PROTECTING MINORITY SHAREHOLDERS FROM OPPRESSIVE CONDUCT: ASSESSING THE LEGAL TRANSFER OF THE AUSTRALIAN OPPRESSION SECTIONS TO THE VIETNAMESE LITIGATION PROVISIONS

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ABSTRACT

Promoting fairness in the market, through adequate protection for minority shareholders, has been identified as an essential prerequisite to attracting investments and developing Vietnam's economy. Incorporating such minority shareholder protection is articulated as a goal in Vietnam's *Master Plan on Economic Restructuring 2013–2020* and the *Enterprise Law 2014*. This law has incorporated minority shareholder protections operating in Australia into its litigation provisions. However, these provisions will not have the necessary wide application nor provide the necessary remedies to satisfactorily protect minority shareholders from oppressive conduct in default of oppression sections in Vietnam.

This thesis critically assesses the effectiveness of the legal transfer of oppression sections from Australia to Vietnam. It specifically examines how the oppression sections from the Australian corporate law are likely to be transplanted into the litigation provisions of the Vietnamese enterprise law. It develops a legal transfer framework founded on Teubner's legal irritation theory and an empirical study of Berkowitz, Pistor and Richard on the effects of corporate legal transfers, to identify the factors that facilitate and irritate the legal transfer from Australia to Vietnam. The thesis proceeds to recommend reforms for improving the effectiveness of this legal transfer.

Australia and Vietnam share many similarities — namely, the overall goal of nurturing an effective market economy, the government's commitment to legal reform, and an active civil society which sees the need for oppression remedies — which support the transfer of legal rules from one country to the other. However, there are substantial differences between the two countries — namely, the multiple objectives of the legislators, the substance of legislative processes, the functionality of lawmaking institutions, the independence of legal implementation institutions, and the political leadership — which will act as hurdles to the legal transfer process.

The main hurdle is posed by Vietnamese party-state institutions, whose conduct can be explained as regulatory capture. The Ministry of Planning and Investment has captured the legislative process, while vested political interests and state-owned enterprises' interests have captured the judiciary which is unlikely to act independently. In contrast with the Australian experience, these institutions are likely to undermine the effectiveness of the legal transfer of oppression sections.

A key challenge for Vietnam is to find a way to transfer not only the wording of oppression sections from Australia, but also the foundational values, specifically fairness that underpins these provisions. The thesis illustrates that effective legal transfer requires commitment, capacity and effective actions from a range of party-state institutions, including the legislature and the judiciary, especially when state-owned enterprises' interests are involved. It is contended that these institutions should use the concept of fairness as the guiding principle in legal transfer and institutional reform.

This thesis contributes nuanced insights into legal transfer regarding minority shareholder protection in Vietnam by focussing on the integration of fairness, not only into the wording of the provisions and the processes therein, but also into the manner in which the party-state institutions interact with these processes.

STATEMENT OF ORIGINALITY

This thesis has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, it does not contain material previously published or written by another person except where due reference is made in the thesis.

The cut-off date of main thesis events is 31 December 2016 that marks 30 years of Renovation (1986–2016) in Vietnam.

Date: 30 October 2017

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[1] Names are in alphabetical order.

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LIST OF ABBREVIATIONS

ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investments Commission
BTA	Bilateral Trade Agreement
CAMAC	Corporations and Markets Advisory Committee
CIEM	Central Institute of Economic Management
CLERP	Corporate Law Economic Reform Program
CPV	Communist Party of Vietnam
GDP	Gross Domestic Product
GM	General Meeting
IRL	Independent Resources Limited
MPI	Ministry of Planning and Investment
OBPR	Office of Best Practice Regulation
OECD	Organisation for Economic Co-operation and Development
OPC	Office of Parliamentary Counsel
PM	Prime Minister
RCV	Restructuring for a More Competitive Vietnam
RIA	Regulatory Impact Assessment
SOE	State-Owned Enterprise
UNDP	United Nations Development Programme
US	United States
VCCI	Vietnam Chamber of Commerce and Industry
WB	World Bank
WTO	World Trade Organisation

CHAPTER 1: INTRODUCTION TO THESIS BACKGROUND

Introduction

Since the introduction of the first corporate legislation, namely *Company Law 1990*,[1] Vietnam has created six laws to regulate the rights of shareholders.[2] These legal changes were aimed at 'protecting rights together with legitimate interests of investors (including shareholders in shareholding companies), strengthening internal forces and propelling economic renovation to modernise the country'.[3] The latest reforms were presented in *Enterprise Law 2014* that came into effect in 2015, with policy guidelines issued in 2016.[4] They demonstrate Vietnam's commitment to the reform process, which seeks to create a sound market for business and corporate operation.

The reforms of 2014 implemented policies to increase minority shareholder protection in the *Master Plan on Economic Restructuring 2013–2020* ratified by Decision No 339/QĐ-TTg Dated 19 February 2013. These reforms responded to reports and recommendations from multilateral development institutions about facilitating judicial access to counter prevalent oppression by majority shareholders and directors targeting minority shareholders, as general meeting resolutions and market exit through sale of shares are inadequate to address this problem.[5]

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1 This thesis applied the referencing guidelines in *Australian Guide to Legal Citation* (3rd ed, 2010). This Guide does not address all features of Vietnamese materials, thereby requiring adaptation. For example, Vietnamese names were written according to standard Vietnamese practices: last name, middle name, if any, and first name. Vũ [last name] Văn [middle name] Mẫu [first name] is written as Vu Van Mau, when clarity is needed. The bibliography provides the diacritical name, Vũ Văn Mẫu. Moreover, as most of cited legislative materials are of Vietnam, the indication of 'Vietnam' is not included when clarity is ensured. The Australian legislation was indicated by 'Cth'. English translation is explained in Section 2.5 of Chapter 2. A simplified table of contents is included in each chapter to assist readers. This thesis was jointly edited by Capstone Editing, Elite Editing and James Clarke according to Parts D and E of *Australian Standards for Editing Practice* (2nd ed, 2013) under the national 'Guidelines for Editing Research Theses'.

