

**The Price of Doing Business: The Challenges and Successes of Business Licensing Reform in Vietnam**

In 2007, Vietnam joined the World Trade Organization (WTO) and overall GDP grew 8.5% from the prior year.<sup>1</sup> Vietnam's overall economy is booming and the burgeoning activity of the formal private sector is among the chief reasons for this phenomenon. The private sector in Vietnam contributes about 42% to overall GDP, compared with a contribution of 39% by state-owned enterprises.<sup>2</sup> Private enterprise represents 56.3% of the country's regular job supply and absorbs the major share of the 1.2 million people entering the labor market each year.<sup>3</sup> More productive per unit of labor than their state-owned counterparts, and given the right regulatory environment, the private sector should continue to increase its share of total employment and significantly contribute to Vietnam's economic productivity.

Vietnam's commitment to participating in international economic integration drives its willingness to reform its legal business framework and create the conditions necessary for the robust development of the private sector. However, the process of restructuring the legal system to address the needs of private enterprise while preserving the country's socialist government orientation has proved complex. In particular, effective and sustainable reform of the business licensing system has proved difficult to achieve. Vietnam uses business licenses as tools of state management to regulate and control business activities and protect the common interests of both society and the business community. These are commendable goals. But the Vietnamese

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<sup>1</sup> Central Intelligence Agency The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited Oct. 31, 2008).

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

<sup>3</sup> *Id.*

business licensing system, even after the major reforms of recent years, still had many shortcomings that undermined the validity of the statutory and regulatory business framework. The worst of these shortcomings contributed to government corruption and created administrative obstacles for business operations.

Vietnam's government recognized the problems and implemented several rounds of legal reforms, most prominently the Enterprise Law of 2000 and the Unified Enterprise Law of 2006. These laws, and accompanying regulations, attempted to eliminate unnecessary business licenses and increase the ease of doing business in the country. Nevertheless, private enterprises still encounter complicated and time-consuming business licensing procedures. Improved business licensing procedures can indeed help improve the overall environment for the private sector and raise standards of efficiency and transparency for government agencies; however, legal reforms that prove to be unsustainable or ineffectual ultimately hinder the development of private enterprise, even when made in the context of a commitment to market liberalism.

This paper will explore the reasons why early efforts in business licensing legal reform in Vietnam were not fully effective, arguing that a legal drafting process that did not allow for business community input, compounded by inadequate attention to the legal culture and political ideology of the Vietnamese bureaucrats responsible for implementing the reforms, allowed the pre-existing shortcomings of the system to continue. Laws are tied to Vietnam's history and culture in a way that its economy, increasingly tied to international interests, is not. Vietnam cannot maintain a sustainable level of new business growth by implementing new business startup procedures that do not consider the impact of the legal reform on existing business and political cultures.

Part I of this paper provides an overview of business licenses, describing their advantages and disadvantages to government and businesses. A business license is a document issued ex-ante by either Vietnam's national or sub-national government that approves a firm's business activity. A specific firm may encompass more than one business activity, requiring multiple licenses.<sup>4</sup> Business activities include commercial, merchandising, or industrial activities as well as the carrying on of a profession or trade. Most licenses must be periodically renewed which requires the business owner to file a renewal application to the appropriate government agency. The frequency of business license renewal depends on the nature of the business activity and the size of the business. Once licenses are issued, government authorities monitor the business so that they may revise or revoke licenses that have not been utilized.

In good business licensing regimes, licensing is a means to fulfill legitimate regulatory purposes. These purposes include protection of public health and safety, environmental protection, national security, and allocation of scarce resources. Business licenses assure that operators have the qualifications necessary to carry out an activity in a way that safeguards public welfare. Prior government approval of business activities serves to minimize nuisances and misleading business practices. Additionally, business licenses assist in orderly business development by gathering land use information, facilitating community planning decisions, and managing allocation of limited natural resources such as land.

Business licensing becomes burdensome when the procedures to obtain licenses are not aligned with legitimate regulatory purposes, increasing the time and cost burdens involved in starting a business. Business license applicants may be asked to submit prerequisite documents

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<sup>4</sup> See *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 2 (for example, a freight transportation company would need to obtain a transport license from the Ministry of Transport and a customs clearance agent license from the Department of Customs).

and meet requirements that are unnecessary to ensure public order and safety.<sup>5</sup> Fulfilling these licensing requirements may be difficult or impossible for infant or small scale enterprises, thus preserving existing monopoly or oligopoly situations. Additionally, sub-national government agencies may require separate licenses to operate in each province or several government agencies may issue similar business licenses. These licenses serve to generate licensing fee revenue for the agencies more so than to protect public interests. Business license applicants end up spending additional time and money in order to comply with overlapping regulatory jurisdictions. Licenses should not be used to manage competition in the economy or to generate revenue, regulatory objectives that are more efficiently addressed through competition and tax policy. The use of licensing to pursue these objectives reduces transparency, increases opportunity for rent-seeking, and leaves the public uncertain about the conditions under which licenses will be issued. Ultimately, rigid and unnecessary business licenses hinder new business development.

Part II puts Vietnam's business licensing laws into a historical and cultural context by analyzing the development of the country's market-oriented legal framework under a socialist government regime. Part III describes the early efforts of business licensing legal reform in Vietnam through the 2000 Enterprise Law and identifies the problems in the law that hindered the long-term sustainability of new business development. Many problems in the 2000 Enterprise Law resulted from the legislature not considering the political and cultural environment in which the law was applied. Part IV examines the 2006 Unified Enterprise Law,

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<sup>5</sup> See Asia Regional Consultative Conf., Bangkok, Thailand, Oct. 2006, *Lessons Learned in Sustaining Business Registration Reform in Vietnam*, at 7 (prepared by Manh Quang Le et al.) (for example, prior to the 2000 Enterprise Law, minimum capital requirements for business licenses in the construction industry were unreasonably high, ranging from USD\$15,000 to USD\$100,000, or approximately 50 to 333 times per capita income).

the most recent effort in business licensing legal reform, to show how the Vietnamese government addressed the problems of earlier reform attempts. The paper concludes in Part V that the consideration of Vietnamese cultural values and political and business stakeholders during the business licensing legal reform process maximizes benefits to the private sector, especially small-to-medium sized businesses and foreign enterprises doing business in Vietnam, such that Vietnam could continue to be competitive internationally and experience high productivity growth in the long-run.

## **I. Overview of Business Licenses**

Business licenses represent prior approval from the government for an individual or an enterprise to conduct commercial activities.<sup>6</sup> Like other administrative tools, the purpose of a business license is to protect public interests, in areas such as health, safety, and the environment. On one hand, business licenses can be an effective way to address specific problems while minimizing regulatory burdens. Reasons for maintaining business entry regulations include preventing fraud and the abuse of intellectual property rights, promoting competition, enforcing quality, safety, social and ecological standards, and protecting the rights of workers and consumers.<sup>7</sup> On the other hand, if improperly implemented or abused, they can significantly increase enterprises' market entry costs and ultimately undermine their freedom to

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<sup>6</sup> Liliana de Sa, Int'l Fin. Corp. [IFC] and The World Bank, *Business Registration Start-Up: A Concept Note*, at 3 (Oct. 27, 2005).

