

# Northwestern Journal of International Law & Business

---

Volume 19

Issue 2 *Winter*

---

Winter 1999

## Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and Gas Industry under the 1995 Land Law

Magali Matarazzi

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [International Law Commons](#)

---

### Recommended Citation

Magali Matarazzi, Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and Gas Industry under the 1995 Land Law, 19 Nw. J. Int'l L. & Bus. 364 (1998-1999)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

## COMMENT

# Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and Gas Industry under the 1995 Land Law

*Magali Matarazzi\**

### I. INTRODUCTION

Foreign investment in Vietnam by U.S. investors has been controversial since the termination of the Vietnam War. Originally, there were political considerations. The idea of conducting business with a socialist government, that was an enemy in the recent past, was antithetical to the U.S. Congress and population.<sup>1</sup> The trade embargo imposed on Vietnam was a reflection of this sentiment. In the meantime other nations were willing to negotiate with the new government because business considerations out-weighed political ideals.<sup>2</sup> Vietnam proved to be a wealth of natural resources, most notably oil and gas reserves. There was also speculation that Vietnam's economy would grow in the same manner as its regional neighbors. Political pressure not to conduct business with Vietnam soon changed to political pressure to allow business with Vietnam. Now the

---

\* J.D. 1999, Northwestern University School of Law.

<sup>1</sup> Vietnam failed to meet the terms of the agreement ending U.S. involvement in the Vietnam War, including accounting for MIAs. 133 CONG. REC. S10727-04 (daily ed. July 28, 1987) (statement of Sen. McCain).

<sup>2</sup> In meetings with Ambassadors in Vietnam, U.S. officials asked their Japanese, French, Belgian, Swedish, British, German and Australian counterparts if they should lift the embargo. The foreign officials responded that if they were to answer in their own interests the answer would be no. However, if they were to answer in the United States' self-interest the answer would be yes. 139 CONG. REC. S8444-01 (daily ed. July 1, 1993) (statement of Sen. McCain).

controversy is whether the Vietnamese legal framework can support a free market economy and whether Vietnam will ride out the financial crisis of the region.

Section II of this comment discusses the evolution of Vietnam's market economy, the current state of foreign direct investment ("FDI") and the reasons for investing in Vietnam. Central to this discussion is the oil and gas industry's role in the successful development of a market economy. This industry cannot continue to grow without outside financing or FDI. The history of FDI in Vietnam is directly related to the adoption of Vietnam's foreign investment law ("FIL") in 1987. Since its inception the FIL has been successful in attracting investors, but legal and financial risks have made investing daunting to all but a select group of investors. The persistence of these investors is based primarily on indicators of Vietnam's potential for growth and profits.

Section III discusses legal considerations affecting business in the oil and gas industry. The current controversy over the Vietnamese legal system is based on the government's practice of intervention and the ambiguous nature of the laws.

Corporations conduct a control versus risk analysis to decide whether to invest in a market. They evaluate whether relinquishing direct control of an operation to government actors will increase the risk of doing business in a foreign market. Two major factors in this analysis are the investment form and the government incentives available under that form. The laws associated with an investment form dictate just how much control investors will have over their operations. The incentives provided under the same laws are factors that mitigate the risk associated with operating under a particular form. Government permission to use land is a typical example of this kind of incentive and the selection of an investment form is often based upon its receipt. A desirable investment form reduces the financial risk associated with investing through incentives and leaves management control with the investor.

Section IV examines the Land Law and its effects on the oil and gas industry. The focus is on the changes to Vietnam's Land Law. The 1995 amendment to the Law repealed the land use right as an incentive to investment. This alters control versus risk factors for choosing an investment vehicle. The Build-Operate-Transfer ("BOT")<sup>3</sup> is the least risk prone investment vehicle for FDI in the oil and gas industry in Vietnam. The BOT offers the greatest investor control of management and thus a higher success rate and greater profits for the project over the long term.

---

<sup>3</sup> A Build-Operate-Transfer is a contractual arrangement between the government and a private investor where the foreign investor builds an industrial project and operates it for a set term then transfers it to the government at the expiration of the term. Wunker, *infra* note 58, at 367-8.

## II. BACKGROUND

### A. History of Vietnam: Evolving into a Market Economy

After the retreat of France and the United States from South Vietnam, a united, socialist Vietnam became a Soviet satellite that relied heavily on the Soviet government for financial support.<sup>4</sup> In the planned economy that ensued, the state owned most natural resources, planned production of those resources, and owned most industrial and agricultural enterprises.<sup>5</sup> The oil and gas industry was left idle because the Soviet Union imported only the products of Vietnam's agrarian economy while exporting machinery and equipment.<sup>6</sup> The height of cooperation between the Vietnamese and Soviet governments lead to a series of five year agreements starting in 1981 to develop Vietnam's own resources and meet payment schedules for Soviet aid.<sup>7</sup> The Vietsovpetro, a joint venture in oil exploration and refining from 1981 to 1991, was a result of this initiative and the first effort at developing Vietnam's oil and gas industry.<sup>8</sup>

In 1986 Gorbachev's declared his intention to reform the Soviet Union's government and economy under perestroika.<sup>9</sup> There were no immediate negative consequences to Vietnam, in fact the two nations agreed to increase foreign aid.<sup>10</sup> However, in a continuing pattern of retreat, the Soviet Union's enthusiasm for support dwindled with greater concerns at home and Vietnamese inability to meet the terms of the aid agreements.<sup>11</sup> Without the financial and technological support of its benefactor, Vietnam was unable to expand its economy or its oil and gas industry.

---

<sup>4</sup> Throughout most of the 1980s, Vietnam imported almost all of its oil, cotton, fertilizer, iron and steel requirements from the Soviet Union. RAMESH THAKUR & CARLYLE A. THAYER, *SOVIET RELATIONS WITH INDIA AND VIETNAM* 61 (1992). Sixty percent of Vietnamese trade was with the Soviet Union and the military was regularly deployed to the region. *Id.*

<sup>5</sup> GARETH PORTER, *VIETNAM: POLITICS OF BUREAUCRATIC SOCIALISM* 43-45 (1993).

<sup>6</sup> *Id.* at 184-85.

<sup>7</sup> *Id.* at 195-96.

<sup>8</sup> Michael J. Scown, *Investing in Vietnam: Oil and Gas Exploration*, E. ASIAN EXEC. REP., Apr. 15, 1992, at 23 [hereinafter Scown 1992]; see also THAKUR & THAYER, *supra* note 4, at 196.

<sup>9</sup> THAKUR & THAYER, *supra* note 4, at 77.

<sup>10</sup> Vietnam and the Soviet Union agreed to the fourth of a series of five-year plans that doubled Soviet aid to Vietnam and postponed payment of outstanding debt. *Id.* at 197.

<sup>11</sup> *Id.* at 78, 202. See also STANLEY KARNOW, *VIETNAM: A HISTORY* 33 (1983). The Vietnamese were not solely at fault for the deterioration of Soviet support. In comparison to Vietnam's prior U.S. benefactors, the Russians appeared stingy with aid. Russians were called "Americans without dollars" and a joke common at the time has the Vietnamese asking Moscow for help to which Moscow cables: "Tighten your belts." Vietnam replies: "Send belts." *Id.*

Fearing the collapse of its economy and the discontent of its population, the Vietnamese government opened its market to other forms of investment in 1987. On December 29, 1987 the National Assembly of Vietnam adopted its foreign investment law ("FIL").<sup>12</sup> Article 1 of the FIL states: "[t]he State shall guarantee the ownership of the invested capital and other rights of the foreign investors, and extend to the latter favorable conditions and easy formalities."<sup>13</sup> This statement opened the way for private ownership of property and promised government help in development of private industries.

These economic changes were not followed by equivalent changes in government philosophy. The same Article 1 of the FIL reaffirmed Vietnam's status as a socialist government in all other respects by stating: "[t]he State of the Socialist Republic of Vietnam welcomes and encourages foreign organizations and private persons to invest capital and technology in Vietnam on the basis of respect for the independence and sovereignty of Vietnam, observance of the laws of Vietnam, equality and mutual benefit."<sup>14</sup>

With Soviet aid no longer available Vietnam needed a new source of investment capital. Vietnam could either rely on its own resources or try to entice outside sources of funding. In order to reform independent of other sources, Vietnam would be required to use its domestic savings to fund economic growth.<sup>15</sup> However, it was considered "inappropriate to commit the public treasury to the high degree of commercial risk inherent in converting resources into a commodity."<sup>16</sup> Vietnam's domestic savings at the time of transition amounted to two percent of its gross domestic product.<sup>17</sup> Under Soviet influence, foreign aid amounted to nine percent of its gross domestic product.<sup>18</sup> Not only would Vietnam put all of its GDP at risk but it would have to make up a deficiency through an outside source. Because Vietnam did not have a public share-holding system,<sup>19</sup> capital could not be generated domestically.

Commercial lending would be the cheapest form of outside financing because it is senior to any other repayment obligation.<sup>20</sup> Vietnam sought fi-

---

<sup>12</sup> Laws on Foreign Investment, Dec. 29, 1987, art. 1, 30 ILM 930, 932 (1991) (amended June 30, 1990) [hereinafter Law on Foreign Investment].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Vietnam's Transition to a Market Economy; Growth Prospects, Financing Requirements and a Reform Agenda*, E. ASIAN EXEC. REP., Jan. 15, 1994, at 8 [hereinafter *Growth Prospects*].

<sup>16</sup> Stickley, *infra* note 46, at 97.

<sup>17</sup> *Growth Prospects*, *supra* note 15, at 8.

<sup>18</sup> *Id.*

<sup>19</sup> William M. Stelwagon, *Financing Private Energy Projects in the Third World*, 37 CATH. LAW. 45, 63-64 (1996) [hereinafter Stelwagon].

