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Volume 20 | Number 2

Article 4

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1-1-1998

### Vietnam: Can an Affective Arbitration System Exist

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#### Recommended Citation

Thuy Le Tran, *Vietnam: Can an Affective Arbitration System Exist*, 20 Loy. L.A. Int'l & Comp. L. Rev. 361 (1998).

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## VIETNAM: CAN AN EFFECTIVE ARBITRATION SYSTEM EXIST?

### I. INTRODUCTION

Located within the Tropic Zone in Southeast Asia, Vietnam's agricultural potential, abundant unexploited natural resources,<sup>1</sup> long coastline of mysterious and exotic landscape, and large, inexpensive, and diligent labor force<sup>2</sup> provide attractive incentives for foreign investors. Although these images are inviting to investors, Vietnam's unstable government strips the country of its appeal.

The instability of Vietnam's government creates various problems for foreign investors. They are "discouraged by high entry and start-up costs, ever-shifting rules and regulations, avarious corruption, a minefield of cultural misunderstandings, and an intensely nationalist system that seems unwilling to allow foreigners to make a profit."<sup>3</sup> Additionally, because private parties in international business transactions prefer arbitration for dispute resolution,<sup>4</sup> the lack of effective dispute resolution mechanisms is a concern.<sup>5</sup>

Arbitration is a private procedure in which parties voluntarily submit their disputes to a neutral third party arbitrator or arbitral

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1. Camellia Ngo, Note, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 71 (1992). "The nation's energy reserves, including coal, natural gas, and petroleum offer encouraging investment returns." *Id.* at 67-68. For example, "while a number of gas finds have been made, Vietnam's gas industry is in embryonic form. In 1997, Wood Consultants Ltd. estimated Vietnam's remaining commercial reserves at more than 1.2 billion bbl of oil, and 3.8 tcf of gas." *Exploration Sags Off Vietnam*, OIL & GAS J., Nov. 3, 1997, at 32.

2. For example, "Vietnam's large population and cheap labor was enough to convince [the Mitsubishi Corporation] that by just being there it would make money." Mark R. Mitchell, *Lessons from Vietnam*, WORLD TRADE, Nov. 1997, at 18, 19.

3. Ken Stier, *In Search of Direction*, ASIAN BUS. (Hong Kong), Dec. 1997, at 30, 30. Stier states that "a common complaint is the inconsistent application of regulations." Additionally, there is the problem of the "broad discretionary powers enjoyed by local officials, which stems from an attitude that the power of the emperor stops at the village gates." *Id.* at 31.

4. See Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, DISP. RESOL. J., June 1994, at 12.

5. See Note, *Protection of Foreign Direct Investment in a New World Order, Vietnam—A Case Study*, 107 HARV. L. REV. 1995 (1994) [hereinafter *Protection*].

panel.<sup>6</sup> Although private parties prefer to use arbitration to settle disputes, many countries may not feel the same. For example, after the arbitrator or arbitration board has rendered a decision, the host country may decide not to enforce that decision.<sup>7</sup> This occurs in countries such as Vietnam, where “no one can count on the government to honor a contract and there is no recourse to objective arbitration.”<sup>8</sup> This can lead to “corruption ‘from top to bottom’ because officials may demand a bribe to live up to what they have already promised.”<sup>9</sup>

This Comment contends that an effective arbitration system cannot exist in Vietnam until Vietnam reforms its legal system. Part II introduces the theory of arbitration and describes the current trends in international arbitration, focusing on the means of enforcing an international arbitration award.

Part III provides a general background of Vietnam, leading up to its current condition. It also discusses important factors for doing business in Vietnam, such as investment vehicles, and it highlights the effect of Vietnam’s Law on Foreign Investment on foreign investors.

Part IV examines Vietnam’s current dispute resolution system. It examines Vietnam’s arbitration system and the reasons for its ineffectiveness. It focuses on the unpredictable or lack of local enforcement, and on the inadequate security for the recognition of foreign arbitration awards provided by Vietnam’s foreign investment laws.

Part V suggests methods foreign investors may use within the current ineffective Vietnamese arbitration system. It discusses possible actions foreign investors should take to protect themselves against the possibility of an unenforceable arbitral award.

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6. See Robert Fischer et al., *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 867, 943 (1996).

7. For example, “in Vietnam’s nationalistic atmosphere, few are willing to risk a final judgment being made against their position. It is also unclear if arbitration decisions—foreign or domestic—can be enforced in Vietnam.” Stier, *supra* note 3, at 34.

8. CLAIRBORNE PELL, U.S. SEN., REPORT ON THE SENATE FOREIGN RELATIONS COMMITTEE TRIP TO TAIWAN, VIETNAM, INDONESIA AND EAST TIMOR, MAY 25, 1996 THROUGH JUNE 2, 1996, available in 1996 WL 8788879 at \*9.

9. *Id.* For example, one seasoned observer says: “All these decrees require more paperwork, and more permits and licensing because of the government’s control mania. For each one, you need approval from an official who is not paid enough, but who has lots of discretionary authority, so naturally you are guaranteeing more corruption. The system is avalanching in this direction.” Stier, *supra* note 3, at 34.

Part VI suggests steps that Vietnam should take to create a stable legal system, one that will *encourage* foreign investment. It suggests measures Vietnam should adopt to emerge from its status as a high-risk country to one at the forefront of the Asian market.<sup>10</sup>

## II. ARBITRATION—THE CUTTING EDGE IN INTERNATIONAL DISPUTE SETTLEMENT

When drafting an international business agreement, dispute settlement is an important issue to consider. Litigation and arbitration are the most common dispute resolution processes.<sup>11</sup>

While litigation may be the most common method to solve disputes, adjudicating the matter in court does not always represent the best alternative as “litigation is usually much more expensive, time consuming, psychologically taxing and adversarial than arbitration.”<sup>12</sup> In addition, “litigation is subject exclusively to the domestic laws of the country where the lawsuit is brought.”<sup>13</sup> Furthermore, differences in custom, language, and culture may potentially result in a biased judgment against foreign investors.<sup>14</sup> Many foreign investors, therefore, avoid litigating in a foreign judicial forum.

In the last few decades, arbitration has become the preferred method of dispute resolution.<sup>15</sup> The advantages of arbitration are that it provides a “neutral, private, predictable, and cost-effective mechanism to settle private international business disputes.”<sup>16</sup> In addition, parties can choose the applicable law, the arbitration

10. For example:

American officials will be scrutinizing Vietnam's market reforms in the coming months, when the two countries will negotiate important trade agreements, including treaties for the elimination of double taxation and guaranteed protection investment. Successful implementation of new policies will also be a factor in U.S. congressional debates over whether to grant Vietnam Most Favored Nation status, which would bring tariffs on Vietnamese imports to America in line with those levied on products from most other countries in the world.

Mitchell, *supra* note 2, at 18.

11. Jane L. Volz et al., *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 870 (1996).

12. *Id.*

13. *Id.* (stating that “if you are a foreigner, bias, whether real or imagined looms over the process.”).

14. *See id.*

15. *See id.* at 868.

16. *Id.* at 869.

forum, and the arbitrators.<sup>17</sup> The selected arbitrators are often experts in the particular area of business in dispute.<sup>18</sup> This flexibility is significant when dealing with a nation known for its inefficient and corrupt judicial system. The ability to arbitrate will often ease a foreign investor's concerns about a biased judgment.