<sup>7</sup> Asia Regional Consultative Conf., Bangkok, Thailand, Nov. 29-Dec. 1, 2006, *Streamlining Business Registration and Licensing Procedures: Experiences from the Philippines and Vietnam*, at 5 (prepared by Ulla Keppel et al.).

do business. The real challenge for any government is to find the right balance between the ease of doing business and protecting the public interest.<sup>8</sup>

The costs of stricter business entry regulations outweigh their benefits because increased business licensing creates a perverse effect on the very people the licenses are allegedly meant to protect. Entry regulations could be used to protect the private interests of incumbent firms, lawmakers, and bureaucrats.<sup>9</sup> Each business registration procedure is a point of contact and an opportunity for a regulator or bureaucrat to extract a bribe. The rich and well-connected may be able to avoid cumbersome entry regulations, or may even be protected by them.<sup>10</sup> By contrast, the poor are hardest hit. Potential entrepreneurs with limited capital are discouraged from setting up businesses by lack of information, prohibitively high costs, and time-consuming registration procedures, or they go ahead and set up their businesses but deliberately remain in the informal sector, forgoing business opportunities in order to stay invisible from government oversight.<sup>11</sup> Participants in the informal business sector, as opposed to those with business licenses, have restricted access to credit, to business development services, and to commercial dispute settlement mechanisms.<sup>12</sup> These bottlenecks further restrict the potential of informal enterprises to grow, invest, and create productive employment.

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<sup>8</sup> See *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1 (explaining the need for a legal framework for business licensing and highlighting the shortcomings of the current business licensing regime).

<sup>9</sup> See Anne Kruger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (describing extensive literature characterizing business licenses as tools to protect self-interests).

<sup>10</sup> Asia Regional Consultative Conf., Bangkok, Thailand, Nov. 29-Dec. 1, 2006, *Streamlining Business Registration and Licensing Procedures: Experiences from the Philippines and Vietnam*, at 5 (prepared by Ulla Keppel et al.).

<sup>11</sup> *Id.*

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

## II. Historical and Ideological Context for Vietnam's Business Licensing Laws

The political system and government structure in Vietnam are identical throughout the country but the implementation of the central government's laws and regulations varies across regions. History, geography, and the complexity of laws and regulations are key factors in explaining the high level of discretion exercised by local authorities and the variations in the implementation of laws.<sup>13</sup> This is particularly true in the implementation of the central government's regulations and policies towards the private business sector.

Independence of local government, lack of transparency between local and central governments, and self-sufficiency characterize northern Vietnam.<sup>14</sup> Early in its history, the Red River Delta region of northern Vietnam had a high population density with poor infrastructure that limited communications between provinces.<sup>15</sup> Citizens subsisted on wet rice cultivation and lived in village settlements, autonomous communities that levied their own regulations and taxes upon their citizens for the benefit of the villages.<sup>16</sup> The independence of villages was manifested by the saying translated as "the laws of the King yield to the customs of the village."<sup>17</sup> Northern provinces have generally applied national policies with local variations not communicated to the central government, an approach that has created challenges for consistent legal reform throughout the country.

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<sup>13</sup> Thi Bich Tran, R. Quentin Grafton & Tom Kompas, *Institutions Matter: The Case of Vietnam* 14 (Austl. Nati'l U. Crawford Sch. of Econ. and Gov't, Working Paper, 2008).

<sup>14</sup> PIERRE GOUROU, *THE PEASANTS OF THE TONKIN DELTA, A STUDY OF HUMAN GEOGRAPHY* 23 (Richard R. Miller trans., Human Relations Area Files 1955) (1936).

<sup>15</sup> Thi Bich Tran, R. Quentin Grafton & Tom Kompas, *Institutions Matter: The Case of Vietnam* 14 (Austl. Nati'l U. Crawford Sch. of Econ. and Gov't, Working Paper, 2008).

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.*

People from northern and central Vietnam settled in the south, with its core area of the Mekong River Delta, beginning in the 17<sup>th</sup> century.<sup>18</sup> The first migrants to the south were those who had lost, or could not find, a place in the villages of northern Vietnam. Difficulties for the first migrants stimulated a cooperative attitude. Village organizations in the south were much less authoritarian when compared to the closed political center of villages in the north.<sup>19</sup> More predictable and benign weather in the Mekong River Delta, coupled with a convenient water transportation system, promoted faster economic development in the south.<sup>20</sup> Southern Vietnam also experienced greater influence of capitalist principles when the French first exercised direct control in the south in 1862 and exposed southern Vietnam to the world market economy by promoting the region's exports of tobacco, indigo, tea, and coffee.<sup>21</sup> From 1954, when the North and South were divided politically after Vietnam's independence from France, until reunification in 1976, North Vietnam operated under a highly centralized, planned economy, whereas South Vietnam mostly maintained the free-market system first advanced by the French.<sup>22</sup> Greater receptivity by local government authorities to implementation of central government reforms calculated to promote a free-market economy and more experience with upholding policies that promoted the non-state sector allow for greater ease of doing business for private enterprises. Thus, the southern provinces have had a head start at developing streamlined economic governance for a market economy and their northern neighbors have been more receptive and adaptable to business licensing legal reform.

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

<sup>19</sup> See PHUONG THACH ET AL., FOLK CULTURE OF THE VIET PEOPLE IN SOUTHERN VIETNAM 2 (1992) (contrasting village settlements in North Vietnam versus South Vietnam).

<sup>20</sup> NEIL L. JAMIESON, UNDERSTANDING VIETNAM 5 (1993).

<sup>21</sup> See *Id.* at 6 (noting further that the French later governed northern Vietnam beginning in 1874 and only indirectly through local Vietnamese administrators because the French had its primary economic interests in the southern agricultural regions).

<sup>22</sup> *Id.* at 5.



Since 1954 in the north of Vietnam and 1975 in the south, the country has come under the rule of the Vietnamese Communist Party.<sup>23</sup> In the socialist model of administrative governance, the Communist Party is considered the absolute leader of society. The socialist development strategy features central economic planning, with state ownership of the means of production and agriculture organized into state farms and collectives that serve both as production and social units.<sup>24</sup> The government nationalized lands, manufacturing plants, and mining industries so that by the late 1970s the two main forms of enterprise were state-owned enterprises (SOE) and cooperatives.<sup>25</sup> Private enterprises were allowed to operate, but were limited in their size and developed at modest speed.<sup>26</sup> However, combined with a staunch American embargo, border conflicts with China in 1979, the occupation of Cambodia from 1979 to 1989 and a gradual weakening of the USSR's economy, existing government policies soon led to very serious macroeconomic imbalances, causing hyperinflation, budget deficits, chronic food shortages, and widespread poverty.<sup>27</sup> By the mid 1980s, Vietnam was literally on the verge of bankruptcy, forcing the Communist Party to introduce a range of reform measures known as *doi moi* in 1986.<sup>28</sup>

*Doi moi*, a process of moving away from central control towards a market economy, allowed for a multi-sector economy, de-collectivization, private ownership, and liberalized

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<sup>23</sup> Central Intelligence Agency The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited Oct. 31, 2008).