<sup>20</sup> *Id.*

nancing from non-governmental agencies when western governments failed to offer aid.<sup>21</sup> This failure was due to Vietnam's invasion of Cambodia and the U.S.'s embargo on Vietnamese trade. Loans from multinational organizations like the IMF proved unavailable because of arrears on previous payments and organizations like the World Bank refused aid because they were aligned with U.S. restrictions.<sup>22</sup>

Vietnam was subsequently forced to rely on foreign direct investment. The most likely models for economic growth in the late 1980s and early 1990s were the other transition economies in the region. Other Asian countries including Singapore, Indonesia, Thailand, Malaysia, Taiwan, Hong Kong and South Korea were examples of successful transition economies<sup>23</sup> after colonial and communist powers extricated themselves from the region. These countries relied on private foreign investors and technology to access their resources and build their consumer, export and industrial capabilities.<sup>24</sup> In addition to providing the model for economic growth, these countries were a source of political pressure on Vietnam to liberalize its economy. The fast-paced growth of their economies, the rise in the standard of living and the exuberance of foreign investors indicated that Vietnam's economic philosophy was ill-equipped to deal with market globalization.<sup>25</sup> Vietnam's planned agrarian economy was strikingly antiquated in comparison to the successful market economies surrounding it.<sup>26</sup>

In 1986, Vietnam adopted a program entitled "doi moi" or renovation to bring its economy and industry into the modern era.<sup>27</sup> Doi moi was a process of legal reform and economic planning that sought to create a "market economy with a socialist direction."<sup>28</sup> The socialist influence on the FIL, a major part of doi moi, focused on restructuring the economy gradually, with privatization as a future goal not an immediate change.<sup>29</sup> The first step in the gradual restructuring was developing Vietnam's export capabilities with the most likely product being its natural resources.

---

<sup>21</sup> Vietnam's invasion of Cambodia instigated the trade and foreign aid boycott which left no other source of aid except for the Soviet Union. THAKUR & THAYER, *supra* note 4, at 168.

<sup>22</sup> MURRAY HEIBERT, CHASING THE TIGERS: A PORTRAIT OF THE NEW VIETNAM 23 (1996) [hereinafter HEIBERT].

<sup>23</sup> *Id.* at 26.

<sup>24</sup> JAMES W. MORLEY & MASASHI NISHIHARA, VIETNAM JOINS THE WORLD 160-61 (1997).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> WILLIAM S. TURLEY & MARK SELDEN, REINVENTING VIETNAMESE SOCIALISM: DOI MOI IN COMPARATIVE PERSPECTIVE 1-2 (1993).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.* at 2.

## B. The Oil and Gas Industry's Role in the Vietnamese Market Economy

The oil and gas industry is Vietnam's largest source of foreign exchange revenue.<sup>30</sup> In 1996 alone, oil investment by foreign parties brought in \$1 billion worth of revenues<sup>31</sup> out of the \$22 billion that had been approved for investment in Vietnam since 1988.<sup>32</sup> In 1998, it was estimated that Vietnam had between four and six billion barrels of oil reserves and 3.6 trillion cubic feet of gas reserves.<sup>33</sup> Because of the earnings potential of oil products in Vietnam, the oil and gas industry was one of the first privatized industries.<sup>34</sup> Private investors were attracted to the oil and gas industry because the basic infrastructure had already been built.<sup>35</sup> Corporations from the United States and other nations were actively exploring for oil in Vietnam prior to the embargo imposed in 1975. Mobil was the first to discover an oil field, but when North Vietnam took control of South Vietnam it was forced to leave the country before development could begin.<sup>36</sup> The Vietsovpetro utilized the findings of corporations like Mobil to initiate production. The joint venture in turn built plants, used Soviet technology, and trained domestic personnel. Vietsovpetro in 1993 produced 125,000 to 130,000 barrels a day and provided one-third of Vietnam's hard currency.<sup>37</sup> Now that Vietnam has decided to liberalize its economy, the oil and gas industry appears to be readily transformable into an even greater profit-making enterprise.

The oil and gas industry is a building block component of an industrialized society.<sup>38</sup> In its transition from an agrarian economy, Vietnam would rely on oil and gas to provide needed energy for industrial production and urban development.<sup>39</sup> Vietnam's major cities, Ho Chi Minh City and Hanoi are the centers of trade and commerce.<sup>40</sup> Ho Chi Minh City is expected to

---

<sup>30</sup> *Vietnam Economy*, INTERNATIONAL COUNTRY RISK GUIDE: ASIA & THE PACIFIC, (Political Risk Services), Jan. 1, 1997, at 3 [hereinafter POLITICAL RISK SERVICES].

<sup>31</sup> *Id.*

<sup>32</sup> *Is Vietnam Worth It?*, BUS. VIETNAM, Aug. 7, 1997 [hereinafter BUS. VIETNAM].

<sup>33</sup> Allan Marks, *Not Yet*, INFRASTRUCTURE FINANCE, Apr. 1997, at 2.

<sup>34</sup> By 1993, 30% of the approved foreign investment projects in Vietnam were in the oil and gas sector. *Vietnam's Transition to a Market Economy: Reform Priorities—Foreign Direct Investment*, E. ASIAN EXEC. REP., Dec. 15, 1993, at 10.

<sup>35</sup> JOHN R. DODSWORTH ET AL., VIETNAM: TRANSITION TO A MARKET ECONOMY 1 (IMF Occasional Paper 135, Mar. 1996) [hereinafter DODSWORTH].

<sup>36</sup> Allanna Sullivan, *Barreling Back: Western Oil Giants Return to Countries That Jilted Them*, PITTS. POST-GAZ., Mar. 12, 1995, at E2.

<sup>37</sup> Agis Salpukas, *Mobil Wins Right to Drill for Oil Off Vietnam*, N.Y. TIMES, Dec. 21, 1993, at D5.

<sup>38</sup> Bill Stormont, *Legal Development in Vietnam*, University Of British Columbia Faculty Of Law Papers, Apr. 11, 1995, at 1.

<sup>39</sup> See DODSWORTH, *supra* note 35, at 3.

<sup>40</sup> HEIBERT, *supra* note 22, at 131; DODSWORTH, *supra* note 35, at 16.

double in size by the year 2000,<sup>41</sup> making it the largest Vietnamese consumer market in tourism, hotels, restaurants, construction and telecommunications.<sup>42</sup> Large urban centers have large energy requirements and stimulate the need for development in other areas of the economy such as mining and manufacturing; oil and gas exploration; and power generation.<sup>43</sup> Another growing need is in transportation in and around Vietnam's urban areas. This demand stimulates auto production and road and highway projects in Vietnam. Currently, only ten percent of Vietnam's 87,000 kilometers of roads are paved because of a shortage of an oil by-product used in paving.<sup>44</sup> To meet industrial demand, oil and gas production would employ large portions of the population. Increased employment, in turn, would result in greater demand for consumer goods as incomes increase. These phenomena are associated with building an economy on industrial production and have proven successful in attracting foreign capital and technology to developing countries.<sup>45</sup>

### C. FDI is Necessary to "Fuel" the Oil and Gas Industry and the Economy

Vietnam will be unable to build its oil and gas industry without foreign direct investment because it does not have the financial and technological capital to exploit its own resources. As a result the industry is afflicted by 1) poor performance of nationalized projects; 2) excessive government intervention; 3) inflation and currency devaluation 4) producer and labor stand-offs; 5) expanding national debt<sup>46</sup> with interest payments reaching \$200-\$300 million;<sup>47</sup> and 6) the lack of competitiveness of publicly owned companies.<sup>48</sup> The Vietnamese Government recognized the importance of development in this type of industry in Article 3 of the FIL:

[t]he Vietnamese State encourages foreign organizations or private persons to invest in the following areas: . . . [h]igh-technology industries using skilled labour; in-depth investment for exploitation and ex-

---

<sup>41</sup> Marks, *supra* note 33, at 2.

<sup>42</sup> *Vietnam's Transition to the Market*, E. ASIAN EXEC. REP., Aug. 15, 1997, at 17; HEIBERT, *supra* note 22, at 116-17.

<sup>43</sup> *Vietnam's Transition to the Market*, E. ASIAN EXEC. REP., Aug. 15, 1997, at 17.

<sup>44</sup> Terry Knott, *Vietnam Ventures - Building an Oil and Gas Industry*, PETROLEUM REVIEW, May 1995, at 224.

<sup>45</sup> Pham van Thuyet, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Vietnam*, 27 LAW & POL'Y INT'L BUS. 541, 546 (1996)[hereinafter Thuyet].

<sup>46</sup> Dennis C. Stickley, *New Forces in International Energy Law: A Discussion of Political, Economic, and Environmental Forces within the Current International Energy Market*, 1 TULSA J. COMP. & INT'L L. 95, 96 (1993).

<sup>47</sup> *Vietnam's Transition to a Market Economy: Growth Prospects, Financing Requirements and a Reform Agenda*, E. ASIAN EXEC. REP., Jan 15, 1994, at 12.