An effective arbitral system is essential to a nation's international business dealings.<sup>19</sup> Foreign investors feel more secure with their investments when the countries with which they do business resolve disputes in a just manner. Therefore, many countries have recently expanded or revised their international arbitration laws or ratified arbitration treaties to attract more foreign business.<sup>20</sup>

Although other dispute resolution mechanisms exist (such as negotiation, conciliation,<sup>21</sup> and mediation), arbitration is the only alternative dispute resolution process that can be binding and enforceable on parties.<sup>22</sup> Certain countries, however, choose not to enforce the arbitral judgment against parties.<sup>23</sup> Moreover, many countries require specific forms of dispute resolution in certain business situations, thus, arbitration is not always an option.<sup>24</sup> If the choice exists, however, most parties choose arbitration.<sup>25</sup>

17. *See id.*

18. *See id.*

19. *See* W. Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 57 (1995).

20. *See id.*

21. Conciliation is a process in which the contracting parties invite another third party, one who is usually familiar with the parties and their dispute, or an institution, to help them negotiate a settlement. *See* Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 638 (1995).

22. *See id.* at 810.

23. *See supra* note 8. Additionally, in China, even if the local court may order the enforcement of the arbitration award, "the local legal community may be reluctant to liquidate a debtor because of the social and economic costs of such action." *Why International Legal Practitioners Fear China*, INT'L COM. LITIG. (London), Jul/Aug 1997, at 39, 40 [hereinafter *Fear China*].

24. For example, a business cooperation agreement between either foreign-invested enterprises or the foreign parties and Vietnamese government agencies permits conciliation and litigation as the only dispute resolution mechanisms. No alternative method of resolution is allowed. *See* Robert L. Wunker, *The Laws of Vietnam Affecting Foreign Investment*, 28 INT'L LAW. 363, 381-82 (1994).

25. *See* Craig, *supra* note 19, at 2 (stating that by "mid-1980's, at least, it had become recognized that arbitration was the normal way of settlement.").

### A. *The Arbitral Process*

There exists two distinct arbitral proceedings between which parties may choose: the institutional arbitration and the ad hoc arbitration.<sup>26</sup> In an institutional arbitration, parties “conduct [the] arbitration in accordance with the procedural rules of the particular institution concerned.”<sup>27</sup> A variety of international and regional arbitration institutions exist, such as the International Chamber of Commerce (ICC), Court of Arbitration, and the Euro-Arab Arbitration System.<sup>28</sup> In an ad hoc arbitration, parties can specify all aspects of arbitration, including rules of procedure, applicable law, place of arbitration, and other arbitral issues.<sup>29</sup>

Whether the parties prefer the procedure of an arbitral organization or of their own make-up, the enforceability of the award remains the most critical issue.<sup>30</sup> Without a guarantee of enforceability, arbitration becomes meaningless.<sup>31</sup>

### B. *Enforcement of an Arbitration Award*

A treaty is an effective method to ensure the enforcement of an arbitration award. One of the most effective treaties in this area is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>32</sup> This Convention provides a legal basis for most international arbitration today.<sup>33</sup> Approximately ninety countries have ratified the New York Convention and more than one hundred are signatories.<sup>34</sup>

The New York Convention strives to liberalize the procedures used to enforce foreign arbitral awards,<sup>35</sup> and is applicable to both commercial and noncommercial matters.<sup>36</sup> In

26. See Fischer, *supra* note 6, at 948.

27. *Id.*

28. See Jean Heilman Grier, *Providing for Arbitration in International Business Transactions*, 863 PRACTISING L. INST./CORP. L. 9, 18, 24 (1994).

29. See Fischer, *supra* note 6, at 948.

30. See Volz, *supra* note 11, at 870.

31. See *id.* (detailing the consequences of enforceability of arbitration award).

32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

33. See Volz, *supra* note 11, at 877.

34. See *id.* at 877-78. “Ratification” means the country approves and accepts the treaty formally. Becoming a “signatory” means the country agrees to the terms of the treaty. See *id.*

35. See *id.*

36. See *id.*

addition, the Convention "confers legitimacy upon awards granted in any state, whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states."<sup>37</sup>

Although other significant conventions exist, they are regional. For example, the European Convention on International Commercial Arbitration (Geneva Convention)<sup>38</sup> addresses the problems between the prior Communist-controlled countries of the Eastern bloc and non-Communist European countries.<sup>39</sup> It is therefore only applicable to countries in eastern and western Europe.<sup>40</sup>

Another significant convention is the World Bank's Convention on the Settlement of Investment Disputes<sup>41</sup> which created the International Centre for Settlement of Investment Disputes (ICSID).<sup>42</sup> ICSID helps resolve disputes between foreign investors and host countries through conciliation and arbitration.<sup>43</sup> Its objective is to "improve the investment climate by creating facilities for voluntary settlement of investment disputes through conciliation or arbitration proceedings to which a host country would be party on equal procedural footing without requiring or permitting intervention of investor's government"<sup>44</sup>

Furthermore, many bilateral and multilateral treaties exist to ensure final and binding international arbitral award. For example, the North American Free Trade Agreement (NAFTA)<sup>45</sup> encourages Canada, Mexico, and the United States to have specific legal procedures to enforce arbitration awards.<sup>46</sup>

Even with these different treaties, however, the host nation still controls the enforcement of arbitration awards. This

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37. *Id.* at 878 (citing Cindy Silverstein, *Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?*, 20 BROOK. J. INT'L L. 443, 454 (1994)).

38. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter Geneva Convention].

39. See Geneva Convention, *supra* note 38, 484 U.N.T.S. at 350.

40. See Volz, *supra* note 11, at 877.

41. Convention on the Settlement of Investment Disputes between States and Nationals of other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

42. See Grier, *supra* note 28, at 35.

43. See *id.*

44. *Id.* at 35-36.

45. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605.

46. See Volz, *supra* note 11, at 885.

discretion affects investors in several ways. Investors in a country favoring arbitral awards and allowing their enforcement, will encounter few problems. In some countries, however, enforcement of an arbitral award may require additional time and money because it may not take place until a local court gives permission to execute the award.<sup>47</sup> Countries with difficult enforcement processes favor other means of dispute resolution than arbitration.

In most Asian countries, arbitration is not the preferred method of dispute resolution.<sup>48</sup> For example, in the People's Republic of China, the Chinese favor mediation or conciliation as the favored method for resolving disputes.<sup>49</sup> In Vietnam, the Vietnamese parties generally prefer to settle disputes through conciliation.<sup>50</sup> Although Asian countries may not prefer arbitration, parties are still given the option to select it. Nonetheless, even if the parties choose arbitration, these countries may still elect not to enforce the arbitral judgment.<sup>51</sup> Therefore, the possibility of an enforceable arbitral award may depend largely on the host country's government and its rules on enforcement of arbitral awards. Accordingly, when entering an international commercial transaction, foreign investors should be aware of the host country's methods of dispute resolution and its political environment.

### III. DOING BUSINESS IN VIETNAM

#### A. Background

Imagine streets bustling with motorists, cyclists, and pedestrians, all going in different directions. Imagine crowded storefront shops offering a variety of goods and services, everything from jewelry to mechanical repair. Imagine large

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47. See *id.* at 904. In the People's Republic of China, if the Chinese party loses and refuses to comply with the arbitrator's award, the winning party must submit to the People's Court to enforce the award. See *id.*

48. See Burton, *supra* note 21, at 637-38.

49. See Volz, *supra* note 11, at 901. The Chinese rationale for preferring conciliation is that "you suffer a little loss, and I suffer a little as well, and we are good friends." The Chinese do not like adversarial dispute resolution proceedings. See *id.*

50. See Tim Tien-Chun Chang, *Doing Business With Vietnam*, 7 PRAC. LAW. 33, 39 (1994).

51. For example, the Chinese courts can refuse to enforce an arbitral award if the parties meet one of the six conditions under Article 260 of the Arbitration Act. See Volz, *supra* note 11, at 904.



advertisements of foreign products displayed throughout the urban areas. Imagine vast construction projects ranging from remodeling infrastructure to building new hotels. Imagine rich rice fields with hardworking peasants gathering the grain. These are the images that reflect modern Vietnam today.