<sup>24</sup> PER RONNAS & ORJAN SJOBERG, SOCIO-ECONOMIC DEVELOPMENT IN VIETNAM – THE AGENDA FOR THE 1990s 17 (1991).

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

<sup>26</sup> See Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *A Private Sector Perspective on Business Environment Reform – The Case of Vietnam*, at 6 (prepared by Hang Thi Thu Pham) (describing government policies between 1975 and 1990).

<sup>27</sup> George Irvin, *Vietnam: Assessing the Achievements of Doi Moi*, 31 J. OF DEV. STUD. 726 (1995).

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

foreign trade and investment.<sup>29</sup> The purpose of *doi moi* was to create, under the political umbrella of the socialist state, a market-oriented economy, while undertaking a series of structural reforms to end Vietnam's economic stagnation. One result of the switch to a market economy was greater unemployment in the public sector. The Vietnamese state no longer provided jobs for all, so citizens were encouraged to create employment opportunities for themselves and for others.<sup>30</sup> Citizens increasingly showed their entrepreneurial spirit by establishing enterprises, running export and import companies, and managing service-sector industries, among other ventures.<sup>31</sup> More than 70% of people who left the state-owned sector because of *doi moi* started working in the private sector by creating small enterprises or being employed by small business owners.<sup>32</sup> *Doi moi* effectively brought about economic development, social and cultural liberalization, and opened Vietnam to globalization.

Legal ideology affected the enactment of the market-oriented legal framework. Under the socialist rule of law in the post-*doi moi* era, state ownership of the key means of production was still allowed, but it was understood that the state should not directly run or intervene in the business operations of the private sector.<sup>33</sup> Despite the government's stated recognition of the need to keep the state out of the private sector, Vietnamese legal drafters nevertheless adapted

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<sup>29</sup> Phuong An Nguyen, *Looking Beyond Bien Che: The Considerations of Young Vietnamese Graduates when Seeking Employment in the Doi Moi Era*, 17 SOJOURN: J. OF SOC. ISSUES IN SOUTHEAST ASIA 221 (2002).

<sup>30</sup> SOCIOECONOMIC RENOVATION IN VIETNAM: THE ORIGIN, EVOLUTION, AND IMPACT OF DOI MOI 4 (Peter Boothroyd et al. eds., 2000).

<sup>31</sup> See Press Release, United Nations Dev. Programme, *One Million Jobs Created By New Enterprise Law in Viet Nam*, June 1, 2003 (noting that about 70 percent of the new businesses are within a range of industries that include food processing, wood products, garments, ceramic and glass manufacturing, and tourism).

<sup>32</sup> Ngoc Hung Le and Dennis Rondinelli, *Small Business Development and Economic Transformation in Vietnam*, 9 J. OF ASIAN BUS. 23, 28 (1993).

<sup>33</sup> THE NATIONAL ADMINISTRATION SCHOOL, ON THE REFORM OF THE STATE APPARATUS 32-37 (1991).

the development and importation of foreign laws suited for market conditions to reflect principles of state-controlled economic management.<sup>34</sup> Business licensing regulations were enacted to control business entry and monitor businesses.<sup>35</sup> Despite significant policy changes, the business environment in Vietnam retained elements unfavorable to development of a market economy, such as a preference for state-owned enterprises that impeded the development of the private sector. Low regard for private enterprise still existed because non-state business pursuits had been branded as cheating under the socialist system.<sup>36</sup>

Neo-liberal economic theory reasons that as the size and complexity of a marketplace grows, so too does the need for comprehensive, transparent, and reliable legal mechanisms to govern business entry, among numerous other aspects of business.<sup>37</sup> Assuming the validity of these premises, Vietnam would have to shed its government's commitment to socialist legal culture if it desires to reach an advanced level as it enters the 21<sup>st</sup> century. Vietnam would be unable to reach an advanced level of capital accumulation and sustain high performance in its private sector without attendant changes in its legal culture that considers Vietnamese cultural values and political and business stakeholders.

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<sup>34</sup> Nien Nguyen, *Several Legal Problems in the Leadership and Management of Industry Under the Conditions of the Present Improvement of Economic Management in our Country*, 14 LUAT HOC 33, 33 (Joint Publications Res. Service trans. 1976) (1976).

<sup>35</sup> *Id.* at 34-35 (explaining how the locus of state-controlled economic management migrated from explicit production plans to licenses controlling business entry).

<sup>36</sup> See Sarah Turner and Phuong An Nguyen, *Young Entrepreneurs, Social Capital and Doi Moi in Hanoi, Vietnam*, 42 URB. STUD. 1693, 1699 (2005) (describing self-employment as an unfamiliar practice for Vietnamese citizens due to socialist ideology).

<sup>37</sup> See MAX WEBER, *RELIGION OF CHINA: CONFUCIANISM AND TAOISM* 35 (1964) (suggesting the need for a legal framework to oversee business operations and dispute resolution).

### III. Early Business Licensing Reform in Vietnam

#### A. Prior to 1999: Identification of the Private Sector's Right to Conduct Business

During the period following the implementation of *doi moi* in 1986 until 1999, reforms aimed at promoting private sector development were gradually instituted. A Communist Party Plenum in 1989 called for a multi-sector economy with various forms of ownership and the Seventh Party Congress in 1991 stated that the private capitalist sector would be allowed to engage in those businesses prescribed by the law and beneficial to the national economy.<sup>38</sup> These policy changes helped promote social and political acceptance of the private sector, thus increasing private sector confidence that the reform process would be sustained. Greater freedom for private sector entrepreneurs to conduct business facilitated the enrichment of economic and social life in Vietnam. By the mid 1990s, government permission was no longer required for internal travel and the number of Vietnamese traveling internationally to market economies on business and for academic study was growing.<sup>39</sup> Contact between Vietnamese and foreigners occurred more frequently and increased access to international perspectives on business development.<sup>40</sup>

Changes to the Constitution of Vietnam signaled to private enterprises that the state would be using the country's legal framework to guide the development of Vietnam's market economy. The 1992 revision of the Constitution of Vietnam legalized the market economy concept, providing for a wide range of economic freedoms benefiting the private sector and overhauling the state administrative structure so that economic decisions can be made with

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<sup>38</sup> BRIAN VAN ARKADIE AND RAYMOND MALLON, VIET NAM — A TRANSITION TIGER 156 (2004).

<sup>39</sup> *Id.* at 157.

<sup>40</sup> *See Id.* (describing increased access to foreign television, newspapers, and other media).

greater efficiency.<sup>41</sup> The constitutional freedom of business and the right to private ownership provided the legal basis for the detailed rights, obligations, and procedures of the subsequent Enterprise Law in 2000.