<sup>48</sup> Stickley, *supra* note 46, at 96.



haustive utilization of potential resources and for raising the output capacities of the existing economic establishments.<sup>49</sup>

Because of these conditions it would be fiscally dangerous "to commit the limited domestic government savings to the high degree of commercial risk inherent in resource production."<sup>50</sup> In addition there is very little hard-currency in Vietnam making foreign financing a requirement for all project development.<sup>51</sup> FDI eliminates the risk associated with investing Vietnam's domestic savings. The most readily available source of financing, in the quantity needed, is private investment. Private foreign investors, namely corporations looking for new markets, bring hard currency into the economy in addition to technology and training. New technology also enhances cost efficiency, thereby increasing revenues by lower production costs. Vietnam has been unable to capitalize its natural resources because the pre-existing industrial developments were located in the south, while the majority of the country's oil and gas reserves were located in the north.<sup>52</sup>

#### D. History of FDI in Vietnam

A fundamental principle of a market economy is the private ownership and the free transferability of assets. In contrast, a fundamental principle of socialist regime is the public ownership and retention of all natural resources. To resolve this conflict of ideals, Vietnam adopted its Foreign Investment Law in 1987. This law legalizes the private ownership of property in Vietnam by foreign investors.<sup>53</sup> Thus, foreign investors are now able to enter the Vietnamese market and retain the profits of their enterprise.<sup>54</sup>

However, because the FIL is the creation of a doctrinally socialist government, the law stipulates that the government retains the role of active planner and regulator of the economy and industry through application and screening procedures and monitoring.<sup>55</sup> In this capacity, the government dictates acceptable types of investment and the sectors to which they can be applied.<sup>56</sup> Specifically, the FIL of 1987 and its 1990 and 1992 amendments

---

<sup>49</sup> Law on Foreign Investment, art. 3, *supra* note 12, at 932.

<sup>50</sup> *Id.*

<sup>51</sup> *Doing Business in Vietnam: Best Prospects, Major Projects*, E. ASIAN EXEC. REP., Nov. 15, 1994, at 6.

<sup>52</sup> Marks, *supra* note 33, at 51-52.

<sup>53</sup> Law on Foreign Investment, art. 1, 3, 21, 22, *supra* note 12, at 932, 939.

<sup>54</sup> *Id.*

<sup>55</sup> Law on Foreign Investment, art. 36, *supra* note 12, at 938:

The State . . . is vested with the overall authority to solve matters related to the investment operation of foreign organizations and private persons in Vietnam. . . The State... shall have the following rights and responsibilities. 1. To assist . . . in the negotiation . . . of...contracts; 2. To consider and approve . . . contracts; 3. To decide and grant . . . preferences; 4. To monitor and supervise . . . contracts and . . . operation[s]; 5. To analyze the economic activities of the enterprises with foreign invested capital. *Id.*

<sup>56</sup> *Id.* at 933.

include provisions for labor regulation, foreign exchange control, accounting standards, land use regulations, royalties provisions, environmental protection, technology transfers, corporate registration, tax provisions, and arbitration guidelines.<sup>57</sup> Accordingly, the adoption of the FIL was the first step towards legal reform in Vietnam. In comparison to the foreign investment laws of the other Asian nations, the incentives offered by Vietnam make the law quite liberal.<sup>58</sup>

The goal of the law governing FDI is centered around two tenets: (1) maintaining control of planning and management; and (2) attracting capital.<sup>59</sup> The FIL explicitly states that high-tech industries, labor intensive production of natural resources, infrastructure building and foreign currency earning services like tourism are those in which foreign investment are encouraged.<sup>60</sup> These industries are targeted because they are compatible "with the social and economic objectives" of the state, and there are "benefits to be gained by [the] Vietnamese party and the State of Vietnam."<sup>61</sup> If the industry attracts technology and know-how, is located in an under-developed area, or is using the existing infrastructure, then it meets the planning objectives of the government.<sup>62</sup> Legal reform is of primary importance to investing corporations because it mitigates the risk of doing business within a developing country. Thus, although application of the law may create additional uncertainties, the FIL provides a good faith assurance by the Vietnamese government that it is committed to market liberalization.

Because of these assurances foreign investors reacted positively to FIL's implementation. When the Vietnamese government initially issued the FIL many regional actors were willing to enter the market immediately.<sup>63</sup> In 1997, Taiwan, Hong Kong, Singapore, South Korea and Japan were the five leading investors in Vietnam.<sup>64</sup> Financing by these countries is related to two factors: (1) labor costs are significantly lower in Vietnam, and (2) stabilization of countries within a region make the region as a whole more prosperous and secure.<sup>65</sup> These trading partners are likewise attractive to Vietnam because they do not link trade or foreign aid to human rights

---

<sup>57</sup> *Id.*

<sup>58</sup> Robert L. Wunker, *The Laws of Vietnam Affecting Foreign Investment*, 28 INT'L LAW 363-383, 363 (1994)[hereinafter Wunker]; DODSWORTH, *supra* note 35, at 16. The law is liberal due to the "tax incentives, import privileges, access to economic sectors, . . . admissible ownership forms . . . and unrestricted repatriation of capital and profits" by foreign investors. *Id.*

<sup>59</sup> Law on Foreign Investment, art. 1, *supra* note 12 at 932.

<sup>60</sup> *Id.*

<sup>61</sup> Decision No. 366-HDBT, art. 2, Nov. 11, 1991 [hereinafter Decision No. 366-HDBT].

<sup>62</sup> *Id.*

<sup>63</sup> The surrounding Asian countries saw Vietnam as a viable market to invest their own domestic savings. DODSWORTH, *supra* note 35, at 1.

<sup>64</sup> MORLEY & NISHIHARA, *supra* note 24, at 162.

<sup>65</sup> *Id.* at 163.

conditions and they do not seek to democratize Vietnam.<sup>66</sup> European investors entered cautiously, thus allowing them to observe the market environment and the application of the laws. Their reasons for entering the Vietnamese market were similar to those of the Asian investors.

U.S. investors on the other hand were unable to explore the possibility of investment in Vietnam because of political complications. Congressional continuation of the U.S. trade embargo hinged on Vietnam's recalcitrance in investigating the status of U.S. MIAs in the Vietnam War and the Vietnamese presence in Cambodia.<sup>67</sup> U.S. investors watched investment opportunities go to foreign competitors for seven years. It was due to pressure from corporate lobbies and the political recommendations of Senator Kerry of Massachusetts and Senator McCain of Arizona that led to the gradual easing of the embargo.<sup>68</sup> Ultimately, President Clinton lifted the embargo in February 1994.<sup>69</sup>

The statistics on FDI show that despite negative reports investment continues in Vietnam. Between 1988 and 1995 foreign investment in Vietnam increased from \$366 million to \$6 billion.<sup>70</sup> The size of investors has changed substantially as well. In the early stages, small and large investors attempted to enter the market for short-term profits. Small investors have since retreated from investing in Vietnam because short-term speculation is not feasible in a market where projects may be unprofitable for a number of years.<sup>71</sup> It is widely believed that long-term investment, though initially unprofitable, will be rewarded by large returns in the future.<sup>72</sup> The small temporary investor has been replaced by large concerns with long-term interests<sup>73</sup> in power generation, real estate development, auto production and the manufacture of consumer goods.

The primary factors that have lead to the retreat of the small investor include government intervention, a weak legal framework, financial/management risk and domestic corruption. The government has attempted to restrict investment to those areas where domestic operations have been unable to meet domestic needs. However, the Vietnamese gov-

---

<sup>66</sup> *Id.* at 164.

<sup>67</sup> 134 CONG. REC. S10962-04 (daily ed. Aug. 5, 1988) (statement of Sen. Pell).

<sup>68</sup> 139 CONG. REC. S8430 (daily ed. July 1, 1993) (statement of Sen. McCain).

<sup>69</sup> Edward A. Gargan, *Vietnam's Oil-Rich Dreams Go Largely Unfulfilled*, N.Y. TIMES, Aug. 19, 1995, at 32; *see also* 141 CONG. REC. S9723-03 (daily ed. July 11, 1995) (statement of Sen. McCain).

<sup>70</sup> 1989 - \$539 million, 1990 - \$596 million, 1991 - \$1.3 billion, 1992 - \$1.9 billion, 1993 - \$2.8 billion, 1994 - \$2.6 billion, 1995 - \$6 billion. Richard Halloran, *Vietnam Drives Off Foreign Money; Corruption, Shifting Rules Hurt Ventures*, WASH. TIMES, Nov. 8, 1996, at A16.

<sup>71</sup> Mathilde L. Genovese, *Succeeding in Vietnam's Emerging Market Economy*, E. ASIAN EXEC. REP., June 15, 1995, at 10.

<sup>72</sup> *Id.*

<sup>73</sup> BUS. VIETNAM, *supra* note 32.

ernment has protected any industry where there is a domestic operation by disallowing foreign competition -- for example, the retail sale of oil. Within the industries where foreign investment is allowed, the government also requires a minimum investment level to attract only those investors that will bring in the greatest amount of capital to Vietnam. For example, the required minimum for a production-sharing contract, known as a Business Cooperation Contract ("BCC"), is \$10 million.<sup>74</sup> Though minimum capital requirements allow an investor to conduct business, greater sums are required to retain incentives, without which conducting business would be too costly or too difficult. Government intervention results in a corporation being unable to control the management of its enterprise as it would in a free market economy.

In addition to reduced management control, corporations' legal rights are still unclear and the judicial system is untried. Under Vietnam's planned economy several laws have changed, upsetting the structure on which a corporation has come to depend. Contradictory interpretations of the government's laws are the result of: 1) regular amendments;<sup>75</sup> 2) laws that are implemented with a socialist bias though based on Western premises; and 3) rivalries between ministries.<sup>76</sup> An example of these three tensions is an amendment to the Land Law that retracted a grant of land use rights and replaced them with leases.<sup>77</sup> Vietnam has a very rudimentary concept of property and contract rights in which title and ownership are often contradictory.<sup>78</sup> This type of policy change is legal and probably not contestable in a court of law because the court would defer to government decisions.

