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The Development Of Competition Law In Vietnam In The Face Of Economic Reforms And Global Integration

*Alice Pham**

I. INTRODUCTION

The past two decades have seen Vietnam, along with several other economies once committed to centralized economic planning, make great efforts to move towards a more market-based economy. Once known mostly for interacting with countries of the same political and ideological commitments, Vietnam now has come a long way from being a completely closed economy towards proactively integrating into various regional and world economies. Together with this process, Vietnam has undergone a massive legislative transformation, the focus of which is to replace the traditional use of administrative directives and government orders in economic regulation with a regulatory system based on universally applicable legislative norms and macroeconomic principles. Vietnam has since achieved record economic growth,¹ drawing a great deal of attention and interest from the international arena.

Achievements notwithstanding, one cannot deny that in recent years the pace of Vietnam's transformation has slowed down at times, and there are threats and challenges, both old and new, with which Vietnam must deal in order to continue its path of development. One such challenge that is as old as the reform process itself is the dilemma between political ideology and economic policy. This dilemma has led to the development of a "bifurcated regulatory system,"² a very unique characteristic of Vietnam

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¹ See The Ministry of Finance of the Socialist Republic of Vietnam, *Vietnam Records GDP Growth of 8.4 per cent in 2005* (Dec. 30, 2005), <http://www.mof.gov.vn/DefaultE.aspx?tabid=356&ItemID=29970>.

² This term was first used in *Vietnam: Legal and Judicial Development* 16 (AusAID [The

which is designed to accommodate the rising demands of a market economy and at the same time ensure socialist ideology and overall state control. The challenge is increasing, especially as Vietnam heads into a more advanced stage of economic reform and integration, and strives for its pending accession into the World Trade Organization ("WTO").³

An effective competition law, as is now widely recognized, is a concomitant requirement for market-based reforms. Such a law aims at limiting unnecessary interventions or abuses of power in the marketplace by the State or by private sector enterprises that adversely affect economic efficiency and consumer welfare. Moreover, an effective competition law enables the government to keep a check on the concentration of economic power and rent-seeking behavior. It strengthens economic democracy and social cohesion by providing market participation opportunities through the prevention of anti-competitive practices by dominant firms, and lowers the barriers to entry faced by individual entrepreneurs, and small and medium-sized businesses.

Beneficial as it may seem, a competition law will be of no use or will have a very small role in a state-run economy if market functions are displaced by government mandates. Furthermore, in a developing economy the possible role of competition law is even more difficult to determine. As put forth by Jean-Jacques Laffont:

Competition is unambiguously a good thing in the first-best world of economists. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question 'Should competition be encouraged in developing countries?' must be raised in a more realistic framework.⁴

Unfortunately, Vietnam has both the above-mentioned attributes of such a developing economy and those of a transitional one. In Vietnam, government regulations still assume a special significance, and public

Austl. Gov't's Overseas Aid Program], Working Paper No. 3, 2000), *available at* http://www.aisaid.gov.au/publications/pdf/vietnam_wp3.pdf.

³ See, e.g., International Center for Trade and Sustainable Development, *Vietnam's Accession Progresses; Civil Society Concerns Raised*, BRIDGES WEEKLY TRADE NEWS DIGEST, December 22, 2004, <http://www.ictsd.org/weekly/04-12-22/story3.html>; *WTO Accession in the Sprint*, VIETNAMNET BRIDGE, Jan. 1, 2005, <http://english.vietnamnet.vn/files/2005/01/368424/>.

⁴ JEAN-JACQUES LAFFONT, *COMPETITION INFORMATION AND DEVELOPMENT* (World Bank ed., 1998).

policies and cultural perceptions reflect a clear preference for statistical solutions to economic problems.

This article examines the development of a competition regime in Vietnam, with all of the existing difficulties and problems. In the context of this socialist country, we examine the economic reform and integration process and the challenges of liberalization and globalization. Finally, we provide some thoughts for the future. Specifically, Section II addresses the emergence of Vietnam's competition law since the 1980's. Section III describes some of the key legal provisions of the Competition Law of Vietnam. Section IV evaluates the current challenges in the implementation of the Vietnam competition regime, while Section V proposes some recommendations.

II. THE EMERGENCE OF VIETNAM'S COMPETITION LAW SINCE THE 1980'S

More than one hundred countries around the globe have now adopted competition laws, of which approximately two-thirds are less-developed and/or transitional economies; many other countries are in the process of adopting competition laws.⁵ The proliferation of competition laws is undoubtedly linked to the wave of neo-liberal economic reforms introduced since the 1980's and, in particular, to the issues raised as a result of privatization.⁶ It is also part of the broader proliferation of liberal democracies and market-oriented economics becoming the dominant ideological models in the wake of the collapse of the communist bloc.⁷ Other motivating factors include the recent global waves of mega-mergers, the increased potential for cross-border anti-competitive practices, the ascendancy of economic integration with the WTO, and lastly the radical shift in the policy of international institutions that now encourage and emphasize the adoption of competition law in developing countries and endorse its vital role in the process of development.