### **B. 2000 Enterprise Law: Implementation of New Business Registration Procedures**

The adoption of the Enterprise Law in 2000 marked the beginning of legal reforms in Vietnam directed at procedures to set up new businesses. Up to 1999, entrepreneurs only had the right to set up businesses that central government allowed and licensed. Government agencies generally exercised wide discretionary powers to impose a licensing requirement on various forms of business in selected economic sectors, creating substantial difficulties and costs in time and money for those wanting to establish businesses in Vietnam, as well as opportunities for government corruption to extract bribes from business owners.<sup>42</sup>

Applying to private enterprises in a wide range of industries, the 2000 Enterprise Law provided for the creation of enterprises by non-discretionary registration, rather than through business licensing and government approval. The capacity of government bureaucrats to proactively control business licensing was significantly reduced because the Enterprise Law allowed enterprises to operate in any area not specifically deemed to be illegal instead of just those areas specifically deemed to be legal.<sup>43</sup> The Enterprise Law limited the power to introduce

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<sup>41</sup> See CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM art. 15 (amended 1992) (affirming development of a market economy under a socialist orientation, acknowledging public and private ownership of capital and property, and recognizing small-business and foreign-investment business sectors).

<sup>42</sup> See *Viet Nam: Legal and Judicial Development* 5-6 (Australian Agency for Int'l Dev., Working Paper No. 3, 2000).) (describing how non-state entrepreneurs were barred from economic sectors considered harmful to the public interest or in areas reserved for state-owned enterprises, such as telecommunications, transportation, and agriculture export).

<sup>43</sup> Mansfield Dialogues in Asia, Ho Chi Minh City, Vietnam, Sep. 13, 2000, *The Rule of Law in Vietnam: Theory and Practice*, at 138 (prepared by Nghia Trong Truong).

business licensing regulations to only the central government's National Assembly and prohibited local authorities from issuing additional business licensing laws.<sup>44</sup>

During the first six months of the Enterprise Law, 6,100 new private enterprises were established, an increase of 15% from the 41,000 private enterprises created since 1990.<sup>45</sup> Overall, the promulgation of the Enterprise Law has resulted in the registration of an estimated 140,000 businesses between 2000 and 2005.<sup>46</sup> Administrative regulations requiring business licenses for certain enterprises were recommended for abolishment if they were deemed extraneous or unnecessary. Nearly 160 business licensing regulations out of approximately 360 business licensing laws in effect were abolished between 2000 and 2005, resulting in significant reductions in the cost, time, and risks of doing business for the private sector.<sup>47</sup>

Published annually by the World Bank and the International Finance Corporation, the Doing Business reports investigate global regulations that enhance or constrain business and rank countries based on the ease of doing business within those countries.<sup>48</sup> The Doing Business reports enable policymakers to identify economic and social outcomes of new reforms affecting the private sector, evaluate regulatory performance in comparison to other countries, and learn from international best practices.<sup>49</sup> According to the 2005 Doing Business Report for Vietnam, the Enterprise Law was instrumental in reducing the number of new business registration

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 138 n.35.

<sup>46</sup> Thomas Finkel, Chief Technical Advisor, MPI-GTZ SME Dev. Program, Presentation at the International Workshop on Public-Private Dialogue: Public Private Dialogue in the Making of the Unified Enterprise Law and the Common Investment Law in Vietnam (Feb. 1, 2006).

<sup>47</sup> Asia Regional Consultative Conf., Bangkok, Thailand, Nov. 29-Dec. 1, 2006, *Streamlining Business Registration and Licensing Procedures: Experiences from the Philippines and Vietnam*, at 14 (prepared by Ulla Keppel et al.).

<sup>48</sup> The World Bank Group Doing Business, <http://www.doingbusiness.org> (last visited Nov. 8, 2008).

<sup>49</sup> See *Id.* (identifying areas of day-to-day business examined by Doing Business reports, including starting a business, dealing with licenses, and registering property).

procedures from an average of 40 to 11, new business setup duration from an average of 6 months to 50 days, and new business registration fees from an average of 200% of GDP per capita to 29% of GDP per capita.<sup>50</sup> The Doing Business report provided quantitative evidence that the 2000 Enterprise Law improved the business environment in Vietnam through reforms that eased conditions to formalize businesses in the private sector and limited opportunities for corruption by government authorities.

### **1. Problems with the 2000 Enterprise Law**

Despite the overall expansion of Vietnam's business environment to be more inclusive towards the private sector, the good start occasioned by the Enterprise Law did not last. The number of business licenses increased from about 180 at the end of 2002 to 340 at the end of 2005.<sup>51</sup> New business licensing regulations emerged and some of those abolished earlier have been reissued in other forms.<sup>52</sup> The reintroduction of extraneous and unnecessary business licensing regulations and other limits to marketplace entry seemingly contradict the spirit of the Enterprise Law.

### **2. Causes for the Problems with the 2000 Enterprise Law**

#### **a. Inefficient and Inconsistent Government Bureaucracy**

Canceling some business licenses without changing the way that issuing agencies regulate did not lead to sustainable benefits for the private sector because government agencies tended to re-regulate in order to preserve or extend their powers and entitlements.<sup>53</sup> Prior to

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<sup>50</sup> Thomas Finkel, Chief Technical Advisor, MPI-GTZ SME Dev. Program, Presentation at the International Workshop on Public-Private Dialogue: Public Private Dialogue in the Making of the Unified Enterprise Law and the Common Investment Law in Vietnam (Feb. 1, 2006).

<sup>51</sup> *Id.*

<sup>52</sup> STOYAN TENEV ET AL., INFORMALITY AND THE PLAYING FIELD IN VIETNAM'S BUSINESS SECTOR 18 (2003).

<sup>53</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1.

2000, socialist law had required bureaucrats to implement laws only when they could be directly applied and, where there was uncertainty and ambiguity, to make decisions based on morality and party policies.<sup>54</sup> Bureaucrats had policed entrepreneurs to assure that their business activities conformed to socialist values and had taken advantage of trivial rule violations or unclear legal documents to extract profits.<sup>55</sup> Civil servants had also extracted bribes from entrepreneurs in exchange for making the business startup process faster and easier.<sup>56</sup> Some bureaucrats had delayed processing applications for businesses in sectors considered controversial, difficult to manage, or contradictory to socialist values such as massage parlors, karaoke bars, and online gambling.<sup>57</sup>

The overall government administrative machinery was consequently ill-prepared to manage the new business environment the Enterprise Law sought to create. Government agencies were very narrowly specialized on the one hand and tended to overlap and duplicate each other's functions and duties on the other hand.<sup>58</sup> Even if there is good will to streamline business licensing procedures, the interests of the different government agencies tend to vary so much that it is difficult to agree on the removal of certain administrative steps. For example, even though the business registration process was simplified for freight service providers under

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<sup>54</sup> See Adam Day, *Legal Reform and Economic Development in Vietnam and China: A Comparative Analysis* 50-51 (Feb. 29, 2004) (unpublished M.A. thesis, Tufts University) (on file with The Fletcher School, Tufts University) (explaining the how the vertical relationship between businesses and the state in Vietnam has been influenced by neo-Confucian, anti-mercantilist, and socialist class theory).

<sup>55</sup> See *Id.* at 52 (explaining the socialist system where civil servants receive financial bonuses for compliance with Party policies and, because of paltry salaries, may use their position to extract bribes from private sector opportunities).

