Vietnam; however, investors may wish to proceed with caution.

The BOT laws are an ideal starting point for establishing the rule of law. The BOT laws concern a very specific form of investment. Although other legal issues, such as land use, affect BOTs, it may prove possible to address these issues in the individual BOT agreement. The basic framework and regulations governing BOT projects should be further developed to encourage their use. This would allow investors to invest in infrastructure while Vietnam pursues systematic legal reform.

Structural reform of the Vietnamese legal system will lead to increased investment and facilitate the adoption of the rule of law. Nationalizing the BOT process and eliminating the conflicting regulations and potential for corruption resulting from the power of local state bodies will simplify the investment process. Since BOT projects involve substantial outlays of capital over long periods of time, investors require stability that only the government can provide. The National Assembly must recognize the risks to investors and reduce or eliminate those risks when possible.

Finally, the prospects for BOT projects in general should be considered. Although Vietnam has adopted its BOT regime to encourage private infrastructure development, the value and utility of BOT remains unknown. Since BOT developed as a type of project financing in the mid-1980s, scant history is available for consideration. The growing pains of BOT itself may affect the use of BOT in Vietnam. Neither investors nor the Vietnamese government should avoid BOT for these reasons. In fact, the relative immaturity of the instrument could improve its ability to adapt to new situations. Vietnam has the natural resources and labor force that make it an increasingly popular destination for a variety of investments. Given the infrastructure needs of Vietnam, BOTs arrived just in time.
APPENDIX A

Excerpts from
Decree on Build-Operate-Transfer (BOT) Contracts
(Decree 87-CP)

Promulgating the Regulations on Investments in the Form of
Build-Operate-Transfer (BOT) Contracts

The Government

Pursuant to the Law on the Organization of the Government dated 30 September 1992;

Pursuant to the Law on Foreign Investment in Vietnam dated 29 December 1987 and the Laws on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment dated 30 June 1990 and 23 December 1992;

In order to encourage investments in construction and development of infrastructure in Vietnam;

On the basis of the recommendations of the Minister-Chairman of the State Committee for Co-operation and Investment;

Decrees:

Article 1

To issue with the Decree the Regulations on Investments in the Form of Build-Operate-Transfer Contracts (abbreviated as BOT).

Article 2

All ministers, heads of ministerial equivalent bodies and bodies of the Government, and chairmen of people’s committees of provinces and cities under central authority shall be responsible for the implementation of this Decree.

Article 3

This Decree shall be of full force and effect as of its date of issue.
Chapter 1
General Provisions

Article 1

In these Regulations, the following shall have the meanings ascribed to them hereunder:

1. **Build-Operate-Transfer project** (abbreviated in English as BOT) means any project approved by the Government for the purpose of constructing and carrying on business of operating infrastructure projects (including expanding, upgrading, and modernizing) and other projects which are permitted by the Government to be carried out in the form of BOT contract within a predetermined period in accordance with these Regulations. Upon the expiry of the duration, the project shall be transferred to the Government of Vietnam without compensation.

2. **BOT company** means a company with foreign owned capital incorporated in accordance with the laws of Vietnam to carry out a BOT project.

Chapter II
Preferential Treatment and Investment Guarantee

Article 9

Tolls, fees, or other revenue derived from the operation of the BOT project must be stipulated in the BOT contract.

Thirty (30) days prior to any increase in tolls, fees, or other charges within the proposed and agreed range stipulated in the BOT contract or any reduction of tolls, fees, or other charges, the State Committee for Co-operation and Investment must be notified by the BOT company of such increase or reduction.
Where the intended increase in tolls, fees, or other charges is higher than the proposed and agreed ceiling level in the BOT contract, the BOT company shall submit its proposal to the State Committee for Co-operation and Investment for consideration and decision.

Chapter III
Methods of Carrying Out BOT Projects

Article 11
1. In accordance with objectives for social and economic development, the State Committee for Co-operation and Investment shall, in conjunction with the State Planning Committee, the relevant ministries and bodies of the Government and the people's committees of provinces and cities under central authority, formulate plans and a list of BOT projects for the purpose of attracting investment. The State Committee for Co-operation and Investment shall, in conjunction with the relevant ministries and bodies of the Government, and the people's committees of provinces and cities under central authority in which a BOT project is located, administrate and provide guidelines for the implementation of the BOT project.

On the basis of proposals of foreign investors, certain BOT projects which are not listed above may be approved by the Government.

2. Depending on the nature and scale of the BOT project, the Government shall select one of the following methods: a tender, a selection of contractors, or direct negotiation with a foreign investor.

Article 13
1. The duration of operation of the BOT project shall be stated in the contract and stipulated in the investment license in accordance with article 15 of the Law on Foreign Investment in Vietnam.

3. Upon the expiry of the duration of operation of the project, a BOT company shall transfer the whole of the BOT project, without compensation, to the Vietnamese Government.

Chapter IV
BOT Contract, Ancillary Contracts, and BOT Investment License

Article 15
1. Disputes relating to the performance of ancillary contracts entered into between the BOT company and ancillary contractors shall first be resolved by way of negotiation and conciliation. Where the dispute remains unresolved after negotiation, then, on the basis of an agreement between the parties, the dispute shall be referred to an arbitration body of Vietnam, an ad-hoc arbitrator established by both parties, an arbitration body of a third country, or an international arbitration tribunal.
2. Disputes between the State body authorized to enter into a BOT contract and the investors or the BOT company in respect of the performance of the contract shall be resolved through negotiation and conciliation.

Where the dispute is not resolved by way of negotiation and conciliation, the parties to the dispute shall refer it to an ad-hoc arbitrator established by the parties for resolution. The procedure to be carried out by the arbitrator shall be determined by both parties on the basis of agreement.

3. The parties to the dispute shall agree on the laws which will govern resolution of the dispute.

4. The decision of the arbitrator shall be enforced in accordance with the laws of Vietnam.

Chapter V
Provisions on Implementation

Article 18

The Minister-Chairman of State Committee for Co-operation and Investment, the Minister-Chairman of State Planning Committee, the Ministers of Energy, Heavy Industry, Transport, Construction, Finance, Trade, and Science, Technology and Environment, the Governor of the State Bank, and the general directors of the General Department for Land Management and other governmental bodies shall, depending on their functions and powers, be responsible for the promulgation of guidance provisions on the implementation of these Regulations.