The emergence of a competition law in Vietnam is set in a localized picture of all of the above factors combined. Vietnam remains a socialist country with a single ruling party, the Communist Party of Vietnam ("CPV"). In the 1980's, the government recognized the roots of economic stagnation and crises in the rigid, centrally-planned, command-and-control economic system, which only favored loss-making, monopolistic, state-owned enterprises ("SOEs"). The CPV has since shown a strong

⁵ CUTS International, *Introductory Chapter: Promoting A Healthy Competition Culture Around the World*, in *COMPETITION REGIMES IN THE WORLD—A CIVIL SOCIETY REPORT* iv, xii–xv (Pradeep S. Mehta ed., 2006) [hereinafter CUTS International].

⁶ Paul Cook, *Competition Policy, Market Power and Collusion in Developing Countries*, in *LEADING ISSUES IN COMPETITION, REGULATION AND DEV.* (Paul Cook et al. eds., 2004).

⁷ *Id.*

inclination towards neo-liberal economic reforms, which resulted in the Doi Moi (“Change” and “Newness” by literal meaning) policy in 1986.⁸ This policy recognized the private sector as potentially more efficient suppliers of goods and services, and as the new engine of growth. It also gave way to the dissolution, restructuring, and privatization (called “equitization” in Vietnam) process of many formerly State-owned monopolies, liberalized both internal and external trade regimes, and encouraged private (both domestic and foreign) investment in the economy. The significance of competitive markets was upheld in several CPV documents and socio-economic development strategies of Vietnam.⁹ With this new thinking in mind, the Vietnamese government (“GOV”) started building the blocks for market development and setting the rules of the game for investors and enterprises.

It was, nevertheless, nearly ten years later, in the late 1990’s, that talk about introducing a competition law in Vietnam started circulating within the academic circles, think-tanks, and state agencies. Facilitated by the technical assistance efforts of international institutions like the United Nations Development Programme (“UNDP”), the World Bank (“WB”), and the International Monetary Fund (“IMF”), it was recognized that after many years of reforms, there remained several flaws in the regulatory infrastructure system for commercial activities and there was severe discrimination between the state and private sector.¹⁰ A level playing field was not properly established and abuse of economic and administrative power by SOEs was still prevalent. In additional, the opening of the economy, as well as its integration into the regional markets and the world,

⁸ See, e.g., Kheang Un, *Vietnam at the Crossroads: The Modern Political Economy*, <http://niu.edu/ceas/outreach/vietnam2.html>; Pietro P. Masina, *Vietnamese Development Strategies Between Tradition and Modernity*, REPORT NO. 4/1999, FEDERICO CAFFÈ CENTRE RESEARCH REPORTS, http://www.ruc.dk/federico/publications/Masina_4_99.pdf; Michael Alexandros, *Where is Vietnam Heading?*, LINKS INT’L J. OF SOCIALIST RENEWAL (Dec. 2002), available at <http://www.dsp.org.au/links/back/issue22/Alexandros.htm>.

⁹ See, e.g., Political Report by the Central Committee of the Communist Party of Vietnam at the 8th National Congress in 1996, § 3 (*Bao cao Chinh tri cua Ban Chap hanh Trung uong Dang, Dai hoi Dang lan thu 8*), available at http://www.cpv.org.vn/details.asp?topic=2&subtopic=4&leader_topic=225&id=BT1260353556 [hereinafter Report to the 8th Congress]; The Resolution of the 9th National Congress of the Communist Party of Vietnam in 2001, § 4 (*Nghi quyet Dai hoi Dai bieu Toan quoc lan thu 9 Dang Cong San Viet Nam*), available at www.cpv.org.vn/details.asp?topic=2&subtopic=4&leader_topic=226&id=BT1370336607; The Strategy for Socio-Economic Development 2001–2010, § 4 (*Chien luoc Phat trien Kinh te Xa hoi 2010–2010*), available at http://www.cpv.org.vn/details.asp?topic=2&subtopic=4&leader_topic=226&id=BT1370335562.

¹⁰ See, e.g., Central Institute for Economic Management, *Some Legal and Institutional Issues Regarding Competition Policy and Control of Economic Monopolies* (2002) (unpublished report produced within the framework of the UNDP-supported project VIE/97/016 [Completing the Enabling Business Environment in Vietnam]), on file with the Northwestern Journal of International Law & Business).

had posed new challenges. There emerged the problem of power asymmetry between foreign companies, most often transnational corporations (“TNCs”) and domestic enterprises, as well as problems arising from domestic and cross-border anti-competitive practices. All of these factors, coupled with Vietnam’s aspirations to join the WTO and its advances into deeper economic reforms, induced the GOV to consider the adoption of a competition law for the country.