<sup>56</sup> See Tiep Trung Nguyen, *Government Reform for Socio-Economic Development in Vietnam*, 10 ASIAN REV. OF PUB. ADMIN. 172, 183 (1998) (describing how some business people would prefer to bribe public servants to save time and to avoid missing business opportunities).

<sup>57</sup> *Id.* at 53.

<sup>58</sup> Chau Minh Dao, *Administrative Reform in Vietnam: Need and Strategy*, 19 ASIAN J. OF PUB. ADMIN. 303, 307 (1997).



the Enterprise Law, a new enterprise, after completing the registration process at the Department of Planning and Investment, would still need to apply for a multi-modal transport business license with the Ministry of Transport and a customs clearance agent business license with the Department of Customs.<sup>59</sup>

In some cases, the problem was not so much overlapping of agency function as creation of regulatory vacuums. The likelihood of threats to public health and safety increased in regulatory vacuums left by the elimination of licenses that had, in the past, included provisions related to environmental pollution and consumer well-being. For example, prior to the elimination of business licensing requirements for food product manufacturers, food safety inspectors in Ho Chi Minh City had incorporated food hygiene standards into license conditions.<sup>60</sup> On the passage of the 2000 Enterprise Law, which eliminated business licenses to food product manufacturers, the Ho Chi Minh City local government authorities were unprepared for deregulation and did not issue food safety guidelines to facilitate self-regulation by the industry and monitoring by health inspectors.<sup>61</sup>

#### **b. Poor Legal Drafting Process**

The poor quality of written regulations related to business licensing diluted the effectiveness of the 2000 Enterprise Law. Laws frequently changed and were hastily issued, without corresponding rationale or widespread communication to businesses about the nature and implications of any legal changes.<sup>62</sup> Regulations were loosely stipulated or written in a generic manner open to interpretation. Businesses were at times not aware that their operations were illegitimate, because they did not realize that a license was needed, where to apply for a

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<sup>59</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1.

<sup>60</sup> *Business Beat*, VIET NAM NEWS, Feb. 2, 2000 at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1.

license, or the names of the government agencies responsible for issuing the licenses.<sup>63</sup>

Contradictory and ambiguous laws created challenges and added confusion for potential entrepreneurs.

### **c. Inadequate Government Resources**

Vietnam's government lacked the resources, human and financial, to fully implement, evaluate, and monitor the implementation of the laws related to new business establishment.<sup>64</sup>

With the transformation of Vietnam's socioeconomic structure into a market economy, not only did government bureaucrats lack knowledge about the accompanying changes in laws related to business licensing and registration, but also the necessary training in the managerial work required to accommodate the legal changes.<sup>65</sup>

The salaries of government bureaucrats were much lower than those in the private sector, especially in comparison with the pay offered to staff in joint ventures or foreign companies.<sup>66</sup> This resulted in a brain drain from the public sector to the private sector, as many young and well-educated personnel moved to work for private enterprises. The remaining older, less skilled public servants were ill-informed and unprepared to deal with their new administrative duties under the new Enterprise Law.

There were significant differences in the implementation of national policies related to business registration at local levels. Most of the enterprises established as a result of the Enterprise Law between 2000 and 2005 were concentrated in urban provinces such as Ho Chi

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<sup>63</sup> Chau Minh Dao, *Administrative Reform in Vietnam: Need and Strategy*, 19 ASIAN J. OF PUB. ADMIN. 303, 308 (1997).

<sup>64</sup> See Tiep Trung Nguyen, *Government Reform for Socio-Economic Development in Vietnam*, 10 ASIAN REV. OF PUB. ADMIN. 172, 183 (1998) (explaining the problems of knowledge obsolescence and knowledge shortage within the existing civil service staff in Vietnam).

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

<sup>66</sup> Chau Minh Dao, *Administrative Reform in Vietnam: Need and Strategy*, 19 ASIAN J. OF PUB. ADMIN. 303, 311 (1997).

Minh City, Ha Noi, Da Nang, and Hai Phong.<sup>67</sup> In the case of these urban provinces, government authorities had the financial resources to promulgate business registration information to attract business investment.<sup>68</sup> Urban provinces created websites about business registration procedures and established new business information centers for entrepreneurs.<sup>69</sup> In contrast, the implementation of the Enterprise Law was weak in poorer provinces without the technical and financial capabilities to disseminate business registration information.<sup>70</sup>

Many regulations were passed but not fully communicated to the government agencies at the local levels due to inadequate communication mechanisms between central and provincial governments.<sup>71</sup> Formal instructions to guide the implementation of business licensing regulations were slow to be issued so provincial government agencies often misinterpreted the regulations either unknowingly or purposely.<sup>72</sup>

#### **d. Lack of Government Transparency**

Decisions to approve business license applications were still heavily subject to the judgment of lower-level government officials, which increased the prospects for abuse of discretion and, subsequently, increased the opportunities for corruption. Firms commonly had to

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<sup>67</sup> Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *A Private Sector Perspective on Business Environment Reform – The Case of Vietnam*, at 14 (prepared by Hang Thi Thu Pham).

<sup>68</sup> See *Id.* (explaining how the successes of some provinces in developing the private sector and creating favorable business environments show the bottom-up reform tradition in Vietnam).

<sup>69</sup> See *Id.* (citing the examples of Da Nang and Ho Chi Minh City in creating effective websites about business registration).

<sup>70</sup> See *Id.* (describing how some provincial government agencies complained about the lack of information about the number of private firms under their supervision because of the lack of resources to record firm registration).

<sup>71</sup> See Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *A Private Sector Perspective on Business Environment Reform – The Case of Vietnam*, at 13 (prepared by Hang Thi Thu Pham) (listing the disparities in enterprise development and investment between Vietnamese provinces).

<sup>72</sup> See *Id.* (listing the disparities in enterprise development and investment between Vietnamese provinces).

pay unofficial fees to government officials who hid information about the actual costs and procedures for establishing a business.<sup>73</sup> Given the limited information available to the public about business startup procedures, those who were familiar with the process of establishing a business were more likely to receive government approval for their business than those who were not, causing inequality in business opportunities.<sup>74</sup> Reasons given for refusing business license applications were often unsubstantiated and there were no clear and consistent procedures for appealing such decisions.<sup>75</sup> When reasons were given for refusing business license applications, some of the vague reasons given by government authorities to enterprises included: inconsistency with local socioeconomic planning, difficulty in exercising government control due to the informality of the enterprise, and potential harm to the public.<sup>76</sup>

#### **e. Ineffectiveness of Regulations to Promote New Business Establishment**

The drafters of regulations related to business licenses made no attempt to inquire about business conditions when enforcing the 2000 Enterprise Law. Additionally, businesspeople were reluctant to express their opinions to lawmakers for fear of antagonizing the government or due to their doubts about the benefits if they did get involved in policy dialogue.<sup>77</sup> Provisions of some business licensing regulations did not fit with the reality of actual business conditions due to the lack of public consultation when the regulations were designed.<sup>78</sup> For example, the government implemented a business license requirement that printing and publishing operators

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<sup>73</sup> See Thi Bich Tran, R. Quentin Grafton & Tom Kompas, *Institutions Matter: The Case of Vietnam* 13 (Austl. Nati'l U. Crawford Sch. of Econ. and Gov't, Working Paper, 2008) (citing 2002 survey of 300 firms carried out by the World Bank in Vietnam).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 14.