This type of legal risk is compounded by financial risk. The Vietnamese currency is not convertible,<sup>79</sup> so loans to Vietnamese parties are based on other types of collateral, like land.<sup>80</sup> The retraction of the land grants had the effect of preventing the land from being used as collateral.<sup>81</sup> Without this collateral, financing is not feasible and already established loans are

---

<sup>74</sup> Michael J. Scown, *Investing in Vietnam: Oil and Gas Exploration*, E. ASIAN EXEC. REP., Apr. 15, 1997, at 27 [hereinafter Scown 1997].

<sup>75</sup> 1990 Amendment, 1992 Amendment, 1993 Decree 18-CP, 1997 Decree 12-CP all amended the original FIL.

<sup>76</sup> John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 335 (1994).

<sup>77</sup> Decree No. 85-CP, art. 29 & 33, Dec. 17, 1996.

<sup>78</sup> Thomas W. Waelde, *International Energy Investment*, 17 ENERGY L.J. 191, 197 (1996).

<sup>79</sup> *Doing Business in Vietnam: Best Projects, Major Projects*, E. ASIAN EXEC. REP., Nov. 15, 1994, at 6.

<sup>80</sup> Law on Foreign Investment, *supra* note 12, art. 7, at 932. "The Vietnamese Partner to a joint venture may make its legal capital contribution in: . . . d. Right to use of land, water surface, sea surface." *Id.*

<sup>81</sup> Thuyet, *supra* note 45, at 570.

being called. This in turn leads to reliance on the untried area of legal remedies. Because all land is owned by the state and private ownership of land is prohibited, loans based on land were made on non-recourse or limited recourse terms when only the revenues from the project were used to repay the obligation.<sup>82</sup> These types of loans are made traditionally on the expected revenues of the project and not on the creditworthiness of the borrower.<sup>83</sup>

Additional symptoms of government planning and intervention are bureaucracy and corruption. License applications and approval of foreign enterprises are subject to multiple levels of government agencies with conflicting powers.<sup>84</sup> The process is far from centralized and the oil and gas industry is particularly afflicted. Local officials are required to approve such issues as labor terms, land usage and land valuation.<sup>85</sup> In this capacity the local agency has the same veto power over a license application as would the national government. The Prime Minister has an overriding veto over all branches of government as well. To allow the approval process to complete itself can involve costly years of waiting for investors. Local officials have taken advantage of investor impatience by making approval contingent on bribes. The head of the American Chamber of Commerce in Ho Chi Minh City, Fred Burke, commented that "Vietnam grants too much discretion to low-level officials. When combined with low salaries, that fosters corruption."<sup>86</sup> Though bribery and corruption exist in most developing countries, these practices compound the other impediments to conducting business in Vietnam -- particularly for short-term investors.

Despite shortcomings Vietnam is making a concerted effort to retain FDI by U.S. investors. After the termination of the Vietsovpetro joint venture in 1991, Vietnamese officials stated that "they could get greater production using American technology as well as the technical data developed earlier" from the discoverer of the field.<sup>87</sup> In addition to having vital information, U.S. corporations can influence Congress on behalf of Vietnam. The needs of corporations were essential in lifting the embargo and can be equally influential in garnering most-favored-nation (MFN) status for Viet-

---

<sup>82</sup> Michael Ernst & Naja Ngoc-Nga Pham, *Financing Infrastructure in Developing Economies: Benefits, Risks and Sources*, E. ASIAN EXEC. REP., Mar. 15, 1994, at 9.

<sup>83</sup> Jay Facciolo, Book Review, 11 B.U. INT'L L.J. 165, 168 (1993).

<sup>84</sup> Decision No. 366-HDBT, *supra* note 61, art. 5 & 6. The oil and Gas industry is a Group A Project according to Article 4 paragraph 1(a) and paragraph 2(a). *Id.*

<sup>85</sup> Genovese, *supra* note 71, at 10.

<sup>86</sup> Mark Matthews, *The Euphoria was Not Realistic: U.S. Business Sours on Vietnam*, WILM. MORNING STAR, June 12, 1997, at 1A.

<sup>87</sup> Stuart Auerbach, *Mobil Eyes Drilling Deal in Vietnam*, WASH. POST, Dec. 18, 1990, at A13.

nam.<sup>88</sup> MFN status is granted by Congress, but can be withheld under the Jackson-Vanik Amendment.<sup>89</sup> President Clinton has already announced his intention to grant a waiver of the Jackson-Vanik Amendment to Vietnam.<sup>90</sup> This development has been welcomed by businesses because it allows them to apply for political risk insurance and it further opens the Vietnamese market to U.S. goods through MFN status.<sup>91</sup>

If Vietnam were to receive MFN status then U.S. corporations would receive indirect federal assistance equivalent to a government subsidy or loan insurance.<sup>92</sup> This type of assistance is already received by Asian and European competitors in Vietnam<sup>93</sup> which has required U.S. investors to come up with proportionately more capital than their competitors. Investment by U.S. corporations is also a vote of confidence in Vietnam's economic potential. According to the U.S. Charges d'Affaires in Hanoi, U.S. investment has reached \$1.2 billion which is the seventh largest investment contingency in Vietnam.<sup>94</sup> It is important to note that U.S. investor presence in Vietnam only began in 1994, whereas other investors have been there since Vietnam adopted the FIL in 1987.

#### E. Reasons For Investing in Vietnam

As of 1997, Taiwan had invested \$4 billion, and Japan, Singapore, Hong Kong and South Korea had invested between \$2.1 and \$2.4 billion in Vietnam.<sup>95</sup> Long-term investment is competitive among large investors because Vietnam has the potential for large profits in the future and the government is progressively reforming its legal system.

FDI in Vietnam is a feasible investment strategy not only for regional investors but also for U.S. investors that have the capital to endure prolonged development periods. If these investors were to wait until the Vietnamese legal and financial structures reformed then they would find

---

<sup>88</sup> Tran-Trong Ky, *A Would-be Tiger: Assessing Vietnam's Prospects for Gaining Most Favored Nation Status from the United States*, 38 WM. & MARY L. REV. 1583, 1624-25 (1997).

<sup>89</sup> Where free immigration is not allowed and human rights abuses are common, Congress is unwilling to give trade preference to a foreign country. 19 U.S.C. § 2432(a) (1994).

<sup>90</sup> John M. Broder, *Clinton Plans to Lower Another Barrier to Trade with Vietnam*, N.Y. TIMES, Dec. 19, 1997, at A8.

<sup>91</sup> *Id.*

<sup>92</sup> Seth Mydans, *Tiger Economy has Become a Fading Vision for Vietnam*, N.Y. TIMES, July 25, 1996, at D1.

<sup>93</sup> *Id.*

<sup>94</sup> Ngoc Huang, *U.S. Investment in Vietnam Still Low*, SAIGON TIMES DAILY, June 13, 1997.

<sup>95</sup> Halloran, *supra* note 70, at A16.

themselves closed out of a market by the investors that chose to endure the transition phase of the economy.<sup>96</sup>

Accordingly U.S. corporations have historically perceived that Vietnam has strong investment potential. The country's natural resources attracted investment prior to the institution of the trade embargo when the legal and financial stability of the country was even more precarious. At the time just prior to the U.S. embargo being lifted, U.S. corporations, including Mobil, were enthusiastic about returning to Vietnam because of its successes in drilling prior to 1975.<sup>97</sup>

In addition to corporate perceptions, expert analysis has established that Vietnam's oil sector has strong potential based on its reserves and its increasing exports.<sup>98</sup> Industrialization and urbanization will ensure a continuing and expanding market for oil and gas products. Under reform strategies akin to its neighbors, Vietnam should experience similar economic growth. A report issued by the IMF in September 1996 stated that Vietnam is the country expected to achieve the highest growth in the world with an industrial output of thirteen percent in the first six months of 1997.<sup>99</sup> Unlike the other Asian nations, Vietnam can use its neighbors as models to create policy and set up mechanisms to mitigate potential problems that they have already encountered.

In efforts to continue to entice investors, the Vietnamese government assures investors that it is committed to building a private economy.<sup>100</sup> A recent government resolution stated: "We will continue rearranging state enterprises and creating favourable conditions for them to renew technology, increase productivity, and improve quality, for better competition in local and overseas markets...The introduction of a share-holding system is to be experimented and carefully expanded."<sup>101</sup> The improvement of state enterprises will make Vietnamese government enterprises viable joint venture partners for foreign investors. Vietnam's joining the Association of South East Asian Nations (ASEAN) in 1995, the ASEAN Free Trade Association (AFTA),<sup>102</sup> and its demonstrated intent to join the World Trade Organization, have substantiated verbal commitments to reform.<sup>103</sup> These

---

<sup>96</sup> The Vietnamese have a saying, "[t]he buffalo that is too slow to reach the watering hole must drink from the muddy water." In the case of investment in Vietnam U.S. investors are the buffalo. JOSEPH P. QUINLAN, *VIETNAM: BUSINESS OPPORTUNITIES AND RISKS* 12 (1995).

<sup>97</sup> Agis SalPukas, *Mobil Wins Right to Drill for Oil off Vietnam*, N.Y. TIMES, Dec. 21, 1993, at D5.

<sup>98</sup> Scown 1992, *supra* note 8, at 24.

<sup>99</sup> POLITICAL RISK SERVICES, *supra* note 30, at 3.

<sup>100</sup> DODSWORTH, *supra* note 35, at 15.

<sup>101</sup> *Resolution of the 11th Session of the Ninth Nat'l Assembly*, BBC SUMMARY OF WORLD BROADCASTS, June 7, 1997 [hereinafter BBC SUMMARY].

<sup>102</sup> DODSWORTH, *supra* note 35, at 2.