Subsequently, the CPV, at its Eighth National Congress, stated the need to

establish cooperation and a healthy competitive environment in production and trade; develop state-owned monopolies in some certain industries and sectors of strategic significance to the country; eliminate monopolies in other commercial activities, and prevent abuses of monopolistic positions aimed at maintaining privileges, individual benefits and distorting competition in the market.¹¹

Thus, the need to adopt a law that safeguards competition in the new market economy was necessary. Henceforth, with the encouragement and technical support of the UNDP and the United Nations Conference on Trade and Development (“UNCTAD”), the Vietnamese Ministry of Trade was assigned the task of drafting a law on competition for Vietnam, which was finally adopted in 2004.¹²

III. THE LEGAL PROVISIONS

Passed in December 2004 by the National Assembly of Vietnam, the Competition Law of Vietnam (“Competition Law”) is a result of a four-year drafting process. It references to the statutes of nine nation-states and territories and the model laws promoted by international institutions like the UNCTAD and the WB, and is influenced by the enforcement practices and experiences of other countries as well.¹³ It became effective on July 1, 2005.¹⁴

The Competition Law applies to all business enterprises and

¹¹ Report to 8th Congress, *supra* note 9.

¹² United Nations Development Programme (“UNDP”) Vietnam, Project VIE/01/002 [Institutional and Capacity Building in the Area of Competition Law and Policy in Vietnam] (with technical assistance from the United Nations Conference on Trade and Development (UNCTAD)), <http://www.undp.org.vn/undp/prog/profile/eng/gov/vie01002.htm>.

¹³ See, e.g., Tran Anh Son, *The Progress of Drafting Competition Law*, <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/TranAnh.pdf> (last visited March 18, 2006); Le Danh Vinh, *Building Competition Law in Vietnam to Meet the Need of Regulating Market Economy and in the Light of Trade Liberalization and International Economic Integration* (2003), http://www.jftc.go.jp/eacpf/01/vietnam_p.pdf.

¹⁴ Competition Law 2005, No. 27/2004/QH11 (Vietnam) [hereinafter Competition Law].

professional and trade associations in Vietnam, overseas enterprises and associations registered in Vietnam, public utilities and state monopoly enterprises, and state administrative bodies.¹⁵ It has supremacy over all other enacted laws of Vietnam regarding restrictive business practices and unfair trade practices.¹⁶

The Competition Law prohibits five broad types of anti-competitive practices: (1) competition restriction agreements;¹⁷ (2) abuse of dominant or monopoly position;¹⁸ (3) "concentrations of economic power" that substantially restrict competition;¹⁹ (4) acts of unhealthy competition;²⁰ and (5) anti-competitive behaviors/decisions by officials or State administrative agencies taking advantage of their authority.²¹ The Competition Law also sets certain competition procedures for complaints and investigations of alleged abuses.²²

A. Regulation of Competition Restriction Agreements

Article 9 of the Competition Law prohibits *per se* bid-rigging agreements, agreements that prevent or restrain other enterprises from entering the market, and agreements that banish other enterprises from the market.²³ It also prohibits agreements on price-fixing, distribution outlets, restricting production quantities, and imposing restrictive conditions on other enterprises or forcing them to accept obligations having no direct connection with the subject of the contracts when the parties to the agreements have a combined market share of 30% or more on the relevant market.²⁴ When violations are found, monetary fines of up to 10% of the total revenue in the financial year preceding the year in which the violative act is committed for each of the parties to the agreement will be imposed.²⁵ Other forms of penalization and remedial measures include confiscation of all of the profits gained as a result of the violating acts and compulsory preclusion of terms in violation of the provisions of law from the contract or business transactions.²⁶

¹⁵ *Id.* at art. 2.

¹⁶ *Id.* at art. 5.

¹⁷ *Id.* at art. 9.

¹⁸ *Id.* at arts. 13, 14.

¹⁹ *Id.* at arts. 16–24.

²⁰ Competition Law, arts. 39–48.

²¹ *Id.* at art. 6.

²² *Id.* at ch. V, arts. 56–121.

²³ *Id.* § 1, art. 9.

²⁴ *Id.* § 2, art. 9.

²⁵ *Id.* at art. 118.

²⁶ See Decree No. 120/2005/ND-CP on Handling Violations of the Laws Concerning Competition, <http://www.mot.gov.vn/mot/LawsData/120.2005.ND-CP.pdf>.