<sup>76</sup> *Id.*

<sup>77</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1.

<sup>78</sup> *Id.*

must ensure that the content of publications complied with existing regulations.<sup>79</sup> Demonstrated knowledge of the regulations would have been a logical prerequisite for issuance of the license. Instead, enterprises desiring to receive the license were required to provide the technical specifications of the printing equipment and demonstrate the proficiency and experience of their managers in the printing and publishing sector, requirements that did not relate to the content of publications.<sup>80</sup>

Furthermore, business licensing regulations could be avoided by legal maneuvering, harming the public interests intended to be served by those regulations. A hotel developer with a vacant site in Hanoi's ancient Hoan Kiem district knew that the special rules for preserving the historical authenticity of buildings in the area made it unlikely that his application to build a hotel would be approved.<sup>81</sup> The developer therefore took the easier way of registering a trade company to operate on the same location and then filing a petition to change it into a hotel business.<sup>82</sup> Meanwhile, he had started to construct a building that could easily be converted into a hotel. This calculated "crime" resulted in a police investigation and eventually a modest fine. The hotel developer's desired permission to operate a hotel was ultimately granted since the receipt for the fine was presented as a "license" to prove that all business requirements had been met.<sup>83</sup>

International experience shows that, in order to substantially reform the legal framework for new business establishment, the government must establish processes that effectively monitor

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<sup>79</sup> *Id.*

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

<sup>81</sup> Adam Day, *Legal Reform and Economic Development in Vietnam and China: A Comparative Analysis* 50-51 (Feb. 29, 2004) (unpublished M.A. thesis, Tufts University) (on file with The Fletcher School, Tufts University).

<sup>82</sup> *Id.*

<sup>83</sup> *See Id.* (describing how a business' illegal action can become the basis for securing a legal claim, given the legal creativity and local knowledge of the entrepreneur).

the lawmaking process related to business licenses and conditions, monitor the licensing procedures, and create mechanisms through which entrepreneurs can appeal for the removal of unreasonable regulations that affect their freedom to do business.<sup>84</sup> Making all information about start-up requirements accessible to the business community, simplifying fees and administrative procedures, and eliminating unofficial payments can further reduce costs of starting a business.<sup>85</sup>

#### **IV. 2006 Unified Enterprise Law: Equal Regulatory Treatment of State-Owned, Private Domestic, and Private Foreign Enterprises**

The legal environment for businesses prior to the enactment of the 2006 Unified Enterprise Law differed according to whether the business was private or public.<sup>86</sup> State-owned enterprises were more easily established and received more government protection than did private enterprises.<sup>87</sup> In 2006, the government of Vietnam merged the 2000 Enterprise Law, 2000 Foreign Investment Law, and 2003 State-Owned Enterprise Law, creating the Unified Enterprise Law which treated all enterprises equally regardless of ownership.<sup>88</sup> The law recognized only four types of businesses: liability limited companies, joint ventures,

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<sup>84</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 1.

<sup>85</sup> *Despite Many Reforms, Doing Business is Still Not Easy in Vietnam*, BUS. ISSUES BULL., Dec. 2005 at 1.

<sup>86</sup> See Trang Nguyen & Lan Van Nguyen, Int'l Fin. Corp. [IFC], *Technical Assistance to Vietnam's Business Environment Reform Process: A Case Study on the Unified Enterprise Law and Common Investment Law*, at 5 (Nov. 2005) (describing factors considered by the government of Vietnam for revising the 2000 Enterprise Law).

<sup>87</sup> See *Id.* (noting that private firms were severely disadvantaged relative to state-owned enterprises in terms of access to credit and land, and in legal and regulatory treatment. Private firms faced restrictions in land use rights for joint ventures with foreign investors. State-owned firms received more favorable lending terms from state-owned banks, which dominate the banking sector).

<sup>88</sup> *Id.* at 3.

partnerships, and private enterprises, regardless of their size, function, and ownership.<sup>89</sup> For each of the four types of businesses, the Unified Enterprise Law specified the forms, procedures, and conditions needed for business registration.

The Unified Enterprise Law did not eliminate business licenses altogether, but it did eliminate those licenses for which business registration would be more appropriate. Unlike a business license which entailed obtaining government permission to establish a business, business registration only required the business to meet the specifications under the Unified Enterprise Law and the business owner to complete the appropriate documents informing the government of business establishment. Explicit conditions regarding business registration under the Unified Enterprise Law limited the discretion of government officials to impose inappropriate and unnecessary licenses on businesses and clarified business startup procedures for business owners in Vietnam. The government's stated objectives in implementing the Unified Enterprise Law were to remove illogical distinctions based on ownership in the treatment of enterprises, strengthen domestic and foreign investor confidence in their right to freely conduct business in those areas not prohibited by law, and adhere to the demands and commitments of the WTO and various international trade agreements.<sup>90</sup>

Prior to the approval of the Unified Enterprise Law, the drafting committee conducted a study on the expected impacts of the proposed reforms. A technique called business impact test panels was performed in all major cities in Vietnam, involving nearly two hundred participants, including business representatives, government officials, and the press.<sup>91</sup> This technique

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<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 3.

<sup>91</sup> Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *Improving the Quality of Business Environment Reforms: The Example of the Reform of the Enterprise Law*, at 15 (prepared by Binh Duy Le).

encouraged the drafting committee to proactively approach key stakeholders in different economic sectors to obtain insight on how important business issues could potentially be affected by the new law.<sup>92</sup> The business impact test panels helped overcome the problems of validity apparent in the 2000 Enterprise Law that had resulted in a disconnect between regulations related to new business development and the public interests that the Enterprise Law was intended to serve. Moreover, opportunities to receive input from and maintain dialogue with the business community were created, promoting greater transparency between the government and the private sector. Opening the lawmaking process to a wider group of stakeholders, the drafting process for the Unified Enterprise Law differed from that of the 2000 Enterprise Law in that the business community told the drafting team what should be in the law instead of the drafting team explaining to the business community what was in the law.

Following the approval of the Unified Enterprise Law, the drafting committee was transformed into an Implementation Task Force to monitor the application of the law and ensure its proper enforcement. The Implementation Task Force drafted implementing decrees for the Unified Enterprise Law, advocated changes to existing laws that were in conflict with the spirit of the new law, and ensured that future draft laws will not contradict the new law.<sup>93</sup> The Decree on State Management of Business Licenses, an implementing decree of the Unified Enterprise Law, made certain international best practices in the regulation-drafting process mandatory for business licenses in Vietnam.<sup>94</sup> The decree required that each business license include the following elements: (1) a mechanism to file a claim in case the applicant is not granted a license or encounters delays; (2) public consultation between the relevant sector of the business

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<sup>92</sup> *See Id.* at 14 (describing the benefits of public consultation during the lawmaking process).

<sup>93</sup> *All Business Equal Under New Enterprise Law*, INTERNATIONALREPORTS.NET, 2005, <http://www.internationalreports.net/asiapacific/vietnam/2005/biz.html>.