Few would have visualized that Vietnam have evolved into the growing market that it is today.<sup>52</sup> After the fall of Saigon in 1975, Vietnam closed its doors to Western markets.<sup>53</sup> For decades Vietnam isolated itself from foreign investors.<sup>54</sup> This hesitation was due to a history of foreign aggression and colonization, as well as its twenty year devastating conflict with the United States from the 1950s to the 1970s.<sup>55</sup>

"After years of steadfast adherence to the Soviet economic model and its dire consequences, Vietnam has finally realized that foreign investment is an indispensable prerequisite to building and developing its economy."<sup>56</sup> In 1986, the Vietnamese Communist Party began improving foreign relations by implementing a series

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52. Despite its problems, Vietnam has transformed itself with remarkable speed into a booming marketplace. Hanoi and Saigon-drab backwaters only five years ago are now home to swank bistros, towering skyscrapers, well-stocked supermarkets, and yuppies toting mobile telephones. GDP is expected to expand 8 to 12% every year for the foreseeable future. Imports, \$13 billion of which poured into the country last year [1996], are growing at an annual rate of 30%. Mitchell, *supra* note 2, at 18.

53. See James Taylor, Jr., *Vietnam: The Current Legal Environment for U.S. Investors*, 25 LAW & POL'Y INT'L BUS. 469, 469 (1994). "After the fall of Saigon in 1975, the communist Vietnamese government sought to stifle the capitalistic business nature of many South Vietnamese by condemning such behavior as subversive to the communist model." Ngo, *supra* note 1, at 69.

54. Ngo, *supra* note 1, at 71-72.

55. "For nearly four decades, the regime was engaged in real war, as opposed to war preparation." Nigel Harris & David Lockwood, *The War-making State and Privatisation*, J. OF DEVEL. STUDIES (London), Jun. 1997, at 600. In 1857, a French military force invaded Danang, Vietnam. A few years later, Vietnamese Emperor Tu Duc signed a treaty giving the French government part of the Mekong Delta region. During World War II (WWII), the Japanese occupied a major part of Vietnam. After WWII ended, communist-dominated Viet Minh forces asserted control over the French, which led to a temporary division of the country. In the early 1960s, the North Vietnamese Army began to infiltrate into South Vietnam. Eventually, the United States sent troops to Vietnam, marking the beginning of a long and devastating conflict between both countries. This conflict lasted until Saigon surrendered to the North Vietnamese Army on April 30, 1975. See JOSEPH BUTTINGER, *VIETNAM: A POLITICAL HISTORY* 75-475 (1968).

56. Ngo, *supra* note 1, at 68 (1992). "The rigid move toward socialism led to a disastrous collective harvest in 1982. *Id.* at 68, n.8 (citing Chris Pritchard, *Vietnam: Welcoming a "Capitalist" Dawn*, BUS. REV. WKLY., Nov. 8, 1991, available in LEXIS, Asiapc Library, Vietnam File). "Socialism left Vietnam unable to provide food or other essentials to meet its people's daily needs." *Id.* at 68, n.8 (citing *The Legal System of Vietnam, Foreign Investment Law*, 9 Modern Legal Systems Cyclopedica 350.29-30).

of economic reforms.<sup>57</sup> These reforms, known as “Doi Moi,” attempted to transform Vietnam from a “centralized [system] to a market economy.”<sup>58</sup> One significant aspect of these reforms was Vietnam’s attempt to attract foreign investment by enacting laws on tax, property, and the exploitation of natural resources.<sup>59</sup> Even with these economic reforms, foreign investors expressed hesitation, resulting largely from the U.S. trade embargo on Vietnam.

The United States initially imposed the trade embargo on North Vietnam in May 1964, when the United States supported South Vietnam in its conflict against the Northern communist guerrillas.<sup>60</sup> The embargo extended throughout Vietnam after the fall of Saigon.<sup>61</sup> It prohibited persons subject to U.S. jurisdiction including companies, citizens, and permanent residents, from engaging directly or indirectly in any business or any other transactions involving Vietnam.<sup>62</sup>

On February 3, 1994, President Clinton improved relations between the United States and Vietnam by easing the restrictions of the trade embargo against Vietnam.<sup>63</sup> As a result, U.S.

57. See Luke McGrath, Note, *Vietnam’s Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 *FORDHAM INT’L L.J.* 2095 (1995).

58. *Id.* at 2096.

Communist Party Secretary-General Do Muoi appears to think that Vietnam has had its fill of market reforms and wants a cooling-off period, but reform-minded government officials and economists insist that stopping or slowing down reforms at this juncture will stall the country’s growth, increase its isolation and maybe even threaten its stability.

Faith Keenan, *What Economic Crisis*, *FAR EASTERN ECONOMIC REVIEW* (Hong Kong), Dec. 18, 1997, at 26-30.

Currently, the World Bank and others have been warning for more than a year that the benefits of the first stage of doi moi . . . are running thin. “A second round of reforms is needed to sustain the growth trajectory they hope for and to do that, especially in the present regional climate they will have to take some bold steps indeed,” says one multilateral lender.

Stier, *supra* note 3, at 30.

59. See McGrath, *supra* note 57, at 2096; see also Ngo, *supra* note 1, at 71. The “general purposes behind the enactment of the 1987 [Foreign Investment Law] were to expand economic cooperation with foreign countries, achieve domestic economic development, and step up exports based on effective exploitation of natural resources, manpower, and other potentialities.” *Id.*

60. Ngo, *supra* note 1, at 83.

61. See Wunker, *supra* note 24, at 364 n.1.

62. See Taylor, *supra* note 53, at 471 (citing The Foreign Assets Control Regulations, 31 C.F.R. § 500.201(b)-(c) (1990) and 31 C.F.R. § 500.329(b)-(c) (1993)).

63. The Bush Administration initiated steps toward better relations with Vietnam. The process of lifting the embargo began during the final months of the Bush

businesses and citizens now have significant opportunities to engage in trade and investment with Vietnam. Along with U.S. investors, other foreign investors have poured into Vietnam.<sup>64</sup>

### B. Investment Vehicles

Foreign investors may conduct business in Vietnam through investment vehicles such as business cooperation contracts, joint venture agreements, enterprises with one-hundred percent foreign capital, or build-operate-transfer (B.O.T.) arrangements.<sup>65</sup> A business cooperation contract exists when a Vietnamese partner and a foreign investor jointly manage a business operation in Vietnam, without creating a new business entity.<sup>66</sup> A joint venture agreement occurs when a foreign party contracts with one or more Vietnamese parties, creating a separate business entity.<sup>67</sup> One-hundred percent foreign capital arrangement results when the foreign investor exclusively owns and operates the capital of a company in the host country.<sup>68</sup> A B.O.T. arrangement occurs when the foreign business person "contracts with the Vietnamese government to construct an infrastructure project that must be transferred to the Vietnamese government after completion."<sup>69</sup>

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Administration and the Clinton Administration completed the process in its first year. See VIETNAM-U.S. RELATIONS: THE DEBATE OVER NORMALIZATION ISSUE BRIEF NO. IV92054 (Cong. Service, LOC, 1992); Steven A. Holmes, *Clinton Takes 2nd Step to Ease Ban on Trade with Vietnam*, N.Y. TIMES, Sept. 14, 1994, at A10. The embargo was eased, but many sanctions remained in place. See *id.*

64. "After setting up shop in 1991, the Japanese trading giant quickly became one of the country's most aggressive investors, importing high-quality products from Japan and obtaining licenses in everything from auto-manufacturing to industrial parks." Mitchell, *supra* note 2, at 19.