Enterprises, however, may apply for an exemption if the agreement (i) rationalizes an organizational structure or business scale and increases efficiency, (ii) promotes technical or technological progress, improving the quality of goods and service, (iii) promotes uniform applicability of quality standards and technical norms of certain types of products, (iv) unifies conditions on trading, delivery of goods and payments but not those relating to price or any pricing factors, (v) increases the competitiveness of small and medium-sized enterprises (“SMEs”), or (vi) increases the competitiveness of Vietnamese enterprises in the international market.²⁷ Exemptions may be granted only for a finite duration.²⁸

The market share threshold of 30% and the block exemption provided in the Competition Law, however, need to be enforced properly. Otherwise they will simply become means by which enterprises can abuse and escape the scrutiny of the law, especially in the context of the restrictive agreements that have been rampant in the Vietnamese market recently, under increasingly sophisticated forms. Exclusionary, foreclosure, and bid-rigging agreements, prohibited *per se* by the Competition Law, create a great deal of harm to enterprise and market development, adversely impact state revenues, and especially deprive the consumers of fair deals, better choices and quality, and reduced prices.²⁹

For example, a new beer product was foreclosed from the domestic market due to unjust pressure exercised by a coalition of established beer producers in retail shops, distribution agencies and bars.³⁰ The product at issue was Laser beer, the first Vietnamese brand of bottled draft beer. The competitors, Heineken, Tiger and Bivina (a product produced by the Vietnam Beer Joint-Venture), reportedly forced distribution agencies, retail shops, and bars to sign exclusive contracts with them. The contracts prevented these sellers and distributors from selling, exhibiting, introducing, marketing, or even allowing marketing staff of any other beer brands to work on their business premises. As compensation, these shops and distributors would receive a “sponsor” amount between VND 50 million (\$3174) and VND 100 million (\$6349) per annum.³¹ This strategy enabled these beer brands to effectively prevent any promotional campaigns

²⁷ Competition Law, *supra* note 14, at point a–f, § 1, art. 10.

²⁸ *Id.* § 1, art 10.

²⁹ CUTS & CIEM, *Competition Scenario in Vietnam*, (forthcoming in May 2006) (report produced within the framework of the Advocacy and Capacity Building on Competition Policy and Law in Asia, on file with the Northwestern Journal of International Law & Business) [hereinafter *Competition Scenario*].

³⁰ See CUTS & CIEM, *E-Newsletter-Vol 1: Promotional Strategy Foreclosed New Entrant*, <http://www.cuts-international.org/E-NewsletterVol1.htm#pro> (for a summary based on stories reported by VIETNAMNET on May 18, 2004 and July 4, 2004).

³¹ Vietnam Dong. US \$1 is equal to approximately VND 15,800 at the current exchange rate.

of Laser anywhere in Vietnam, from metropolitan cities to provincial areas. A beer shop owner was even brought to court by the Vietnam Beer Joint Venture for having violated the contract by selling Laser beer which, according to the shop owner, had been repeatedly demanded by the customer. The court ruled in favor of the beer producers, since the Competition Law had yet to be passed.

Many other examples of outrageous anti-competitive behavior can be seen in construction projects funded by the state budget in Vietnam. One such example was the Van Lam-Son Hai II Road Construction Project.³² Four companies participated in the bidding for this project and "Company 98" was awarded the contract. It was later discovered that all four participants belonged to the same business group, which Company 98 controlled.³³ Company 98 had arranged for three shell companies to submit bids at inflated prices in order to create the illusion of a competitive process. Having made these arrangements in advance, Company 98 was ensured, and indeed was awarded, the contract at a price within ten millionths of a percent of the published government estimates (VND 141 difference on a VND 1.56B contract).³⁴ Clearly, the government's plan to reduce construction costs by selecting the lowest bid failed.

B. Control of Abuses of Dominance and Monopoly

According to the Competition Law, a dominant market position applies to firms holding at least a 30% market share or firms that are "capable of substantially restricting competition."³⁵ The Competition Law also provides for a collective market dominant position for firms having a total market share of the relevant market of 50% for two business entities, 65% for three, and 75% for four.³⁶ Dominant firms are prohibited from selling goods below cost to restrict a competitor, fixing an unreasonable selling or purchase price, restricting production, distribution, markets or technical development in ways that harm consumers, applying dissimilar commercial conditions to different firms for the same transaction, imposing conditions on other firms in sale-purchase contracts or imposing conditions unrelated to the transaction, preventing market entry by new competitors, and engaging in "other practices" in restraint of competition as stipulated by law.³⁷

A monopoly market position would apply to a firm if it has no

³² Competition Scenario, *supra* note 29.

³³ *Id.*

³⁴ *Id.*

³⁵ Competition Law, *supra* note 14, § 1, art. 11.

³⁶ *Id.* § 2, art. 11.