<sup>103</sup> Mydans, *supra* note 92, at D1.

alignments have been hailed as an irreversible "lock" on economic liberalization.<sup>104</sup>

From a legal perspective legal reform in the creation and application of the foreign investment laws is a foreseeable event. The National Assembly in May 1997 recognized that the laws dealing with cooperative ventures, those most likely to affect oil and gas projects, lacked satisfactory implementation.<sup>105</sup> The National Assembly's statement reflected a commitment to correct the situation. The government is also debating the repeal of the February 1995 decree converting land use rights into leases.<sup>106</sup> If one assumes that "reform of any legal system occurs in cautious, incremental steps," then revision of the law indicates reform in the future.<sup>107</sup> To ensure that this occurs sooner than later, multilateral institutions like the World Bank have pre-conditioned loan assistance on reform.<sup>108</sup> On a firm belief that Vietnam will reform, the President of the World Bank, James Wolfensohn, committed \$1.3 billion to Vietnam in 1997 and \$1.5 billion over the next three years.<sup>109</sup> Legal reform is also evidenced by Vietnam's adoption of a Civil Code in 1996.<sup>110</sup>

From a business perspective, strategic planning can reduce the problems associated with a developing legal and economic infrastructure. According to Michael Scown, former president of the American Chamber of Commerce in Vietnam, for U.S. investors to capitalize now on future profitability they must "set more realistic goals, truly commit to projects and settle in for the long haul."<sup>111</sup> To achieve this end, oil and gas investors must investigate the legal forms of enterprise that can be used to enter the market and determine which is suitable to their risk and financial capacity. In addition, investors must decide whether it is beneficial for them to assume more financial risk in order to reduce management risk. The most profitable investment vehicle could be one that is initially subject to greater legal and financial risk, but less management risk because of efficient management and operations. Efficient management is linked to greater profits. Recent changes in the Land Law give investors an opportunity to assume more control now that an incentive attached to a government joint venture partner has been repealed. It is the author's contention that investors should

---

<sup>104</sup> *Id.*

<sup>105</sup> BBC SUMMARY, *supra* note 101.

<sup>106</sup> Clifford J. Schultz & William J. Andry IV, *Asia's Next Tiger?*, MARKETING MANAGEMENT, Winter 1997, at 28.

<sup>107</sup> Gillespie, *supra* note 76, at 335.

<sup>108</sup> Ngo Vinh Long, *A Letter From Vietnam*, CHALLENGE, Jan/Feb. 1997, at 87; DODSWORTH, *supra* note 35, at 15.

<sup>109</sup> DODSWORTH, *supra* note 35, at 15.

<sup>110</sup> Scown 1997, *supra* note 74, at 17.

<sup>111</sup> Shultz & Andrey, *supra* note 106, at 29.



operate as 100% foreign-owned entities under a build-operate-transfer contract because of greater management control.

### III. LEGAL CONSIDERATIONS AFFECTING BUSINESS

#### A. Government Administration

A part of the weakness of Vietnam's legal system has to do with who within the government has the power to make and implement the laws affecting FDI. The National Assembly decides Vietnam's plan for socio-economic development including issuing laws like the FIL which privatized parts of the economy.<sup>112</sup> The National Assembly also elects the Prime Minister who nominates ministers to head the various branches of government.<sup>113</sup> Collectively, the ministers are known as the Government,<sup>114</sup> and have the task of being the administrative arm of the National Assembly.<sup>115</sup> The Government also drafts laws that apply to all areas of society and the economy.<sup>116</sup> Individual ministries may also draft laws particular to the area they are administering or they institute decrees that put into effect regulations adopted by the Government.<sup>117</sup> The Prime Minister has veto power over the laws and regulations adopted by the ministries and other local government entities known as the People's Committees.<sup>118</sup> The laws often stipulate that some or all of national or local government agencies administer its terms on behalf of the National Assembly and the Prime Minister.<sup>119</sup> This system results in overlapping authority among the national and local levels of government.

When the National Assembly promulgated the Foreign Investment Law it created yet another separate entity, the State Committee for Cooperation and Investment ("SCCI"), to administer its provisions. The SCCI reviews applications and grants licenses in accordance with the FIL.<sup>120</sup> The SCCI can also propose new regulations, which if approved by the Prime

---

<sup>112</sup> *Vietnam Net: The National Assembly* (Mar. 5, 1998) <<http://home.vnn.vn/english/government/assembly.html>>.

<sup>113</sup> James Finch & Sesto Vecchi, *New Amendments, Regulations to Foreign Investment Law*, E. ASIAN EXEC. REP., Nov. 15, 1993, at 12.

<sup>114</sup> *Id.*

<sup>115</sup> *Vietnam Net: The Government* (Mar. 5, 1998) <<http://home.vnn.vn/english/government/government.html>> (visited on May 20, 1999) [hereinafter *The Government*].

<sup>116</sup> Scown 1992, *supra* note 8, at 9.

<sup>117</sup> *Id.*

<sup>118</sup> *The Government*, *supra* note 115.

<sup>119</sup> Decree No. 18/CP, art. 21-22, Feb. 13, 1995 [hereinafter Decree No. 18/CP]; Decree No. 87-CP, art. 18, Nov. 23, 1993; Regulation on Foreign Investment, art. 104-105, Apr. 16, 1993 [hereinafter Regulation on Foreign Investment].

<sup>120</sup> Finch & Vecchi, *supra* note 113, at 8.

Minister would be signed into law on behalf of the Government.<sup>121</sup> The SCCI and the ministries are supposed to confer on a project before submitting it to the Prime Minister for final approval, however, in case of disagreement, the SCCI sets up an independent Council of ministry officials to finally evaluate the project.<sup>122</sup>

The overlap in government authority is also apparent in the administration of Vietnam's Land Law. The Land Law, revised as of 1995, stipulates that several branches of government are responsible for setting rental rates, valuing land and granting land use rights. The Ministry of Finance issues a "rental frame" of standardized rental rates based on the type of land to be rented.<sup>123</sup> The People's Committees are then responsible for actually setting the rental rates based on the rental frame and have the discretion to readjust the rate by up to fifteen percent after five years.<sup>124</sup> The valuation of the land use right, in cases where land is granted rather than rented, is determined by the People's Committees based on the same rental frame used to set rental rates.<sup>125</sup> In the event that the rental rate or the valuation is not deemed suitable by the Ministry of Finance, the Prime Minister has the authority to override the rate set by the People's Committees.<sup>126</sup> The actual authority to allocate land, regardless of whether the land is leased or granted is delegated to the People's Committees, then reviewed by the Government and finally approved by the National Assembly.<sup>127</sup>

This deferral of decisions from a central body to local agencies induces bureaucratic delay and corruption. For example, the People's Committees of provinces and cities to make a recommend land rental rates to the SCCI they are generally over-valued.<sup>128</sup> The rent paid on the land is remitted to the State, a portion of which gets allocated to the local provinces in rental fees and taxes on the land. This provides an incentive to overvalue the land for the benefit of local treasuries.

Recent legislation has sought to centralize the decision making process to this type of government corruption. The 1996 revisions to the FIL stipulates that the Prime Minister, rather than the People's Committees, de-

---

<sup>121</sup> *Id.* at 12.

<sup>122</sup> Genovese, *supra* note 71, at 10.

<sup>123</sup> Decree No. 18/CP, *supra* note 119, art. 3. Land is classified generally by activity to take place on it. For example, land can be designated for professional activities, industrial activities, tourist activities, agricultural activities, urban use, suburban use and rural use. Decree No. 1417-TC/TCDN, Regulation on the Rent Prices for Land, art. 3, Dec. 28, 1994.

<sup>124</sup> Decree No. 18/CP, *supra* note 119, at art. 3.

<sup>125</sup> *Id.* at art. 10.

<sup>126</sup> *The Government*, *supra* note 115.

<sup>127</sup> Law on Land, art. 23, July 14, 1993 [hereinafter Law on Land]; Decree No.18/CP, *supra* note 119, at art. 4.

<sup>128</sup> Decree No. 11/CP, art. 5, 8, 16, July 15, 1991.

termine land rents for projects using fifty hectares of non-urban land<sup>129</sup> and for leases that are for fifty to seventy years.<sup>130</sup> The Government is attempting to has abolish old systems in favor of new ones that are more closely attached to the central Government so that the management of foreign investment is uniform<sup>131</sup>

The Government is still trying to work out an efficient structure for the administration of its laws. Recently, the Ministry of Planning and Investment was created to actively coordinate the activities of the other ministries and People's Committees.<sup>132</sup> The responsibilities of the SCCI were handed over to the Ministry of Finance and the SCCI was abolished. Reform is a welcome development to foreign investors that are often required to work closely with government entities. However, until the government is able to reduce bureaucracy and corruption working with a government agency is often a liability to a foreign investor.

### B. Control v. Risk

For a corporation to be able to mitigate risk in FDI it must recognize that there is a link between the risk in capital investment and control.<sup>133</sup> The greater the capital investment provided by a foreign investor to a project, the greater its incentive to control its operations. To prevent financial loss the party with the greatest management expertise is best equipped to make the most efficient management decisions. Inexperienced management threatens the success of the project. A corporation's lack of complete control over management is considered the aspect of government intervention that is most likely to contribute to failure.<sup>134</sup> Failure in combination with non-recourse indebtedness results in excessive risk to a foreign investor's creditors. Lending institutions are unlikely to provide financing if they fear mismanagement will lead to a bankrupt operation.

Vietnam's planned economy skews the balancing between risk and control that normally takes place in a free market economy. Despite its inexperience in free market enterprise, the government reserves the right to plan the development of the oil and gas industry because of its importance to Vietnam's industrialization.<sup>135</sup> However, they do not have the domestic savings or hard currency to carry the financial burden of development.<sup>136</sup>

---

<sup>129</sup> Thanh Nguyen, *New Foreign Investment Law Implementing Regulations*, 19 E. ASIAN EXEC. REP. 9, 12 (Mar. 15, 1997).