65. See Chang, *supra* note 50, at 34. "To fully penetrate the market, most executives agree that they need a local manufacturing facility. 'To be a real player in Vietnam, you eventually have to move to localized production.' Mobil Manchester says." Mitchell, *supra* note 2, at 20.

66. See Chang, *supra* note 50, at 35.

67. See *id.*

68. See *id.*

69. *Id.*

Previously, authorities only granted licenses to 100% foreign-owned projects if they were in high priority industries. Now, even small investors have managed to get by without a partner. [For example], Indochina Partners, a group of entrepreneurs that have become among the most aggressive U.S. companies in Vietnam, was recently allowed to establish a wholly owned juice canning factories.

Mitchell, *supra* note 2, at 20.

Additionally, Vietnam is pushing ahead with its first major build-operate-transfer (B.O.T.) power project, a \$500 m gas-fired power station 50 km south-

Foreign investors employ the joint venture vehicle most frequently in Vietnam.<sup>70</sup> The joint venture's advantages include the shared allocation of risk between the foreign investor and the local party, as well as benefits from the local government, such as tax breaks.<sup>71</sup> Moreover, the foreign investor may have greater access to less expensive materials, may obtain an abundance of natural resources, and may recruit a large labor force.<sup>72</sup> The disadvantages, however, are that the foreign investor may have to contribute at least thirty percent of the capital, and plan for a joint venture with a limited duration, usually fifty years.<sup>73</sup> An additional negative aspect is that a foreign investor may later discover that he is not the only one who signed the contract with the local partner.<sup>74</sup>

### C. Government Officials

In addition to choosing a type of investment vehicle, foreign investors must obtain approval from the appropriate governmental authorities in Vietnam.<sup>75</sup> Approval from officials of the State Committee for Cooperation and Investment (SCCI) is the most significant authorization.<sup>76</sup> The SCCI, a state agency in Vietnam, is primary responsible for approving all applications for foreign investment.<sup>77</sup> Without its approval, foreign investors are not

east of Ho Chi Minh City. On a smaller scale, Hanoi has awarded a \$120 m B.O.T. project—a diesel engine dual fuel power project in Ba Ria, in Vung Tua to Finland's Wartsila USD Corporation.

*Vietnam's B.O.T. Deals Make Progress*, INT'L TRADE FIN. (London), Nov. 7, 1997, at 4.

70. See F. Gale Connor, *Vietnam: Trading with the Enemy or Investing in the Future?*, 25 LAW & POL'Y INT'L BUS. 481, 483 (1994).

71. See *id.* at 484. "A good Vietnamese joint-venture partner can help navigate the waters." Mitchell, *supra* note 2, at 20.

72. See Connor, *supra* note 70, at 484.

73. See Ngo, *supra* note 1, at 68. For example, "the 1977 foreign investment law required that a foreign partner's investment share be a minimum of 30% and no greater than 49%. The 1987 Law on Foreign Investment [however] places no limit on the maximum amount of capital contributed by a foreign partner in a joint venture." *Id.* at n.7 (citing *The Legal System of Vietnam, Foreign Investment Law*, 9 Modern Legal Systems Encyclopedia 350.31).

74. See Mitchell, *supra* note 2, at 20 (stating that there are stories in Saigon and Hanoi of Vietnamese companies signing identical contracts).

75. See Taylor, *supra* note 53, at 474. "Requiring that all foreign investment projects obtain approval . . . prior to commencement . . . causes delays, generates excessive bureaucracy, and leads to corruption." Ngo, *supra* note 1, at 94.

76. See Taylor, *supra* note 53, at 473.

77. See *id.*

issued a license, and thus, not allowed to invest in Vietnam.<sup>78</sup>

The SCCI considers all aspects of the intended business investment, including the proposed investment contract, the economic and technical feasibility studies, and the legal, financial, and technical status of the parties.<sup>79</sup> Because the Foreign Investment Law (FIL) in Vietnam provides no specific guidelines, the SCCI has complete discretion "in granting investment licenses and preferential treatment" to foreign investors.<sup>80</sup> Within three months from receiving the application for foreign investment, the SCCI must notify the applicant of its decision.<sup>81</sup> If the SCCI issues a license, the foreign investor has thirty days to publish certain project details in a local or central daily newspaper.<sup>82</sup>

In addition to receiving the SCCI's approval, foreign investors must receive permission from other significant governmental entities.<sup>83</sup> Many Vietnamese ministries have as much influence as the SCCI officials. Moreover, a specific ministry is responsible for each area of investment.<sup>84</sup> These distinct ministries review the proposed investments and evaluate their social and economic impact.<sup>85</sup> The Vietnamese Ministry of Finance, for example, approves the monetary unit to be used in bookkeeping, whether in Vietnamese currency (dong) or a foreign currency.<sup>86</sup>

#### D. Law on Foreign Investment in Vietnam

To be a successful investor in Vietnam requires that one be

78. See Wunker, *supra* note 24, at 365.

79. See REGULATIONS IN DETAIL FOR THE IMPLEMENTATION OF THE LAW ON FOREIGN INVESTMENT IN VIETNAM, DECREE NO. 18-CP arts. 9, 10, 20, 21, 22, 46, 47, 48 (Vietnam) [hereinafter 1993 REGULATIONS]. "The feasibility study [in Vietnam] should include the following: an explanation of the company structure; names and nationalities of officers; an explanation of how profits will be allocated; environmental statement; and types of governmental assistance required." Chang, *supra* note 50, at 37.

80. *Protection*, *supra* note 5, at 2004.

81. See 1993 REGULATIONS, *supra* note 79, arts. 11, 23.

82. See *id.* arts. 12, 24, 49. One detail that should be published is the form of investment vehicle used. See *Protection*, *supra* note 5, at 2004.

83. "Even after receiving an investment license, foreign companies must obtain a myriad of additional permits. One executive in Saigon was required to obtain permission to build a manufacturing plant in Dong Nai province from not only 3 ministries in Hanoi, but also the Ho Chi Minh City People's Committee." Mitchell, *supra* note 2, at 20. "Approval from numerous officials is needed for many minor business activities and, with many competitors for few promotions, there is intense skirmishing within the bureaucracy." Stier, *supra* note 3, at 34.

84. See Wunker, *supra* note 24, at 368.

85. See *id.*

86. See 1993 REGULATIONS, *supra* note 79, art. 87.

familiar and understand Vietnam's law on foreign investment. The 8th Legislature of the National Assembly of the Socialist Republic of Vietnam first enacted the Foreign Investment Law (FIL)<sup>87</sup> on December 29, 1987, during the economic reform period of "Doi Moi."<sup>88</sup> The National Assembly issued further amendments to the FIL in 1990 and 1992.<sup>89</sup> Most recently, on April 16, 1993, the government announced as Decree Number 18-CP, the Regulation in Detail for the Implementation of the Law on Foreign Investment in Vietnam (1993 Regulations).<sup>90</sup>

The FIL and the 1993 Regulations dictate the investment vehicles, the responsibilities of the SCCI, and other investment procedures required in Vietnam.<sup>91</sup> Moreover, the FIL and 1993 Regulations provide investment protections to foreign investors.<sup>92</sup> For example, Vietnam's FIL specifically prohibits the confiscation and expropriation of foreign investors' capital and assets, and affirms that the Vietnamese government will not nationalize enterprises with foreign-owned capital.<sup>93</sup> Despite these protections, foreign investors should be aware that Vietnam has a Communist regime<sup>94</sup> and is highly nationalistic.<sup>95</sup> Therefore, foreign investors should consider seeking outside protection for

87. LAW ON FOREIGN INVESTMENT IN VIETNAM, Dec. 29, 1987, *reprinted in* 30 I.L.M. 930 (1991) [hereinafter FIL].

88. See Ngo, *supra* note 1, at 68. The Law on Foreign Investment in Vietnam is a "bold revision of the original Decree on Foreign Investment enacted in 1977 by the Communist Party." *Id.* at 68 (citing Gary Vause, *Doing Business with Vietnam-Prospects and Concerns for the 1990s*, 4 FLA. INT'L L.J. 231, 252-53).