³⁷ *Id.* at art. 13.

competitors for the goods it trades or for the services it provides.³⁸ Monopoly firms are prevented from undertaking any of the activities listed in the previous paragraph pertaining to dominant firms, as well as imposing disadvantageous conditions on consumers, and unilaterally rescinding or replacing a contract for plausible reasons.³⁹ A unique provision of the Competition Law regulates the state-monopolized sectors. The government will continue to control those sectors by deciding the prices, quantities, volumes, and market scope.⁴⁰

As mentioned in the introduction, liberalization and deregulation versus keeping the dominant role in communist political ideology is at the core of the dilemma that Vietnam faces during its economic reform process. This explains the above bifurcation between the control of abuses of dominance and monopolies and the maintenance of State control over key sectors of the economy in the Competition Law. The paradox is that most of these state-monopolized sectors are large-scale network industries producing public utility products/services, such as telecommunications, electricity, water, and transportation. The threat of abuse would rise when these public monopolies are simply transformed into private ones since not all are so-called natural monopolies. In another scenario, the *de facto* position of these dominant or monopolistic SOEs may put them outside the reach of the Competition Law, annulling the power of the enforcement agencies. The problems will be aggravated when enforcement agencies are not completely free from political will or administrative hierarchy, or are not equipped with sufficient knowledge, skills and resources, which is the case in Vietnam.

1. The Telecommunications Market as an Illustrative Example

The telecommunications market, for example, will be one source of enforcement headaches for the competition authority due to its complexities and the conflicts between state interests and unleashed competition from the private sector. Before 1995 the state-owned Vietnam Post and Telecommunications Corporation ("VNPT") was the only network and fixed-line telephone operator in Vietnam. There were only three mobile networks in operation in Vietnam during that time and all of them belonged to VNPT: Vinaphone, Mobiphone, and Call-link. As of the end of 2003, there were two enterprises providing fixed-line services: VNPT and Saigon Postel Co. ("SPT"). There were three other mobile phone services providers: Viettel, an army-run company, was allowed to build and operate its mobile network in 1998 and actually started its network in October of

³⁸ *Id.* at art. 12.

³⁹ *Id.* §§ 2–3, art. 14.

⁴⁰ *Id.* at art. 15.

2004; SPT, introduced the S-Fone network in July 2003; and Hanoi Post launched the Cityphone network in Hanoi in December 2002 and expanded to Ho Chi Minh City in 2003. In effect, competition has been infused into the market for a few years now, though VNPT remains the dominant player in both fixed-line and mobile services. By the end of 2004, VNPT had nearly 3.4 million fixed-line subscribers and SPT only 24,000 subscribers. In contrast, Mobifone and Vinaphone dominated the mobile services market with approximately 2.2 million and 2.5 million subscriber respectively, while there were only about 150,000 and 100,000 subscribers for S-Fone and Viettel respectively.⁴¹

More quality services are available and prices have been reduced substantially as a result of the liberalization process, due to the benefits of competition. Concerns about anti-competitive behaviors of market players, however, have arisen. For example, SPT and Viettel have repeatedly complained about VNPT for abusing its market power and for using its "patronage-client" relationship with the Ministry of Post and Telematics ("MPT") to maintain its market dominance. The incumbent service provider was said to cause difficulties for SPT and Viettel by not providing sufficient interconnection to its network and by quoting technological or capacity constraints to refrain from providing interconnection in a timely manner. Such behavior not only arises from an anti-competitive refusal to deal, in contravention of the Competition Law's prohibition of enterprises with dominant market share, but also contradicts the mandatory obligation to provide interconnection as required by the telecommunication sectoral regulation.⁴² As these two young service providers were trying their best to build their market share, which had been dominated by VNPT, they resorted to measures such as unreasonably excessive promotions, or selling below costs, a behavior also prohibited by the Competition Law if an enterprise holds a dominant market position.⁴³ Resolving such cases would certainly be difficult for the competition authority in light of the bifurcated provisions in the Competition Law itself.

C. Regulation of Economic Concentration Between Enterprises

Economic concentration activities are defined as any conduct by a firm that aims to govern the activities of other enterprises including, but not

⁴¹ See Competition Scenario, *supra* note 29 (for a description of the situation pre- and post-Doi Moi in the telecommunication sector in Vietnam.).

⁴² See CUTS Centre for Competition, Investment, & Economic Regulation, *E-Newsletter Vol. 1*, <http://www.cuts-international.org/E-NewsletterVol1.htm#do>; CUTS Centre for Competition, Investment, & Economic Regulation, *E-Newsletter Vol.-V*, <http://www.cuts-international.org/7up2/7Up2E-newsV-full.htm>.

⁴³ See, e.g., CUTS Centre for Competition, Investment, & Economic Regulation, *E-Newsletter Vol. VII*, <http://www.cuts-international.org/7up2/7up2E-newsVII-full.htm>.

limited to, mergers, acquisitions, consolidations and joint ventures that have this aim. All concentration cases in which the combined market share of the relevant firms would be 50% or more are prohibited except where: (1) the result is still a small or medium-sized enterprise (a concept not defined in the law),⁴⁴ (2) one of the parties is at risk of being dissolved or bankrupt, or (3) the economic concentration has the effect of expanding exports or contributing to socio-economic development and technological advance.⁴⁵ A 30-day notification to the competition authorities is mandatory where the participating parties would have a combined market share of 30–50%. Divestiture measures are provided, but only as an *ex post* remedy for unlawful concentration cases.⁴⁶

D. Prohibition of Unfair Competition Acts

With respect to acts of unhealthy competition, the Competition Law prohibits falsification of commercial instructions, infringement of business secrets, acts of bribery, inducement or coercion, defamation of other enterprises, disrupting the lawful business practices of other firms, advertisements and promotions aimed at unhealthy competition, discrimination within or by an industry association, and illegal multi-level (“pyramid”) selling of goods.