<sup>94</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 3.



community and the issuing agency on the consequences of the license on business conditions and the public interest; and (3) definite time limits for processing each application in the interest of transparency, objectiveness, and fairness.<sup>95</sup>

The Implementation Task Force reviewed more than 400 existing legal documents including approximately 300 business license regulations.<sup>96</sup> The basic criteria for evaluating a business license regulation were the purpose of the state's intervention and the impact of the regulation on private business activities.<sup>97</sup> The Implementation Task Force considered the following ten factors to assess the legality, necessity, reasonableness, and comprehensiveness of business licenses: name of the license, purposes of the license, business activities managed by the license, who needs to apply for the license, application process for the license, time required to process the application, validity period of the license, application process to change or extend the license, revocation of the license, and procedures for filling complaints about the business licensing process.<sup>98</sup> A business license was considered inadequate if it did not cover all ten areas and needed to be revised before going into effect.<sup>99</sup>

The Implementation Task Force also evaluated the presence of suitable procedures to guide civil servants for each business license regulation because the government was dedicated to creating an effective, accountable, adaptable, and responsive civil service with high morals

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<sup>95</sup> *Id.*

<sup>96</sup> Thomas Finkel, Chief Technical Advisor, MPI-GTZ SME Dev. Program, Presentation at the International Workshop on Public-Private Dialogue: Public Private Dialogue in the Making of the Unified Enterprise Law and the Common Investment Law in Vietnam (Feb. 1, 2006).

<sup>97</sup> See TIMOTHY J. SINCLAIR, GLOBAL GOVERNANCE 7 (2004) (describing the ways in which a state intervenes in private enterprise, such as positively influencing the behavior of private entrepreneurs through policies designed to maintain or accelerate their activities or negatively influencing private entrepreneurs by regulating or constraining their activities).

<sup>98</sup> *Streamlining Business Licensing*, BUS. ISSUES BULL., June 2006 at 3.

<sup>99</sup> *Id.*

and motivation to work for the public good.<sup>100</sup> Revision of administrative procedures to eliminate non-essential hierarchies and unnecessary work processes would rid the administrative system of red-tape and duplications. Under an improved working environment, the administrative system should find it easier to attract young talented recruits with the skills and interest to facilitate new business establishment.

It is not as yet clear what the impact of the 2006 Unified Enterprise Law has been. The 2010 Doing Business Report for Vietnam indicated that the time needed to start a business remained at 50 days and the number of new business registration procedures remained at 11 steps, no change from the 2005 report prior to the implementation of the Unified Enterprise Law.<sup>101</sup> Vietnam ranked 93 out of 181 countries for ease of doing business and 116 out of 181 countries for ease of starting a business.<sup>102</sup> Given the recent introduction of the Unified Enterprise Law, the effect of the reforms on new business establishment were not yet captured in the Doing Business report data.<sup>103</sup> However, The World Bank and International Finance Corporation, publishers of the Doing Business report, were optimistic that the indicators for ease of starting a business in Vietnam would show improvement in future years.<sup>104</sup>

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<sup>100</sup> Ian Scott and Ian Thynne, *Public Sector Reform – Critical Issues and Perspectives*, 10 ASIAN J. OF PUB. ADMIN. 18, 31 (2004).

<sup>101</sup> The World Bank and International Finance Corporation Doing Business in Vietnam Report, <http://www.doingbusiness.org/ExploreEconomies/?economyid=202> (last visited Oct. 6, 2008).

<sup>102</sup> *Id.*

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

<sup>104</sup> *See Id.* (citing how business licensing reform resulting from the Unified Enterprise Law and the introduction one-stop-shop for business registration certificates, tax codes, and stamp carving permits in March 2007 would help shorten the time and save the number of administrative visits during the startup process. A one-stop-shop is considered to be any institution that unites government officials from different department in one location to provide improved information and/or services to its citizens).

## **A. Impact on Foreign Enterprises**

Based on the principle of ensuring the freedom of enterprises to choose any business area not prohibited by law, the Unified Enterprise Law also minimized conditions and restrictions for foreign invested enterprises. Prior to the enactment of the law, a foreign investor could hold only up to 30% ownership of a business in Vietnam.<sup>105</sup> The Unified Enterprise Law abolished the cap and declared that foreign investors need only register their business operations in Vietnam rather than apply for a license.<sup>106</sup> Foreign enterprises were also allowed to increase investment or expand the scope of their business operations without seeking government permission.<sup>107</sup>

Increasing foreign investor confidence and trust in doing business in Vietnam, the Unified Enterprise Law created greater transparency, accountability, and predictability in procedures establishing foreign invested businesses and removed time-consuming, unnecessary licensing requirements. Improving the business environment for foreign enterprises was important for the Vietnamese economy because foreign companies contributed to the country's GDP, increased exports and access to international markets, and created jobs.<sup>108</sup> Through transfers of technology and knowledge, foreign enterprises helped develop new industries for Vietnam, such as oil and gas exploration, and upgraded other industries, such as garment and

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<sup>105</sup> *Enterprise and Investment Laws in Place but Implementation Still Being Hindered*, BUS. ISSUES BULL., Apr. 2007 at 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See U.S. COM. SERVICE, DOING BUSINESS IN VIETNAM: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 3 (2007) (noting that, between 2000 and 2005, Vietnam attracted over USD\$18 billion in foreign direct investment with foreign enterprises contributing 14% of the GDP, 1/3 of the total export turnover, and 800,000 new jobs).

textile manufacturing.<sup>109</sup> Foreign enterprises also helped modernize corporate management as new groups of young and dynamic managers were trained in international business principles.<sup>110</sup>

In regards to joint ventures in particular, because the Unified Enterprise Law clearly specified the requirements and procedures for their setup, foreign investors felt more secure and were more willing to work with state-owned enterprises or domestic private firms to establish businesses.<sup>111</sup> By 2007, joint ventures accounted for the majority of foreign enterprises in Vietnam.<sup>112</sup> The foreign partner to a joint venture benefited from the relationship with the Vietnamese partner because the domestic firm could contribute local market know-how, existing relationships with customers, and access to land that might otherwise be difficult to obtain. Easing the entrance process for foreign firms in Vietnam resulted in greater competition for domestic firms, but domestic firms largely supported the provisions within the Unified Enterprise Law relating to foreign invested enterprises because of the potential benefits to domestic firms as well.<sup>113</sup> For domestic firms wishing to create new business projects but not having the requisite technology or experience, joint ventures with foreign firms provide management skills and significant operating capital from foreign enterprises.

### **B. Impact on Small-to-Medium Sized Enterprises (SMEs)**

The Vietnamese economy is characterized by a large number of small-to-medium sized enterprises. In Vietnam, SMEs are officially defined by the government as enterprises with

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See* CENT. INST. FOR ECON. MGMT., A QUICK GUIDE THROUGH THE ENTERPRISE LAW 86 (2005) (defining a joint venture as a limited company owned principally by two or more corporate shareholders).

<sup>112</sup> U.S. COM. SERVICE, DOING BUSINESS IN VIETNAM: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 87 (2007).