89. LAW ON FOREIGN INVESTMENT WITH AMENDMENTS & ADDITIONS, June 30, 1990; LAW ON AMENDMENT OF AN ADDITION TO A NUMBER OF ARTICLES OF THE LAW ON FOREIGN INVESTMENT IN VIETNAM, Dec. 23, 1992.

90. 1993 REGULATIONS, *supra* note 79.

91. See *Protection*, *supra* note 5, at 2003-05.

92. See FIL, *supra* note 87, art. 20, *reprinted in* 30 I.L.M. at 933; 1993 REGULATIONS, *supra* note 79, art. 99. The Government of Vietnam guarantees appropriate and equal treatment to all foreign organizations and individuals investing in Vietnam in accordance to the Law on Foreign Investment. Any treaty on investment incentives and protection signed by the Government of Vietnam with the government of another country shall prevail with its agreements. 1993 REGULATIONS, *supra* note 79, at art. 99.

93. See FIL, *supra* note 87, arts. 21, *reprinted in* 30 I.L.M. at 934. Expropriation is one way the country can deprive foreign investors of their interests. A country can expropriate in two ways: "outright expropriation" occurs when the state takes physical possession of the investor's business, and "creeping expropriation" occurs when the country adds burdensome regulations which can eventually prevent an investor from operating his business profitably. See RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED COURSEBOOK 1018-1056 (3d ed. 1995).

94. See Ngo, *supra* note 1, at 69.

95. See Stier, *supra* note 3, at 34.

their investments, such as political risk insurance.<sup>96</sup>

Political risk insurance protects investors against noncommercial or political risks.<sup>97</sup> If expropriation occurs, the insurance scheme would “indemnif[y] the investor, and [subrogate] the investor’s claim against the host state as its own to seek reimbursement.”<sup>98</sup> Other significant insurance schemes include the United States Overseas Private Investment Corporation (OPIC) and the World Bank’s Multilateral Investment Guarantee Agency (MIGA).<sup>99</sup> OPIC, however, will not be available for foreign investors in Vietnam until the United States and Vietnam have fully restored diplomatic relations.<sup>100</sup> Nonetheless, Vietnam is in the process of joining MIGA, which offers insurance against inconvertibility of currency, expropriation, breach of contract, war and civil disturbance, and breach of contract.<sup>101</sup>

In addition to guarding against expropriation, the FIL also attempts to secure foreign investment against the risk of adverse changes in law.<sup>102</sup> Due to Vietnam’s evolving legal system, the 1992 Amendment to the FIL provides that if any change in the law occurs which may harm the interests of foreign investors, Vietnam will use adequate measures to protect investors’ interests.<sup>103</sup>

The clauses in the FIL depict Vietnam as a low risk country that is taking great measures to safeguard foreign investors. The FIL, however, reflects a “curious dichotomy.”<sup>104</sup> Although Vietnam’s FIL extends further than most other developing countries in protecting against expropriation and subsequent changes in law, Vietnam does not seem to follow the current worldwide trend in dispute resolution, especially international arbitration.<sup>105</sup> Foreign investors will not be completely protected unless arbitration becomes available. Thus, Vietnam’s attitude toward international arbitration concerns foreign investors.

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96. See Taylor, *supra* note 53, at 474.

97. See *Protection*, *supra* note 5, at 2002.

98. *Id.* at 2002 n.51.

99. See *id.* at 2002.

100. See Taylor, *supra* note 53, at 474.

101. See *id.*

102. See *Protection*, *supra* note 5, at 2005-06.

103. See *id.*

104. *Id.* at 2012.

105. See *id.*

## IV. VIETNAM'S DISPUTE RESOLUTION SYSTEM

The 1993 Regulation sets forth the specific method of dispute resolution allowed for each type of business investment.<sup>106</sup> For instance, if a dispute arises between a foreign-invested party and a Vietnamese governmental agency in a contractual business cooperation agreement, conciliation is required.<sup>107</sup> If conciliation fails, then "a competent authority," which the 1993 Regulations does not clearly define, would decide the case.<sup>108</sup> The 1993 Regulations do not allow any other means of dispute resolution under those circumstances.<sup>109</sup>

Although Vietnamese law does not address the issue of arbitration between foreign investors and the Vietnamese government, parties can choose to arbitrate in other business situations.<sup>110</sup> For example, Vietnam's FIL and the 1993 Regulations allow international arbitration as an alternative dispute resolution for foreign and Vietnamese parties in a joint venture or a contractual business cooperation agreement.<sup>111</sup> The parties, however, must initially try to resolve their dispute through negotiation and conciliation before using arbitration.<sup>112</sup>

Vietnam's attitude toward dispute resolution is similar to other Asian countries influenced by Confucian values.<sup>113</sup> Vietnamese people prefer to settle disputes through conciliation rather than through a confrontational dispute resolution process.<sup>114</sup> If conciliation fails, then the Vietnamese parties prefer to have the Vietnamese courts settle the dispute.<sup>115</sup> To many

106. See Wunker, *supra* note 24, at 381.

107. See 1993 REGULATIONS, *supra* note 79, art. 102.

108. See Wunker, *supra* note 24, at 382.

109. See *id.*

110. See *Protection*, *supra* note 5, at 2007.

111. See *id.*; see also Wunker, *supra* note 24, at 382.

112. See Wunker, *supra* note 24, at 382.

113. See Chang, *supra* note 50, at 39. "In the Confucian tradition, parties conduct business on a friendly basis within the cultural ethic of *Li* (peace, harmony, and conciliation), not *Fa* (strict application of legal rules)." Burton, *supra* note 21, at 638 n.1. Therefore, countries that follow the concept of traditional Confucianism desire to maintain their relationship. Accordingly, they prefer discussion and compromise over litigation. See M. Scott Donahey, *Seeking Harmony-Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, DISP. RESOL. J., Apr.-June 1995, at 74, 74. Mediation and conciliation represent the predominant forms of civil and commercial dispute settlement for both international and domestic matters in the People's Republic of China. See Volz, *supra* note 11, at 901-02.

114. See Chang, *supra* note 50, at 39.

115. See *id.*



foreign investors, however, there is only a remote possibility of Vietnamese judges deciding complicated issues of foreign transactions in a fair and unbiased manner.<sup>116</sup> For this reason, foreign investors prefer arbitration.<sup>117</sup> Investors usually choose an international arbitrator from a third country, or select an arbitration panel located in a foreign forum.<sup>118</sup> Foreign investors generally find these alternatives more appealing than a Vietnamese judicial settlement.<sup>119</sup>

#### A. *The Ineffectiveness of International Arbitration in Vietnam*

One downfall of not litigating or arbitrating in Vietnam is that there is no guarantee of enforcement of a foreign arbitration award.<sup>120</sup> If the government or a local court does not enforce the arbitration award, the award is worthless. Unpredictable or lack of local enforcement practices support the notion that an effective arbitration system cannot exist in Vietnam.