E. Organization of the Competition Authorities

The enforcement authorities provided for by the Competition Law are the Competition Administration Agency and the Competition Council. The Competition Administration Agency is to be established under the purview of the Ministry of Trade and performs the regulation of economic concentration and investigations into competition cases, as well as resolving cases involving unfair competition acts only. The head of the Competition Administration Agency is appointed by the Prime Minister at the proposal of the Trade Minister,⁴⁷ while the investigators are appointed by the Trade Minister at the proposal of the head of the Agency.⁴⁸ The Competition Council consists of eleven to fifteen members serving a five-year term who are appointed (and may be reappointed) by the Prime Minister at the proposal of the Trade Minister.⁴⁹ The Council hears and resolves competition cases other than those related to unfair competition acts. After the Competition Administration Agency has conducted preliminary and

⁴⁴ Competition Law, *supra* note 14, at art. 18.

⁴⁵ *Id.* at art. 19.

⁴⁶ *Id.* at art. 117.

⁴⁷ *Id.* at art. 50.

⁴⁸ *Id.* at art. 51.

⁴⁹ *Id.* at art. 53.

official investigations into a competition case, the chairperson of the Council will select five members to set up a Competition Case-Handling Council which will hold a hearing. This *ad hoc* Council rules on the evidence produced by the investigation and submitted by the affected parties, as well as any expert opinions it or the parties solicit.

F. Competition Procedures for Complaints and Investigations

The Competition Law also stipulates detailed rules and procedures governing complaints, investigations, interim orders by the competition authorities, consideration of alleged abuses, and penalties thereof. Either an affected party or the Competition Administration Agency can initiate complaints or actions against violative conduct. Where the Agency determines that it has jurisdiction over an external complaint within seven days from receipt of a complaint, it must begin an investigation.

If a breach of the law is found, warnings, fines and other additional sanctions (such as revocation of the business registration certificates, and remedial measures such as the restructuring of the enterprise holding the dominant position, the division of the merged enterprises, or the removal of illegal provisions from the contract) may also be imposed.⁵⁰ In the event that state officials or government employees have breached the law, they may be disciplined or criminally punished and may be subject to civil liability for damages.⁵¹

Any party who disagrees with the decisions of the Competition Case-Handling Council may file a complaint with the Competition Council. In contrast, one who disagrees with the decisions of the head of the Competition Administration Agency may file a complaint with the Trade Minister.⁵² Again, the party who disagrees with the decision to settle complaints about the decisions may file an administrative lawsuit with the relevant provincial/municipal People's Courts,⁵³ whose rulings will be final.

IV. CURRENT IMPLEMENTATION OF THE VIETNAM COMPETITION REGIME

The current competition regime of Vietnam dates back to earlier than the birth of the 2004 Competition Law itself. Prior to the passage of the law, a Competition Administration Department had already been created within the Ministry of Trade, by an order from the Trade Minister.⁵⁴ This Department was expected to be built into the Competition Administration

⁵⁰ Competition Law, *supra* note 14, at art. 117.

⁵¹ *Id.* at art. 120.

⁵² *Id.* at art. 107.

⁵³ *Id.* at art. 115.

⁵⁴ See Vietnam's Ministry of Trade Homepage, <http://www.mot.gov.vn>.

Agency for Vietnam after the law was passed. The Department was assigned by the Trade Minister to take charge of all issues related to competition and initially to draft all the implementation guidelines for the Competition Law,⁵⁵ consumer protection, and trade remedy measures. This is a somewhat strange development in the competition regime of Vietnam since in most other countries the competition authority is usually set up to implement the law after the law on competition has been adopted. In the case of Vietnam, as mentioned above, even when the competition law was still being drafted and there was no legal framework for the establishment of a competition authority, the authority was already there. This reverse development course of the Vietnam competition regime had its origin within the content of the Competition Law itself, although only a draft at the time, and the specific political economy of Vietnam.