<sup>130</sup> Decree No. 18CP, *supra* note 119, art. 4. Industrial projects including the oil and gas industry fall into this category. *Id.*

<sup>131</sup> *Law on Foreign Investment*, E. ASIAN EXEC. REP., Mar. 1, 1997, at 27-28.

<sup>132</sup> *Id.* at 28.

<sup>133</sup> Waelde, *supra* note 78, at 200.

<sup>134</sup> Stelwagon, *supra* note 19, at 67.

<sup>135</sup> *Law on Petroleum*, art. 38, July 14, 1993 [hereinafter *Law on Petroleum*].

<sup>136</sup> Stickley, *supra* note 46, at 97; *Growth Prospects*, *supra* note 15, at 8.

Foreign investors are required to take on a disproportionately greater financial risk with respect to the control they have over management decisions.

Corporations will try to mitigate financial risk and retain control over management of the project. Of particular importance to investors is the type of entity with which they will try to enter the Vietnamese market. At present, it is possible to enter through a production sharing contract, a joint venture, as a subsidiary of a foreign corporation or through a build-operate-transfer contract. The amount of financial risk and degree of managerial control varies for each investment form. Though the state may possess ownership of oil extracted and have a contractual right to "overall management," management powers are still retained by the investor<sup>137</sup> to varying degrees based on form. Balancing not only affects the type of investment form a foreign investor would like to choose but also effects the type of form Vietnam will *allow* the investor to use.

In this manner the FIL directly influences control v. risk analysis. It dictates the financial and legal characteristics of each business form<sup>138</sup> and the investment forms the investor can use. In an analysis of FDI in Vietnam foreign investors maintain that financial risk is mitigated by foreign control over management. When deciding which form to use, foreign investors' financial considerations are the minimum capital requirements and the percentage of profits that they will receive based on their initial investment within a fixed duration. The greater the percentage profits they can retain and the longer they are allowed to operate the more willing foreign investors will be to assume a higher minimum capital requirement.

Important legal considerations to a foreign investor are the managerial characteristics of an investment form. These include the participation of a domestic entity and the degree of foreign management autonomy. In Vietnam's planned economy, a domestic partner to a project is subject to a government advisory committee and is often an agent or subdivision of the government.<sup>139</sup> The degree of involvement is particularly high in an industry as vital as the oil and gas industry is to Vietnam's development. The greater the control foreign investors have over operations the more likely they will be willing to bear the lack of efficiency associated with conducting business with a less skilled domestic partner.

### C. Investment Vehicles under the FIL

Currently, the FIL allows investment in Vietnam in most industries under a business cooperation contract, a joint venture, a 100% foreign owned

---

<sup>137</sup> *Growth Prospects*, *supra* note 15, at 8.

<sup>138</sup> Law on Foreign Investment, chapt. II. Nov. 12, 1996 [hereinafter Law on Foreign Investment 1996].

<sup>139</sup> Law on Petroleum, *supra* note 135, art. 14. Petrovietnam is the state corporation created to conduct operations in oil and gas and enter into contracts with other organizations in the oil and gas industry. *Id.*

entity and a build-operate-transfer contract. A business cooperation contract ("BCC") is also known as a production-sharing contract. It does not create a legal entity, only a contractual relationship.<sup>140</sup> Profits, management and technology transfers are negotiated by the government and explicitly stated in the contractual agreement. The government approves all contract terms.<sup>141</sup> The foreign participant is funded entirely by foreign capital.<sup>142</sup> The minimum capital requirement is \$10 million. The contract allows the foreign concern to share in the revenues, but it does not have equity ownership.<sup>143</sup> Profit-sharing terms are specified in the contract and are not a pro-rata percentage of the original investment. The project is designed to perform a certain task and end. It is not an ongoing relationship for a specific time period. The foreign entity has control over its part of the project because it has negotiated for specific contractual obligations. Because of the inflexibility and the limited duration of such an agreement this arrangement is not suitable for the long-term and complex arrangements necessary for the development of an oil and gas project.

A joint venture creates a legal entity distinct from either partner.<sup>144</sup> The domestic partner maybe a government entity or a private domestic enterprise. For the oil and gas industry the parties are the state agent, Petrovietnam and a foreign investor(s).<sup>145</sup> The joint venture, unlike the BCC, creates a new enterprise that has greater productive capacity, technology and market entry potential than either of the partners on their own.<sup>146</sup> The foreign partner has to contribute a minimum of thirty percent of the total capital.<sup>147</sup> Profits are apportioned according to the capital contribution of the partners for a duration not to exceed seventy years. State approval is required before production can begin.<sup>148</sup> In addition, a board of management runs the partnership, the general manager of which must be Vietnamese. The number of managers per party is pro-rated based on their respective capital contributions.<sup>149</sup> Boards must reach a unanimous decision on major issues even though local partners generally hold a minority of

---

<sup>140</sup> Wunker, *supra* note 58, at 365.

<sup>141</sup> Genovese, *supra* note 71, at 8.

<sup>142</sup> Tim Tien-Chun Chang, *Doing Business With Vietnam*, 40 PRAC. LAW. 33, 35 (1994).

<sup>143</sup> *Global Private Power*, 1995 B. C. & M. R. 5, (The Financial Times), Dec. 1, 1995, at 2 [hereinafter *Global Private Power*].

<sup>144</sup> Chang, *supra* note 142, at 35.

<sup>145</sup> Law on Petroleum, *supra* note 135, art. 14.

<sup>146</sup> Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1526 (1982).

<sup>147</sup> Law on Foreign Investment, *supra* note 12, arts. 4 & 6-13.

<sup>148</sup> Genovese, *supra* note 71, at 8.

<sup>149</sup> Thuyet, *supra* note 45, at 576.

the assets.<sup>150</sup> It is likely that the private requirements of the foreign investor would become secondary to the public policy goals of the state agency.<sup>151</sup>

A 100% foreign-owned entity ("FOE") is the subsidiary of a foreign enterprise. The subsidiary is subject to the same laws as a domestic corporation. The FOE is required to have at least thirty percent of its capital supplied by foreign investors, but allows up to one hundred percent of the capital to be supplied by a foreign investor.<sup>152</sup> This is a very liberal provision since most governments restrict foreign ownership to forty-nine percent and do not allow the repatriation of profits.<sup>153</sup> No government approval is required<sup>154</sup> except in certain strategic industries, including the oil and gas industry, where approval by the Prime Minister is needed.<sup>155</sup> The FOE is restricted to fields that the government would not deem vital to national interests since the FOE would have ownership of all resources and is allowed to repatriate its profits. The entity has a duration of twenty-five to fifty years, not exceeding seventy.<sup>156</sup>

A Build-Operate-Transfer ("BOT") arrangement is a contract between the government and a private investor, where the foreign investor builds an industrial project and operates it for a set duration then transfers it to the government.<sup>157</sup> The time allotment is of sufficient duration to pay for the cost of construction and make a reasonable profit.<sup>158</sup> At expiration, the project is transferred to the government without further compensation to the foreign investor.<sup>159</sup> A BOT can be entered into by either a joint venture or a foreign-owned entity. If an FOE participates in a BOT then it does not have a domestic partner to connect it to the government. However, the government supports a BOT more than an FOE in view of the fact that they will assume the enterprise at the end of its term.<sup>160</sup> Although the government is unwilling to give up perpetual rights to production of its natural resources, the government is willing to surrender rights of ownership for the fifty to

---

<sup>150</sup> BUS. VIETNAM, *supra* note 32; Law on Foreign Investment 1996, *supra* note 138, arts. 13-14.

<sup>151</sup> George T. Ellinidis, *Foreign Direct Investment in Developing and Newly Liberalized Nations*, 4 J. INT'L L. & PRAC. 299, 306 (1995).

<sup>152</sup> Wunker, *supra* note 58, at 367.

<sup>153</sup> *Id.*; DODSWORTH, *supra* note 35, at 16.

<sup>154</sup> Genovese, *supra* note 71, at 8.

<sup>155</sup> *Id.* at 9; DODSWORTH, *supra* note 35, at 16.

<sup>156</sup> Wunker, *supra* note 58, at 367.

<sup>157</sup> *Id.* at 367-68.

<sup>158</sup> Chang, *supra* note 142, at 35.

<sup>159</sup> Thomas M. Kerr, *Supplying Water Infrastructure to Developing Countries Via Private Sector Project Financing*, 8 GEO. INT'L ENVTL. L. REV. 91, 93 (1995).

<sup>160</sup> *Id.* at 103.

seventy year duration if an absence of production would otherwise be a threat to national sovereignty.<sup>161</sup>

#### D. Investment Incentives

Enticing foreign investors is a difficult challenge for Vietnam where substantial financial risk is placed on the foreign investor and their control over operations is not absolute. The Government has attempted to overcome this challenge by offering incentives that reduce the financial risk to the investor. Such incentives do not require the Government to shoulder any additional financial burden nor relinquish any control. Vietnam offers these incentives in the FIL and attaches specific incentives to specific industries and investment forms. The investor can receive financial reductions in the cost of developing an enterprise. Traditionally, incentives have taken the form of preferential tax treatment, exemption or reduction of tariff rates, guarantees of currency convertibility and the use of property and other government assets.<sup>162</sup> The cost of importing materials and of building the infrastructure are also reduced by the incentives.