Several reasons influence the Vietnamese government's or a local court's decision to not enforce an arbitration award. First, Vietnam's decision not to enforce international arbitration awards may be due partly to its perception of international arbitration as biased. Vietnam's view of arbitration as biased may be similar to that of many Latin American countries based on their reliance on the "Calvo Doctrine."<sup>121</sup> Under the Calvo Doctrine, Latin American countries believed that foreign investors should not be entitled to greater rights than those available to their nationals.<sup>122</sup> Therefore, any form of dispute resolution should be under the exclusive jurisdiction of the host state's domestic courts and governed by national laws. International courts and international laws should not play a part in the host state's domestic affairs.<sup>123</sup>

In addition, these Latin American countries hesitate to submit

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116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* Like in China, "foreign parties should be prepared for the risk that local courts will reach verdicts on the recognition of foreign awards, which may be self-serving and entirely different from the outcome of previous international arbitration proceeding." *Fear China*, *supra* note 23, at 40.

121. *See Protection*, *supra* note 5, at 1997. An Argentinean jurist, Carlos Calvo, developed the Calvo Doctrine during the last part of the nineteenth century. *See id.* at 1997 n.23.

122. *See id.*

123. *See id.*

their disputes to international arbitration because they found it biased against developing countries.<sup>124</sup> As a developing country beginning to participate actively in international commerce, Vietnam also perceives international arbitration as possibly biased against developing countries.<sup>125</sup> Furthermore, Vietnam perceives international arbitration as a “‘foreign’ process and an infringement upon national sovereignty.”<sup>126</sup>

The second reason for Vietnam’s non-enforcement of an arbitral award may be due to Vietnam’s lack of an enforcement law.<sup>127</sup> Vietnam’s foreign investment laws rarely provide adequate security for the recognition of foreign arbitration awards. Additionally, neither the FIL nor the 1993 Regulations encourage international arbitration as the initial means of dispute resolution.<sup>128</sup> Vietnam’s policy is apparently that only its courts should make decisions regarding business contracts in the country.<sup>129</sup>

The most significant reason for Vietnam’s non-enforcement of an arbitral award is government instability. In Vietnam, the government may choose not to recognize certain clauses, such as an arbitration clause in a foreign investment contract.<sup>130</sup> For example, assume a foreign investor and a Vietnamese party or the Vietnamese government enter into a business contract which has an arbitration clause. If either party breaches the contract, the parties will arbitrate. In many cases, however, the arbitrator’s decision is meaningless because the Vietnamese authorities may decide not to fulfill their contractual obligation or comply with the award. The Vietnamese authorities may decide instead to extort money from the foreign investor to enforce the award.<sup>131</sup> In the event of extortion, the Vietnamese officials may still decide not to comply with the arbitrator’s award.<sup>132</sup> One U.S. businessman referred to investment contracts in Vietnam as “water soluble glue.”<sup>133</sup> This situation exemplifies Vietnam’s unstable

124. *See id.* at 2002.

125. *See id.* at 2008.

126. *Id.* at 2007.

127. *See PELL, supra* note 8, at 9.

128. *See Wunker, supra* note 24, at 382.

129. *See Protection, supra* note 5, at 2007.

130. *See PELL, supra* note 8, at 9.

131. *See id.*

132. *See id.*

133. *Id.*

government system and its effect on international arbitration.

One measure Vietnam has taken toward international arbitration is enacting bilateral treaties (BITs) with selected countries.<sup>134</sup> Through the BITs, Vietnam allows foreign investors to use international arbitration, even in business investments with Vietnamese governmental agencies.<sup>135</sup> This provision contradicts the 1993 Regulations, which do not allow international arbitration as an option in contracts with the Vietnamese government.<sup>136</sup> Nonetheless, the FIL and the 1993 Regulations provide that “[a]ny treaty on investment incentives and protection signed by the Government of Vietnam with the government of another country shall prevail with its agreement.”<sup>137</sup> Therefore, the BITs do have some validity.

One significant advantage of a BIT is that it strengthens the enforcement process of an arbitration award. For example, if Vietnam fails to enforce an arbitration award, it may detrimentally affect its relationship with the country that signed the treaty.<sup>138</sup> The BITs, however, are only made with select countries. They are not reassurance to foreign investors from countries that do not have BITs with Vietnam, such as the United States.<sup>139</sup>

Therefore, due to Vietnam’s distrust of arbitration, its lack of legal enforcement, corruption in the government, and significantly low numbers of BITs, effective arbitration cannot exist. The Vietnamese government must change its attitude toward international arbitration and deal with enforcement of arbitral awards for an effective arbitration system to exist.

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134. *See id.* at 2008 n.102. “The Australia-Vietnam BIT allows arbitration before either ICSID, or by agreement before an arbitral authority.” Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 5, 1991, Austl.-Vietnam, art. 12, 1991, Austl. T.S. No. 36. “The China-Vietnam BIT allows arbitration before a tribunal appointed by the parties.” Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Dec. 2, 1992, P.R.C.-Vietnam, art. 8, §§ 3-4.

135. *See Protection, supra* note 5, at 2008.

136. *See id.* at 2007. Both the FIL & 1993 Regulations have provisions for international arbitration as an alternative dispute resolution for businesses between foreign investors and Vietnamese parties to a joint venture. Nonetheless, the FIL is silent on dispute resolution between foreign investors and the Vietnamese government, and the 1993 Regulations require that disputes between such parties be brought before a Government competent authority. *See id.*

137. 1993 REGULATIONS, *supra* note 79, art. 99.

138. *See Protection, supra* note 5, at 2007.

139. *See id.*

## V. PREPARATION FOR AN INEFFECTIVE ARBITRATION SYSTEM IN VIETNAM

A foreign investor in Vietnam should always prepare for the possibility that Vietnam may not enforce the investor's arbitration award. There are a few ways a foreign investor may prepare for a possibly unenforceable arbitration award.

First, foreign investor should seek as much governmental involvement as possible. The more the government is involved, "the easier [it is] to approach the government for assistance if investments are threatened."<sup>140</sup> Furthermore, the government may hasten the approval process and help the investor identify potential problems in the investment.<sup>141</sup> Moreover, governmental officials may provide guidance on the effectiveness of the proposed dispute mechanism.<sup>142</sup> For example, the State Economic Arbitration Committee has the express authority to execute laws relating to economic contracts and economic arbitration.<sup>143</sup> By dealing with the governmental officials on a cordial level, the foreign investor may reduce the possibility of bribery or extortion. In addition, working closely with the government officials increases the likelihood of enforcement of an arbitration award.

Second, the foreign investor should draft a proper investment contract. This is essential to negotiate a detailed written agreement.<sup>144</sup> Most important, the foreign investor must include a provision specifying the applicable dispute resolution mechanism.<sup>145</sup> If a valid arbitration clause is carefully drafted, enforcement presents little difficulty because parties will usually abide by the arbitration awards.<sup>146</sup> Necessary elements in an enforceable arbitrable agreement include: (1) a broad and arbitrable subject matter under local law; (2) capacity of the parties to contract when they agree to arbitrate; (3) the arbitrator or arbitration panel must have been decided in advance; (4) existence of a choice of law clause; (5) previously decided location of where the arbitration takes place; and (6) a set of rules to

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140. Taylor, *supra* note 53, at 474.

141. *See id.*

142. *See id.* at 478.

143. *See id.*

144. *See* Chang, *supra* note 50, at 35.

145. *See* Taylor, *supra* note 53, at 478.