The initial drafts of the Competition Law provided for the establishment of the Competition Administration Agency within the Ministry of Trade. However, when put forward for national consultation and comments, this idea faced great opposition from all other government agencies, research circles, and the wider public, similar to when the draft law was put forward for debates in the National Assembly. The agency's placement within the Ministry of Trade was perceived to handicap the independence of the future agency, thus affecting this agency's specialization, fairness, transparency, and accountability; which had been considered as the main causes leading to the ineffectiveness of competition law enforcement in several countries. It was also thought that locating the future competition agency within the Ministry of Trade would mean subjugating this agency's power in disciplining the conducts of giant SOEs in Vietnam, which are owned by different line ministries and have powerful relationships within the government. Furthermore, the Ministry of Trade itself at that time, held the ownership and control of several SOEs, leading to public skepticism that they would be "at the same time both the players on the ground and the referee" if they were to be given the power over competition issues.⁵⁶ Favoritism was thought to be inevitable in such a scenario.

The Ministry of Trade and their advocates convinced the National

⁵⁵ Three implementation regulations have subsequently been passed, namely (i) the Decree making detailed provisions for implementation of the Competition Law, (ii) the Decree on Administrative Offences in the Field of Competition, and (iii) the Decree on Illegal Multi-level Marketing Schemes. A Decree on the Organization of the Competition Administration Agency and the Competition Council is still pending, and thereupon pending the official decree of the legal status of the Competition Administration Department mentioned above, as well as the establishment of the Competition Council.

⁵⁶ See Thanh Nian, *Competition Regulation: Not to be at the Same Time the Players on the Ground and the Referee* (2004), available at <http://www3.thanhvien.com.vn/xahoi/2005/4/4/65444.tno>.

Assembly that the proposal was meant to be in line with the ongoing administrative reforms in Vietnam. They argued that: (1) the creation of another ministerial-level state agency was undesirably cumbersome and wasteful; (2) that the Ministry was the only agency at that time that had some expertise on competition issues, being the lead agency of the law drafting committee; and (3) that many other countries were effective in their placement of their competition agency within a Ministry. The opponents of such a placement eventually lost the battle. However, they were certain that the early establishment of the Competition Administration Department within the Trade Ministry had been a Machiavellian step, which contributed significantly to the success of the Ministry in getting control over competition issues into their own hands and not into the hands of any other new state agencies.

The triumph of the Ministry of Trade over the Competition Law in Vietnam also has another political significance. As mentioned earlier, the dilemma of the reform process in Vietnam was to balance the development of a market economy with the rigidities of communist ideology and State control. The adoption of the Competition Law is expected to provide an important tool to ensure a level playing field for all enterprises to compete fairly, to avoid concentration of power, oligarchy, monopoly, corruption and other distortions that may arise in a market economy. However, the government in Vietnam still wants to retain control over the economy at the end of the day, not just as a facilitator who creates the ground but as a player as well. This essentially means restraining the power of the competition authorities within the realm of administrative fiat. Subjugating control over competition issues in the Trade Ministry would very conveniently serve this end.

Despite the expertise of the Ministry of Trade and its enthusiasm to take over the implementation task for the Competition Law, the Government Decree on the Organization of the Competition Administration Agency and the Competition Council is not yet issued and therefore no enforcement activities have been undertaken so far.⁵⁷ The Competition Administration Department still restricts itself mainly to advocacy, networking, training, and information dissemination. The developments of the market, in the meantime, do not wait for anybody, and the complexity of enterprises' competitive behaviors in Vietnam has greatly matured. The incidences of anti-competitive practices and unfair competition practices are increasing and being reported over and over again, discrediting the regulatory role of the government against market participants, affecting enterprise development and economic efficiency, and ultimately, harming the consumer's welfare and interest.

⁵⁷ *Id.*

V. CHALLENGES TO COMPETITION LAW ENFORCEMENT IN VIETNAM AND SOME RECOMMENDATIONS

Implementation of a competition law, however, is not a problem pertaining only to Vietnam. Enforcement records have been generally low in most developing countries for the same set of reasons, such as political economy constraints, corruption, skepticism, apathy, business opposition, and policy inertia.⁵⁸

De jure ministerial override of the competition authority's power exists in many countries' regimes, such as in Kenya, Pakistan, and Argentina.⁵⁹ These can be absolute or partial. For example, under German law, although rarely used, the Minister can veto the competition authority's decisions in merger cases, except in cases where national interests are involved (such as the international competitiveness of an important industry, or other public interest issues).⁶⁰ In developing countries like Vietnam, even if the competition law does not subjugate the power of the competition authority to that of a particular ministry, ministers can exercise *de facto* powers to influence the competition authority's decisions.⁶¹ In the case of Vietnam, the traditionally heavy state intervention into the operations of the market, and the insistence of the ruling party on maintaining communist ideological control over the economy, might exacerbate the problem.

SOEs' enterprises may prove difficult to discipline, since they can rely on the patronage of the line ministries,⁶² whereas provincial authorities have always shown strong inclination to favor industries and enterprises based in their jurisdiction, which may amount to local monopolies beyond the reach of the competition agencies. All of these factors may defeat the ultimate objective of the law or the case decisions. Independence of the competition authorities is crucial to the success of competition law enforcement. This may not happen immediately, due to reasons we have repeatedly touched upon earlier in this paper, but may develop gradually, such as in the case of other countries. Institutional building, however, should be stressed starting at the foundation stage, beginning with the most fundamental elements,

⁵⁸ See, e.g., Josef Drexler, *International Competition Law—A Missing Link between TRIPS and Transfer of Technology*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (2003), available at http://www.wipo.org/documents/en/meetings/2003/wipo_wto/presentations/doc/drexler.doc.