<sup>113</sup> *Id.* at 88.

capital of under VND 10 billion (or US \$670,000) and fewer than 300 staff.<sup>114</sup> In 2005, 98% of the 2.8 million businesses in Vietnam's formal sector had less than ten employees, generally in the form of household businesses.<sup>115</sup> Each job generated in a SME is estimated to require a capital investment of about US \$800 compared with an investment of US \$18,000 for each job in a state-owned enterprise, indicating how SMEs use business capital more efficiently under most conditions.<sup>116</sup> SMEs have the potential to play a crucial role in Vietnam's economic development by harnessing latent entrepreneurial zeal, creating new jobs, bringing about a more efficient allocation of resources, and promoting regional development.

Progress in business environment reform encouraged the formalization of a significant number of small-to-medium sized household enterprises. Registering a company to formalize an enterprise offers substantial benefits for the enterprise in terms of the ability to gain access to equity capital and loans and to receive Value Added Tax (VAT) invoice books, without which goods and services cannot be sold to state-owned enterprises and the government.<sup>117</sup> A 2005 World Bank survey showed that about 45% of the enterprises registered during the 2000-2005 period were already in existence in 2000 in the form of small household businesses.<sup>118</sup> SMEs still only accounted for only two percent of all new business establishments per year in Vietnam,

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<sup>114</sup> Sarah Turner and Phuong An Nguyen, *Young Entrepreneurs, Social Capital and Doi Moi in Hanoi, Vietnam*, 42 URB. STUD. 1693, 1698 (2005).

<sup>115</sup> See Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *A Private Sector Perspective on Business Environment Reform – The Case of Vietnam*, at 7-8 (prepared by Hang Thi Thu Pham) (listing construction, garment and textile, food processing, and ceramics as the top sectors for SMEs with fewer than 10 employees).

<sup>116</sup> Charles Harvie, *Competition Policy and SMEs in Vietnam* 14 (U. of Wollongong Department of Econ., Working Paper, 2001).

<sup>117</sup> Markus Taussig, *Domestic Companies in Vietnam: Challenges for Development of Vietnam's Most Important SMEs*, 2005 U. OF MICH. WILLIAM DAVISON INST. 7.

<sup>118</sup> Small Enterprises Dev. Int'l Conf., Cairo, Egypt, Nov. 29, 2005, *A Private Sector Perspective on Business Environment Reform – The Case of Vietnam*, at 6 (prepared by Hang Thi Thu Pham).

but the annual registration of SMEs greatly accelerated at a rate of over 20% per year from 2000 to 2005.<sup>119</sup>

The increased rate of SME registration may be interpreted as an indicator of increasing business confidence in the government. When a SME chooses not to take the bureaucratic step of registering the firm, such inaction says something important about the business context in which the entrepreneur operates. Firms may choose to avoid formalization when the costs of compliance with regulations may be too high or when informality keeps firms under the radar of rent-seeking officials who might target them for illicit fees if they knew the true extent of their operations.<sup>120</sup> With previous difficulties in registering an enterprise overcome with the enactment of the Unified Enterprise Law, the Vietnamese government now more actively encourages entrepreneurs to embrace opportunities provided by the business reforms and establish their own businesses. The rationale is that one can contribute to the welfare of the nation by becoming rich individually.<sup>121</sup> This change in the discourse of the socialist-minded Vietnamese government is evident in the increase in news stories in the state-controlled media featuring entrepreneurs and owners of successful informal household firms formally registering their enterprises and launching their business with great success.<sup>122</sup>

## V. Conclusion

A system of legal regulation for new business establishment was an integral part of Vietnam's economic development. Sustained economic growth in Vietnam required equalizing business opportunities to develop a robust and dynamic private sector. Business licensing reform

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<sup>119</sup> *Id.*

<sup>120</sup> Markus Taussig, *Domestic Companies in Vietnam: Challenges for Development of Vietnam's Most Important SMEs*, 2005 U. OF MICH. WILLIAM DAVISON INST. 6.

<sup>121</sup> Sarah Turner and Phuong An Nguyen, *Young Entrepreneurs, Social Capital and Doi Moi in Hanoi, Vietnam*, 42 URB. STUD. 1693, 1699 (2005).

<sup>122</sup> *Id.*

under the 2000 Enterprise Law included the clarification of rules and simplification of procedures to obtain government approval for business establishment as well as the elimination of many unnecessary licenses so that businesses need only register to notify the government of business establishment. Despite the well-meaning objectives of the 2000 Enterprise Law, Vietnam's reconfiguration of its legal institutions to suit the post-*doi moi* environment of private sector development was not without its problems and challenges. Due to a government bureaucracy that lacked transparency, business licensing remained an important tool of state management, unfairly favoring state-owned enterprises over private firms and protecting the power and interests of government bureaucrats. Contradictory and ambiguous regulations administered by inefficient bureaucrats further diluted the effectiveness of the 2000 Enterprise Law.

Business licensing reform in Vietnam demonstrated the importance of the political and cultural context within which the reform took place and the value of domestic and international business stakeholders in shepherding the reform process. The Unified Enterprise Law of 2006 exemplified the government's dedication to thoughtful policy design and effective policy implementation, addressing the weaknesses of the 2000 Enterprise Law. To meet its planned 2006-2010 GDP annual growth rate of 7.5 to 8 percent, the government recognized that it must integrate its economy globally with measures to attract foreign enterprises.<sup>123</sup> Unfettered access to world markets became a priority, leading the government to adopt the 2006 Unified Enterprise Law which complied with terms of WTO accession requiring that laws and legal institutions be transparent, rule-based, and neutral in their application to domestic and foreign businesses. The

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<sup>123</sup> U.S. Agency for Int'l Dev. [USAID], *Reforming the Enterprise Law in a Culture of Gradualism: Lessons from Vietnam*, at 2, Issue 6 (May 2006).

international business environment helped drive reform to create a level playing field for new businesses in Vietnam, domestic and foreign, state and private, and large and small.

The 2006 Unified Enterprise Law also overcame several problems in the 2000 Enterprise Law. By conducting business impact test panels and encouraging active public-private dialogue, the drafters of the 2006 Unified Enterprise Law considered actual business conditions so that inefficiencies during the business establishment process were properly identified and addressed. By clearly specifying when business licensing or registration would apply to particular business types or industries, the rules and procedures under the 2006 Unified Enterprise Law offered government transparency to business owners and reduced corruption opportunities for government bureaucrats who took advantage of ambiguous rules.

From the experience of drafting the 2006 Unified Enterprise Law in Vietnam, a few lessons stand out. First, economic growth is a powerful motivator. Business licensing reform was accelerated by trade negotiation timetables for bilateral agreements and WTO accession. Second, transparency deflects dissent. Opposition to business licensing reforms came from within the government bureaucracy. The federal government managed internal dissent by increasing stakeholder involvement and improving external disclosure and communication. And finally, political will is essential. To sustain high economic growth and new business development, Vietnam must continue to show political leadership in its business licensing reform efforts and provide the human, technical, and financial support necessary to ensure the quality and accountability of the new business startup process.