146. *See* Fischer, *supra* note 6, at 961.

govern the arbitration established in advance, such as the institutional rules or the ad hoc rules.<sup>147</sup>

Third, the foreign investor should be prepared for the losing party to refuse to honor the award even with a well drafted arbitration agreement. For example, if arbitration is the preferred method of dispute resolution, but the Vietnamese party or government does not recognize the award, the contract should specify a second preferred dispute resolution process. The foreign investor should expect the possibility of resorting to conciliation or mediation, which is often the favorable form of dispute settlement for the Vietnamese government.<sup>148</sup>

One way to mitigate the consequences of an unenforced arbitration award in Vietnam is by obtaining non-commercial risk insurance from entities, such as MIGA. If the Vietnamese government fails to enforce the arbitration award, an insurance policy can compensate the investors.<sup>149</sup>

Fourth, the foreign investor should attempt to understand and accommodate cultural differences to avoid investment problems and ensure enforcement.<sup>150</sup> A foreign investor may create problems and tensions with local investors and officials if he is not sensitive to Vietnamese customs and culture.<sup>151</sup> Also, a foreigner should not be ignorant, but accommodate the differences in the Vietnamese work ethic, lifestyle, and daily activities. It is beneficial, therefore, to engage the services of a local legal adviser during negotiations and other aspects of the business transaction.<sup>152</sup> A local adviser is more familiar with the way the business should be run in Vietnam and can more effectively handle the loopholes a foreign investor must overcome. Additionally, a local adviser may be able to push for enforcement of the arbitral

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147. See Grier, *supra* note 28, at 25-32; see also Fischer, *supra* note 6, at 961.

148. See Chang, *supra* note 50, at 39.

149. See *Protection*, *supra* note 5, at 2001-02.

150. See Chang, *supra* note 50, at 38.

151. See *id.*

For maintaining good relationships with a foreign country, it goes without saying that respect for its culture and understanding of its people's unique sentimentality and customs should be a basis. In June of [1997], when a deputy director of the Vietnamese ministry of labor was invited to Korea . . . in his speech, he warned: "Korean companies need to observe the Vietnamese labor law, and managers and officials in charge in particular should get thoroughly acquainted with our culture, tradition and customs, which will help prevent the failures of Korean investors in Vietnam."

*Troubled Investments*, BUS. KOREA (Seoul), Oct. 1997, at 18.

152. See Chang, *supra* note 50, at 38.

award, without creating further tension with the Vietnamese government.

## VI. STEPS TOWARD AN EFFECTIVE ARBITRATION SYSTEM

Although the foreign investor may take steps to protect himself from the possibility of an unenforced arbitral award, these steps may not be enough to soothe his fear of investing in Vietnam. Vietnam must take extra measures to improve its relationships with foreign investors.<sup>153</sup> Implementing measures to reduce expropriation is one positive step. These measures, however, are not sufficient.<sup>154</sup> To reassure the foreign investors, Vietnam needs an effective arbitration system.

Thus, Vietnam must change its policy regarding international arbitration by moving away from the Calvo Doctrine and toward a willingness to enforce arbitral awards. Several solutions exist to aid Vietnam in developing a more effective arbitration system.

### A. *Uncitral's Model Law*

First, Vietnam should consider adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) as a standard for enforcement of arbitral awards.<sup>155</sup> The United Nations passed this model in 1985, to create uniform arbitration laws and to assist developing countries with arbitration laws.<sup>156</sup> It particularly focuses on providing for a uniform enforcement of arbitral awards.<sup>157</sup> It attempts to limit the role of local courts in

153. Authorities have shown other signs that Vietnam is willing to yield to foreign investor's demands. Stemming in part from a proposal by the American Chamber of Commerce, the government revised a law which had allowed Vietnamese partners, no matter how small their share, to veto joint venture decisions. In response to complaints from other foreign executives, Hanoi also changed the investment code to allow companies to deduct interest payment for tax purposes. Officials have even gone so far as to solicit recommendations from foreign companies before drafting new policies.

Mitchell, *supra* note 2, at 20.

154. See FIL, *supra* note 87, art 20, reprinted in 30 I.L.M. at 933; 1993 REGULATIONS, *supra* note 79, art. 99.

155. UNCITRAL Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, at 81, U.N. Doc. A/40/17 (1985), reprinted in 24 I.L.M. 1302.

156. See Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 719 (1987).

157. See *id.*

international arbitration.<sup>158</sup> Although the New York Convention is one effective method to assure the recognition and enforcement of foreign arbitral awards, it has not yet been ratified by all countries.<sup>159</sup> Vietnam, for example, has neither signed nor ratified this treaty.<sup>160</sup>

The Model Law provides three approaches for the winning party if the losing party fails to comply with the arbitrator's decision.<sup>161</sup> First, the winning party should put pressure on the losing party by stating that it is in the party's best interest to perform the award or risk losing future business with the winning party.<sup>162</sup> If that is unsuccessful, the next step is to compel the losing party to pay or risk adverse publicity.<sup>163</sup> If the losing party has a successful business and is concerned with negative press coverage, it may comply with the arbitration award.<sup>164</sup> If both steps fail, the final approach is to seek court intervention through the country's judicial system.<sup>165</sup> The court may force the party to adhere to the award.<sup>166</sup>

In the arbitration enforcement proceedings, domestic courts in each country have different procedures and levels of control.<sup>167</sup> Their performance depends on the arbitration rules of the particular country.<sup>168</sup> Some countries enforce the award with little or no judicial intervention, while other countries require the parties to reargue the entire claim in the court.<sup>169</sup>

The Model Law has been successful in countries that have adopted either it or a similar version.<sup>170</sup> Hong Kong, for example, has adopted the UNCITRAL Model Law and is the leading arbitrating site in the Asia-Pacific region.<sup>171</sup> Singapore and Malaysia have also adopted the UNCITRAL Model Law, and are

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158. See Craig, *supra* note 19, at 26.

159. See Volz, *supra* note 11, at 887.

160. See *id.* at 940.

161. See *id.* at 887.

162. See *id.*

163. See *id.* at 887-88.

164. See *id.*

165. See *id.*

166. See *id.* at 888.

167. See *id.* at 871.

168. See *id.* at 888.

169. See *id.*

170. See Craig, *supra* note 19, at 55.

171. See *id.*

leading candidates as neutral arbitration sites in that region.<sup>172</sup> In short, success often depends on the individual country's willingness to change its arbitration laws to meet the standard of the Model Law.<sup>173</sup> For countries, such as Vietnam, which have little or no enforcement procedures for arbitration awards, the effect of adopting the Model Law would be advantageous to their position in the Asian market.

### 1. Judicial Enforcement of Arbitral Awards

Currently, Vietnam has little or no guideline for judicial enforcement of arbitral awards.<sup>174</sup> In addition, none of Vietnam's current laws reflect any positive attitudes regarding arbitration.<sup>175</sup> Many courts may still adhere to the Calvo Doctrine and may refuse to enforce arbitration awards against its own government or business people.

If judicial intervention is necessary, Vietnam should include procedural rules to give its courts definite guidelines to follow in their decision to enforce arbitral awards. For example, Vietnam should adopt measures as seen in the People's Republic of China (PRC). PRC has adopted the Arbitration Act of The People's Republic of China, which came into effect on September 1, 1995.<sup>176</sup> The Act provides procedures toward a more fair, efficient dispute resolution. Article 260 specifically provides six conditions which Chinese courts can refuse to enforce an award.<sup>177</sup> As a result, the Vietnamese courts have legitimate reasons to compel the losing party to perform the award.

### 2. Amendment of Vietnam's Foreign Investment Law

If Vietnam incorporates UNCITRAL's Model Law, enforcement of awards may be further guaranteed. Vietnam should amend its investment laws, such as the FIL, to reflect the principles embodied in the Model Law. Vietnam should revise its law on international arbitration more favorable to foreigners, and reduce local courts' supervision over the recognition and

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172. *See id.*

173. *See id.*

174. *See Wunker, supra note 24, at 381.*

175. *See id.*

176. The Arbitration Act is modeled after UNCITRAL and is highly responsive to foreign investors in China. *See Volz, supra note 11, at 904.*

177. *See Volz, supra note 11, at 904.*



enforcement of foreign awards.