⁵⁹ CUTS International, *supra* note 5.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The concept of 'line ministries' is often used in command-and-control, developing or transition economies to refer to ministries which are assigned to take charge of all issues related to a particular sector or industry within an economy, from industrial policy to regulatory functions, and sometimes planning and development of the incumbent SOEs or monopolies, etc. in that industry/sector.

such as manpower and budget, and ranging to development of the international organizational structure and enhancing the relationship with other relevant state agencies, as well as the judiciary.

The approach of graduality also applies to the implementation process of the law itself, which has been the experience of several other countries. The Fair Trade Commission of Korea, the first new industrialized economy to have successfully disciplined giant transnational corporations ("TNCs") and international hard-core cartels, initially dedicated several of its founding years to advocacy and played the role of awareness-raiser and advisor to the private sector, before the Korean competition regime gained its current power and credibility. Many other countries, such as the United Kingdom, India and Taiwan, have also used the same method, based on a simple idea inspired by R. Shyam Khemani and Mark A. Dutz⁶³ and Gesner Oliveira.⁶⁴ Given the low awareness and the remaining skepticism of society on the relevance of competition law in Vietnam, as well as its limited resources, the competition authorities should start by familiarizing the public with the law, and focusing on the actions that would most likely succeed and will benefit the market, as well as other confidence-building and support-mobilizing measures. Gradually, they can take up more complicated cases, or target more powerful adversaries, when they are more mature in terms of capacity and have more resources and public support. Capacity building and competition advocacy should also be focused towards the consumer movement, the business community, or sectoral regulators to the best extent possible in the process. Rigorous competition enforcement and success only come at a later phase.

Last but not least, as Vietnam undergoes a deeper level of reform and more fully integrates into the region and the world economy, cross-border issues in competition law will become inevitable. International cooperation on competition law enforcement will become more important. With the opening up and integration of the Vietnamese economy, consumers may easily be harmed by the anti-competitive behaviors of a company doing business outside the country's jurisdiction. For companies, this means they will have to compete in a wider market and will be faced with more rigorous competitive pressures. As a result, even young competition authorities like those of Vietnam may have to deal with cases of international cartels or large-scale, cross-border mergers. International cooperation with other competition authorities is inevitably required to effectively investigate conduct that restrains competition regionally or

⁶³ R. Shyam Khemani & Mark A. Dutz, *The Instruments of Competition Policy and their Relevance for Economic Development*, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 16 (Claudio R. Frischtak ed., 1995).

⁶⁴ Gesner Oliveira, *International Cooperation and Competition Policy*, in CUTS, PUTTING OUR FEARS ON THE TABLE (2003).

globally. Technical and legal assistance, and the exchange of information with more advanced competition authorities are also essential in this regard.

VI. CONCLUSION

Many countries have adopted competition laws but have never quite managed to successfully enforce them: Thailand enacted its first law in 1979, which was never implemented and the enforcement records of the new law promulgated in 1999 were extremely poor; Egypt took almost a decade to enact a competition law since the first draft in 1995,⁶⁵ and even after adoption, there was no certainty that the law could be implemented effectively. More or less similar situations can be found in countries like Indonesia, Pakistan, Sri Lanka, and Malawi.⁶⁶ However, this is not to say that the challenges for Vietnam should be insurmountable. In all countries with long traditions in implementing competition laws, the process has been very dynamic. Laws have been substantially amended or scrapped and new ones have been adopted to meet the current needs and the new political economy of the country. Thus, a long-term, dynamic vision should be adopted for Vietnam vis-à-vis the implementation of this new Competition Law.

As stated by the economic Nobel laureate Joseph Stiglitz, “strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.”⁶⁷ The development of competition law in Vietnam should not be a goal in itself, the law should not become just a decorative tool, and its enforcement should aim to bring about increased economic efficiency and improved public welfare. From this perspective, competition law enforcement is in line with Vietnam’s ideological aspiration towards “an affluent people, a strong State, and a fair and civilized society,”⁶⁸ and its significance should not be categorized as a capitalistic Trojan horse.

⁶⁵ Law on the Protection of Competition and the Prohibition of Monopolistic Practices, No. 3/2005 (Egypt).

⁶⁶ CUTS International, *supra* note 5.

⁶⁷ Joseph E. Stiglitz, *Competing Over Competition Policy* (Aug. 2001), <http://www.project-syndicate.org/commentary/stiglitz5> (italics added).

⁶⁸ VIETNAM CONSTITUTION, art. 3.