The government has been able to dictate which industries will receive FDI and who can invest in those designated industries based on the incentives it offers. The rationale for such selectivity is that the government can acquire the most sophisticated foreign technology and training. Though incentives reduce current revenue to the government, they encourage greater revenues in the future. The government also reserves the right to repeal the incentive once it has outlived its usefulness or conflicts with a government objective. Because incentives are often predicated on government involvement in the management of the enterprise, this can present problems for financing. Credit institutions traditionally hold that the lack of managerial expertise is likely to result in poor management of its assets and failure of the project.<sup>163</sup> However, the foreign partner will benefit from the incentives extended to itself or to the domestic partner and benefit from the relationship the domestic partner has with the government and the local population.<sup>164</sup>

#### E. Land Use Right

An important incentive related to the oil and gas industry is the right to use the land where the reserves are located.<sup>165</sup> A land use right is an interest

---

<sup>161</sup> Christopher J. Sozzi, *Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 435, 445-46 (1996).

<sup>162</sup> *Global Private Power*, *supra* note 143, at 4-5.

<sup>163</sup> Charles E. Harrell et al., *Securitization of Oil, Gas and Other Natural Resource Assets: Emerging Financing Techniques*, 52 BUS. LAW. 885, 901 (1997).

<sup>164</sup> *Id.*

<sup>165</sup> Land also includes water and sea surfaces. Law on Land, *supra* note 127, art. 71.

in land that falls short of full ownership.<sup>166</sup> The land use right is not an absolute grant of land because there are restrictions to its transferability. Land unlike other natural resources is subject to the socialist principle of state ownership and indivisibility.<sup>167</sup> The socialist policies of the government require users of land to protect, replenish, rationally exploit and economically use land for the benefit of the state.<sup>168</sup> The land use right is given for a specific purpose, which coincides with this state goal.<sup>169</sup> The right is given for a set duration, generally twenty-five to fifty years, with a possibility of extension to seventy years if the continuation of the enterprise is consistent with the FIL and state policies.<sup>170</sup> The land use right also conveys ownership of the improvements on the land to the foreign investor.<sup>171</sup> However, the process of reversion is untested because none of the rights have expired and it is unclear if this ownership ends with the expiration of the right. The question remains whether the improvements will be sold to the government or whether they are transferred automatically.<sup>172</sup>

To resolve this problem for foreign investors, the government of Vietnam grants land use rights to a project absolving the foreign investor from paying rent or taxes on the use of the land. The grant is given by certificate after the project has been assessed as coinciding with government objectives. This grant, however, was initially only available to joint ventures because the land could not be transferred to a foreign party. Land had to be vested in a state agency which in the case of the oil and gas industry was the Petrovietnam. The land use right granted to Petrovietnam was still a financial incentive to foreign investors because they would have been unable to have access to the land without the grant.

Land once vested in the state agency is a valuable asset to be contributed by the Vietnamese party to a joint venture. This places a great deal of emphasis on the valuation of the land. Land is valued by the People's Committees. Land is not valued until a project has received license approval from the national government. These two factors often lead to suspect valuation practices. The local People's Committees derive income off the taxes assessed on the land they manage, creating an incentive to overvalue the land. Overvaluation also occurs when land is valued after license approval. The domestic entity and the foreign investor each agree to provide a certain amount of capital to the project prior to approval. If the land

---

<sup>166</sup> Gillespie, *supra* note 76, at 339. The Land Law also encompasses rights to sea surfaces. *Id.*

<sup>167</sup> Thuyet, *supra* note 45, at 549.

<sup>168</sup> Gillespie, *supra* note 76, at 339.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 340, 352.



is valued after these amounts are set, there is an incentive to overvalue the land so that the hard currency a domestic entity must contribute is reduced.

The financing of an oil or gas project is often dependent on being able to pledge land as collateral on a loan.<sup>173</sup> Domestic loans are given on the value of the land use right because the domestic currency is not readily convertible.<sup>174</sup> Only Vietnamese partners had the right to pledge the land because they were the only party allowed to hold title. The valuation of the land is very important to the allocation of profits among partners, because the right is vested with the Vietnamese party and constitutes part of the Vietnamese party's percentage of the capital to the project and subsequent entitlement to profits. Because the government is solely responsible for valuing the land, the land is often overvalued to give the appearance that the Vietnamese party is assuming a greater portion of the financial burden of the project.

For this reason foreign investors evaluate land as an investment incentive according to certain factors. These factors are closely related to the cost and the feasibility of financing. They include: 1) the rental fees associated with the land (or any waiver of the fees); 2) on whom the obligation to pay the rental fees rests; 3) who holds title to the land; and 4) the transferability of the land including the ability to pledge the land as collateral to a bank. Because of the deferment of costs associated with land use, land was considered a cost incentive to foreign investors to invest which altered the risk versus control balance.

#### IV. VIETNAM'S LEGAL STRUCTURE: CHANGES IN THE LAND LAW

##### A. The Land Law

The original Land Law of December 1987 stated (1) that land belongs to the people but is administered by the state; (2) that the state uniformly administers land; (3) that the state promotes the economical use of land; (4) that the state protects agricultural land; and (5) that the state encourages land users to invest labor and capital in land for improvement and regeneration.<sup>175</sup> This statement demonstrates the basic socialist philosophy behind retaining control over state resources. There were also provisions that prevented transferring land to a private party. The Land Law, read in conjunction with the FIL, prohibited investors from entering the market other than

---

<sup>173</sup> It appears that the government will only allow the land to be pledged to a Vietnamese bank, which are all state run. This is due in part to the fact that the financing is non-recourse. The land is not transferred to the bank on default. Rather, the land reverts back to the State which pays damages to the bank that was holding the loan. Decree No. 18/CP, *supra* note 119, at art. 9.

<sup>174</sup> Gillespie, *supra* note 76, at 353.

<sup>175</sup> Hong-Anh Tran, *An Assessment of the Vietnamese Land Law and Regulation*, 13 WISC. INT'L LAW J. 585, 589-90 (1995).

under a joint venture where the land was vested in the state agency.<sup>176</sup> Foreigners could not hold title to land directly, thus precluding the possibility of a foreign investor entering the market as 100% foreign-owned entity.<sup>177</sup>

The Land Law underwent changes in 1993 making it easier for foreign investors to get land use rights. Land transfer restrictions were lifted to allow other market entry forms to acquire land use rights.<sup>178</sup> Though the Land Law itself is ambiguous as to who is entitled to these expanded rights,<sup>179</sup> corresponding changes to the FIL outline which investment forms most benefit from the new land policies.<sup>180</sup>

According to the 1993 Land Law, projects that were essential to national security would be eligible for consideration by the government for land use rights.<sup>181</sup> Included within national security concerns were projects for "fields of industry, science and technology . . . combined with economic purposes."<sup>182</sup> The government as a means of protecting its control over the land also stipulated that the State reserved the right "for the purpose of national defence [sic], security, national or public interest, [to] recover possession of the land"<sup>183</sup> and granted the same right to the People's Committees in the event of an emergency.<sup>184</sup> The land amendments recognized that foreign investors would be an integral part of industrial project development requiring land use rights. As a result, the government would consider their needs on a case by case basis.<sup>185</sup> These decisions were to be made in light of the more specific provisions of the FIL.<sup>186</sup>

Under the Amended 1993 FIL, joint ventures continue to be granted land use rights.<sup>187</sup> The FIL, however, conspicuously fails to discuss land procurement under the 100% foreign owned entity.<sup>188</sup> The 1993 Amendments permitted, for the first time, development projects under the BOT form.<sup>189</sup> BOT's are allowed to mortgage a land use right and the govern-

---

<sup>176</sup> Regulation on Foreign Investment, *supra* note 119, art. 7, 26.

<sup>177</sup> Tran, *supra* note 175, at 591. BOTs were not a legal form under the FIL at this time. Law on Foreign Investment, *supra* note 12, art. 3-7.

<sup>178</sup> See generally Law on Land, *supra* note 127.

<sup>179</sup> *Id.* at art. 80.

<sup>180</sup> Regulation on Foreign Investment, *supra* note 119, art. 56. Apr. 16, 1993; Regulations on B-O-T Contracts, art. 6, Nov. 23, 1993; Decree No. 1417-TC/TCDN, Regulation on the Rent Prices for Land, Dec. 28, 1994.

<sup>181</sup> Law on Land, *supra* note 127, art. 65.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* art. 27.

<sup>184</sup> *Id.* art. 28.

<sup>185</sup> *Id.* art. 80.

<sup>186</sup> *Id.* art. 81 & 83.

<sup>187</sup> Regulations on Foreign Investment, *supra* note 119, art. 26.

<sup>188</sup> *Id.* ch. IV.

<sup>189</sup> *Id.* art. 56. The FIL refers to additional legislation which goes into greater detail on the terms and rights of a BOT. *Id.*

ment is willing to exempt the land rent associated with the mortgage.<sup>190</sup> The BOT contract with the government can be entered into by both a joint venture and a 100% foreign-owned entity.<sup>191</sup> In the case of the joint venture, the ability to mortgage and the waiver of rent appears to be the same incentive offered under a non-BOT joint venture. In contrast, the BOT contract used by a 100% foreign owned entity seems to be the first attempt by the government to allow a foreign investor to hold title to land directly at least for the duration of the BOT contract.<sup>192</sup> But, the ability of the FOE to secure the land is still based on government approval.<sup>193</sup> The government states that it would prefer an active role in certain industries:

[P]rojects which are of economic importance and shall provide guidance for the foreign investor to state in the application for investment that it will consent to a Vietnamese enterprise, on the basis of agreement, purchasing a share of the capital of the enterprise so as to have the result of converting it into a joint venture enterprise.<sup>194</sup>

The government essentially requires applicants for 100% foreign-owned enterprise to agree to a conversion provision in their application if the Government deems the project to be crucial to the economy, likely including the oil and gas industry.<sup>195</sup> Conversion of a 100% FOE to a joint venture essentially means that any land allocated to the project will vest in the domestic Vietnamese party.<sup>196</sup> It appears that in all cases the government is not willing to give title to land, for any duration, to a foreign investor.