Therefore, Vietnam should consent to international arbitration in its FIL, as seen in its BITs with selected countries.<sup>178</sup> Vietnam should revise the law to have fewer restrictions and formalities so that enforcing the arbitral award is easier. Vietnam should follow countries, such as Malaysia, in amending its arbitration system. Kuala Lumpur has a committee administering international arbitration under UNCITRAL rules. Under Malaysian law, an award rendered under those rules is final and binding, without resorting to Malaysian courts for enforcement.<sup>179</sup>

*B. Other Steps Vietnam Should Take to Become the Dominant Actor in the Asian Market*

In addition to amending its investment laws to reflect UNCITRAL Model Law, Vietnam should form more BITs with capital exporting countries, such as the United States. In these BITs, Vietnam should specifically consent to international arbitration. The BITs would assure foreign investors that a closer relationship exists between their home countries and Vietnam and thus, enforcement of arbitration awards would be more assured. In the absence of a BIT, however, investors currently have little legal ammunition to bring to Vietnamese courts to ensure fair treatment and protection under international law.

Vietnam should also consider joining more multilateral international conventions. Specifically, Vietnam should ratify the New York Convention to demonstrate its willingness to cooperate and work with other nations in recognizing foreign arbitral awards. In addition, Vietnam may opt for the reciprocity reservation under the New York Convention.<sup>180</sup> This clause would allow Vietnam to recognize only foreign arbitration awards granted by an arbitration body from countries ratifying the New York Convention.<sup>181</sup>

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178. See *Protection*, *supra* note 5, at 2008 n.102.

179. See Craig, *supra* note 19, at 56. Thailand is another country that Vietnam should look at in creating its own model. Thailand has opened an arbitration office in the Ministry of Justice. This office allows businesses to resolve their disputes in a neutral place than resorting to the Thai judicial system. See Jahan P. Raissi, *Arbitrating in Thailand*, 16 HASTINGS INT'L & COMP. L. REV. 99, 100 (1992).

180. See New York Convention, *supra* note 32, art. I(3), 21 U.S.T. at 2519. Section three provides: "When signing, ratifying, or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State . . . ." *Id.*

181. See *id.*

If Vietnam chooses not to officially ratify the Convention, it can become a signatory. As a signatory, the Vietnamese government would generally be required to abide by its terms.<sup>182</sup> The failure to abide by the terms of the Conventions may have a detrimental effect on Vietnam's position as a growing market, but would not subject Vietnam to enforcement procedures.

If Vietnam chooses neither to ratify nor become a signatory to the Convention, it should consider modifying its current dispute resolution mechanisms. Vietnam, therefore, should consider combining conciliation with arbitration.<sup>183</sup> Its current method of conciliation alone is not completely satisfactory because the agreement settlement is not final and binding, and rules do not exist that specify a conciliator's duties in detail.<sup>184</sup> The combination of conciliation and arbitration would satisfy both the Asian parties' desire for harmony and the foreign investor's preference for arbitration.<sup>185</sup>

A number of ways to structure the combination of conciliation and arbitration exist.<sup>186</sup> Parties can, for example, agree to eliminate all references regarding dispute resolution from the contract. When a dispute arises, the parties may then agree to first conciliate before using arbitration.<sup>187</sup> If parties want an advance agreement, however, they may have two options in combining conciliation and arbitration.<sup>188</sup>

One option is to blend conciliation rules with arbitration rules.<sup>189</sup> In one proceeding, the tribunal would act as both conciliator and arbitrator.<sup>190</sup> In addition, the tribunal may choose

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182. See *id.* art. VIII(1), 21 U.S.T. at 2521.

183. The People's Republic of China is one the foremost proponent of this practice. Although no written rules or prescribed practice exist, Chinese arbitrators practice the combination of mediation and conciliation. See Donahy, *supra* note 113, at 75. A combined mediation/arbitration is unique to the PRC, and is often applied to foreign-related disputes, as defined under the Foreign Economic Contract Law. Edward HW Chan, *Amicable Dispute Resolution in the PRC and its Implication for Foreign-Related Construction Disputes*, CONSTRUCTION MANAGEMENT & ECONOMICS, Nov. 1997, at 539-48.

184. See Burton, *supra* note 21, at 638-39.

185. See *id.* at 638.

186. See *id.* at 639.

187. See *id.* at 642.

188. See *id.*

189. See *id.*

190. See *id.* at 653. For example, the China International Economic and Trade Association's (CIETAC) Arbitration Tribunal may conciliate cases in the process of arbitration. In addition, the arbitrator may become a conciliator, then become an

to use whatever conciliation rules and arbitration rules are appropriate under the circumstances.<sup>191</sup>

The second option is to combine conciliation and arbitration in a two-step process.<sup>192</sup> The parties may resort to arbitration only after the conciliation is concluded, however, the arbitration remains a separate proceeding.<sup>193</sup> This means that different people are employed as conciliator and arbitrator, and statements made or information gained during conciliation may not be used in the arbitration.<sup>194</sup>

Whatever method the parties choose to combine conciliation and arbitration, whether or not in an advance agreement, depends upon the situations of their businesses.<sup>195</sup> The important thing is for the parties to consider that both conciliation and arbitration are alternatives for effective dispute resolution.<sup>196</sup>

## VII. CONCLUSION

To place itself at the forefront of the Asian market, Vietnam has taken initial steps to gain the confidence of the foreign investors. It has succeeded in creating laws that are workable and favorable to foreign investors. Nonetheless, Vietnam fails to fully embrace the international norms governing dispute resolution.<sup>197</sup> It still needs to develop a more efficient system for settling disputes, in particular its arbitration system.

Under its current dearth of legal enforcement, significantly low numbers of BITs, and instability in the government, an effective arbitration system, however, cannot exist. An effective arbitral system is necessary to maintain a positive business atmosphere. There are certain measures that Vietnam may

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arbitrator again at any stage of the proceedings. See *Donahey, supra* note 113, at 75.

191. See *Burton, supra* note 21, at 653.

192. See *id.* at 642.

193. See *id.* at 657.

194. See *id.* There are some risks that parties, who conciliate in good faith, may impair their strategic positions in a later arbitration. Therefore, it is better to separate the conciliation proceeding from the arbitration one. See *id.* at 644.

195. See *id.* at 657.

196. See *id.* "One of the subjects addressed at the 1996 Arbitration Conference was the relationship between arbitration and conciliation in the resolution of international commercial disputes. It is concluded that although there is an expanding culture that favors combining arbitration with conciliation, each operates best when functioning separately." Michael Hoellering, *Mediation & Arbitration, A Growing Interaction*, 52 *DISP. RESOL. J.* 23, 23-25 (1997).

197. See *Protection, supra* note 5, at 2012.

consider to amend its laws regarding arbitration. If Vietnam exerts the extra effort to amend its arbitration laws, it may emerge at the forefront of the Asian market.

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\* J.D. Candidate, Loyola Law School, 1998; B.A., Loyola Marymount University, 1995. I dedicate this Comment to my grandmother, whose experiences have been the inspiration behind all my goals, i.e., publishing this article, and to my parents, whose constant guidance has led me to where I am. I thank my family and friends for their love and support, especially to Nik Lachowicz for his continual love, encouragement, and support in all my endeavors throughout the years. I also thank the *Journal* editors and staff as well as my international law professors; their contributions truly made a difference to my article.