The Land Law was amended in February 13, 1995, requiring domestic Vietnamese parties to pay rent on the land that was previously granted without fees.<sup>197</sup> In addition, law stipulated domestic entities would now: (1) be issued a land use certificate; (2) have the right to pledge a land lease for a loan; and (3) have priority in continuing the investment project upon expiration of the land lease.<sup>198</sup> Forcing domestic entities to lease land abolished land use grants under joint venture agreements. Instead of depending on a Vietnamese party to hold title to the land, land could be transferred directly to the foreign investor under a BOT. Textually, the law appears to remove an incentive to enter the Vietnamese market as a joint venture by placing a greater financial burden and risk on the foreign investor. How-

---

<sup>190</sup> Decree No. 87/CP, Regulation of B-O-T Contracts, art. 6, Nov. 23, 1993 [hereinafter Decree No. 87/CP].

<sup>191</sup> Regulations on Foreign Investment, *supra* note 119, art. 55.

<sup>192</sup> Decree No. 87/CP, *supra* note 191, art. 6-7.

<sup>193</sup> *Id.*

<sup>194</sup> Regulation on Foreign Investment, *supra* note 119, art. 47.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* art. 26.

<sup>197</sup> Decree No. 18/CP, *supra* note 119, art. 5.

<sup>198</sup> *Id.* arts. 5 & 9.

ever, the law liberalizes oil and gas project development because the foreign investor has an alternative form to operate under, the BOT. Investors have a greater choice in investment forms and potentially more control over operations.

In an extremely controversial move, the Vietnamese Government's rescission of land grants to domestic entities was applied retroactively.<sup>199</sup> The Decree abolished current grants to land use rights to domestic entities and converted them to leases.<sup>200</sup> Now overvaluation could serve to discourage investors if the resulting rental fees are excessive. Pursuant to the Decree, the Prime Minister sets the rental rates reducing the trend of overvaluation.<sup>201</sup> The leases are subsequently worth less than the previous land use rights.<sup>202</sup> Credit institutions have been forced to call outstanding loans prematurely, because devaluation of the land results in insufficient collateral on the loan.<sup>203</sup> Under current terms, projects get less financing because the land use rights are not sufficient to secure a loan.<sup>204</sup> Although land is transferable for a certain duration to a private party, under a lease the government retains the right to retake the land for emergency reasons.<sup>205</sup> It is suspected that such an emergency will occur if there is the possibility of a bank repossessing Vietnamese land after default on a loan. The end result is that corporations are being forced to re-calibrate the cost benefit analysis of investing in Vietnam under one investment vehicle or another. Some investors claim that these changes are an indication that Vietnam is not committed to a free market economy. However, these changes, though retracting an incentive, have had the effect of encouraging investors to use another investment form that would give them greater management control at an equivalent or reduced level of financial risk.

#### B. Choosing the Best Investment Vehicle

Without the incentive of a land use right, U.S. investors should seek an investment vehicle that gives them greater control over management operations. The revised Land Law eliminates land incentives from the cost benefit analysis of foreign investors. This elimination creates parity among the investment forms as far as mitigating the cost of acquiring the land. If the foreign investor leases the land instead of having a Vietnamese party contribute it, then the internal management risk is removed.

---

<sup>199</sup> *Id.* art. 5.

<sup>200</sup> Thuyet, *supra* note 45, at 551.

<sup>201</sup> Nguyen, *supra* note 129.

<sup>202</sup> Thuyet, *supra* note 45, at 551.

<sup>203</sup> *Id.*

<sup>204</sup> Tran, *supra* note 175, at 596.

<sup>205</sup> Law on Land, *supra* note 127, art. 27-28.

The level of control associated with each investment form can be evaluated according to a risk v. control analysis. Under a BCC, the production tasks are allocated ahead of time and each party has management control over their task. The profits are stipulated in the contract and are not based on a pro-rata percentage of the capital invested by each party. Although management of one party's task is absolute once the contract is formed, extensive negotiations are required to get to this point. Under the theory that contract negotiations are costly and increase with the number of provisions that have to be worked out, the cost of establishing a BCC is excessive. BCCs are also inflexible once negotiated. Confining actions by the parties to those contracted for prior to actually commencing a project limits the capability to respond to problems that do not have a solution under contract. Management of only specific tasks does not outweigh the cost of contracting nor the financial risk associated with a BCC. The changes in the Land Law do little to make this form more feasible for an oil and gas project because the domestic party to the contract is responsible for paying the cost of rent and this value is calculated into its contribution to the contract.<sup>206</sup>

The rescission of land use grants decreases a foreign investor's incentive to use the joint venture. The financial risk associated with entering a joint venture is equivalent to any other form now that joint ventures are no longer exempted from rental fees. However the managerial risks associated with this form persist. Joint ventures require a domestic partner which is the Petrovietnam. One of the requirements of operation under this form is that the general director of the board be Vietnamese.<sup>207</sup> The board as a whole must vote unanimously on all decisions,<sup>208</sup> thus greatly restricting management control by the foreign investor.<sup>209</sup> It is likely that all decisions that do not conform to state objectives will be overruled by the general director. This presents a latent financial risk because banks are unwilling to fund projects with inexperienced managers.

A foreign investor in a FOE has the greatest management control and the greatest return on capital. No government party is required to have any position in the corporation's management. Financial risk is mitigated because the FOE has control over all management aspects of the enterprise.<sup>210</sup> Despite the superior management expertise attributed to the FOE, it lacks the relationship to the government and population inherent in a joint venture.<sup>211</sup> It is unlikely that this investment form would be approved by the

---

<sup>206</sup> Decree No. 1417-TC/TCDN, Regulation on the Rent Prices for Land, art. 1, Dec. 28, 1994.

<sup>207</sup> Law on Foreign Investment 1996, *supra* note 138, art. 12.

<sup>208</sup> *Id.* art. 13-14.

<sup>209</sup> Thuyet, *supra* note 45, at 576.

<sup>210</sup> Genovese, *supra* note 71, at 10.

<sup>211</sup> Ellinidis, *supra* note 151, at 302-04.

government. The oil and gas industry is too important to Vietnam's economy for the government not to plan its development.

A BOT contract between a 100% foreign-owned entity and the government is the best form for U.S. investors in the oil and gas industry. All the managerial benefits of the FOE inure to the foreign investor under the BOT as they would without the BOT contract. The investor has complete control over all the management decisions. The BOT as a result is a more efficient enterprise than one involving direct government control.<sup>212</sup> The private investors have a strong profit motive to operate as efficiently as possible in development and production<sup>213</sup> due to the limited duration of the project and the high degree of financial risk.

The expert management and operational capabilities of the BOT are a demonstration to the government of how the enterprise should be managed when it assumes the project.<sup>214</sup> Although the investor must shoulder all the financial burden, the government is accommodating to the investor offering exemptions to fees and taxes. The 1996 revised FIL now provides land rent free to projects under the BOT, showing government favor of the BOT form over the joint venture.<sup>215</sup> Because the BOT operates for a limited duration and the project reverts to the government after the term expires, it is in the government's best interest to cooperate with corporations doing business under this form.<sup>216</sup> Part of this cooperation is limiting government intervention. The Prime Minister is solely responsible for oversight of these agreements.<sup>217</sup> The government also allows a 100% foreign-owned entity to exist under a BOT in the oil and gas industry where it could not otherwise exist. This development can be attributed to the diplomacy of the World Bank in convincing the government to allow a 100% foreign owned BOT in connection with a power plant project in 1996.<sup>218</sup> This opened the door for other energy projects to use the same form. This kind of control and government support arguably mitigates financial and managerial risk relative to the other investment forms. Banks are more willing to provide collateral; it is in the best interest of the government to ensure the project succeeds; and the foreign investor is not required to share profits or control with another partner.

---

<sup>212</sup> David A. Levy, *BOT and Public Procurement: A Conceptual Framework*, 7 IND. INT'L & COMP. L. REV. 95, 103-04 (1996).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Law on Foreign Investment 1996, *supra* note 138, art. 46.

<sup>216</sup> *Id.*

<sup>217</sup> Decree No. 87/CP, *supra* note 190, art. 3.

<sup>218</sup> *Vietnam: Foreign Investors Not Convinced*, BUS. VIETNAM, Aug. 1, 1996, at 2.

## V. CONCLUSION

U.S. corporations seeking to enter Vietnam's oil and gas industry should do so through a 100% FOE under a BOT contract. In the past, U.S. corporations would enter the Vietnamese market because of investment incentives that reduced the costs of development. This was often accomplished by entering into a joint venture with Vietnamese parties. However, operating with a Vietnamese partner meant relinquishing control over management decisions to a board consisting, in part, of government officials and limiting profits to the percentage of the original capital invested. This outcome limited the extent to which corporations could exploit Vietnam's liberal foreign investment laws because all managerial decisions needed to coincide with government market growth objectives. Limited control also reduced the large short-term profits expected in comparison to the market activities of other Asian nations. The FIL has been evolving since Vietnam first sought to open its markets to private investment in 1987. The Land Law is an example of a law that has undergone several changes which at first provided large incentives for investment and later rescinded them. As a result, the foreign investor is becoming more focused on retaining control rather than on obtaining incentives. U.S. corporations can assume more control over their operations while keeping costs equivalent to those under a more restrictive form. Increased management control will lead to greater profits provided these businesses are prepared to make long-term investments. The BOT contract allows a foreign investor to develop a project for an extended duration, recoup its investment, make a profit, and retain all management control. Therefore, the mode of business operation best suited for U.S. investors is the BOT.