2 The six laws are: (1) *Company Law 1990*; (2) *SOE Law 1995*; (3) *Enterprise Law 1999*; (4) *SOE Law 2003*; (5) unified *Enterprise Law 2005*; (6) *Enterprise Law 2014* (Vietnam) ('*Enterprise Law 2014*'). Moreover, Vietnam enacted *Private Enterprise Law 1990*; however, this law did not regulate rights of shareholders.

3 See, eg, *Enterprise Law 1999*, Preamble.

4 See, eg, Resolution No 19-2016/NQ-CP Dated 28 April 2016 of the Government on Primary Missions and Solutions to Improve the Business Environment and Increase the National Competitiveness Capacity for Two Years 2016–2017, with Orientation Towards 2020 ('Resolution No 19-2016/NQ-CP Dated 28 April 2016').

5 For example, the annual *Doing Business* reports by the World Bank; World Bank, 'Corporate Governance Country Assessment: Vietnam' (2013); International Finance Corporation, Global Corporate Governance

The *Enterprise Law 2014* (Vietnam) significantly broadened litigation rights in ss 147, 161 in an attempt to strengthen minority shareholder protection. These reforms were part of legal transfers from Australia.[6] However, they were inadequate because they lacked litigation measures to remedy oppressive conduct. Thus, stronger litigation rights are needed to provide minority shareholders with oppression remedies aimed at improving investor confidence and the business environment to attract investments.

This thesis examines the transfer of the oppression sections 232–235 in Australia's *Corporations Act 2001* (Cth) to the litigation provisions in Vietnam's *Enterprise Law 2014* in order to protect minority shareholders from oppressive conduct in companies.

This chapter sets the scene for the research, and outlines the socioeconomic and legal significance of protecting minority shareholders. It identifies the main research objectives, the ambit of the discussion, the research question, and the thesis structure, before stating the main research contributions. The research methodology and data collection are explained in Chapter 2.

Forum and State Securities Commission of Vietnam, 'Vietnam Corporate Governance Scorecard 2012' (2012); Asian Development Bank, 'ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014' (2014). Sections 3.9.1, 3.9.2 of Chapter 3 discuss these reports in more detail.

[6] For example, Raymond Mallon (Australia) and David Goddard (New Zealand) are advisers from Australia's Restructuring for a More Competitive Vietnam (RCV) project that sponsored Vietnam's economic restructuring, including creating *Enterprise Law 2014*; David Goddard, 'Draft Revised Law on Enterprises — Some Comments' (Paper presented at the Conference on (Amended) Enterprise Law and Sharing International Experiences in Corporate Governance, Sponsored by DFAT, Hanoi, 15 August 2014).

1.1 Setting the Scene for Research

Minority shareholder protection is instrumental in the effective functioning of companies and the market. Many scholars have confirmed this link in various ways. Mallin and Melis demonstrated that companies that exercise unbiased shareholder rights experience better corporate performance, higher profits and lower capital expenditures.[7] Lang et al and Johnson et al observed that the problems of internal expropriation and unfair treatment of minority shareholder interests often lie behind poor corporate governance practices and devastating corporate collapses.[8] In identifying the causes of these problems, Klapper and Love, Claessens and Yurtoglu, and La Porta et al found that deficiencies in law and enforcement were to blame.[9] All these studies suggest that foundational institutions play an essential role in protecting minority shareholders.[10]

Minority shareholders are often susceptible to oppressive conduct within companies. They usually have modest voting power and limited access to quality information. These problems undermine their ability to use certain measures as self-defence tactics — such as general meeting resolutions and market exit through sale of shares — when faced with oppression by directors, majority shareholders or both. Oppression sections allow courts to redress oppressive conduct, thereby providing minority shareholders some form of protection against this endemic problem.

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[7] Chris Mallin and Andrea Melis, 'Shareholder Rights, Shareholder Voting, and Corporate Performance' (2012) 16(2) *Journal of Management and Governance* 171, 173.

[8] P H Larry Lang et al, 'Expropriation of Minority Shareholders: Evidence from East Asia' (Policy Research Working Papers World Bank November 1999); Simon Johnson et al, 'Corporate Governance in the Asian Financial Crisis' (2000) 58(1–2) *Journal of Financial Economics* 141. For Vietnam, Nguyen Ngoc Thang, 'Corporate Governance and its Impact on the Performance of Firms in Emerging Countries: The Evidence from Vietnam' (2011) 27(5E) *Vietnam National University Journal of Science, Economics and Business* 12.

[9] Leora F Klapper and Inessa Love, 'Corporate Governance, Investor protection, and Performance in Emerging Markets' (2004) 10(5) *Journal of Corporate Finance* 703; Stijn Claessens and B Burcin Yurtoglu, 'Corporate Governance in Emerging Markets: A Survey' (2013) 15 *Emerging Markets Review* 1; Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58(1–2) *Journal of Financial Economics* 3; Rafael La Porta et al, 'Investor Protection and Corporate Valuation' (2002) 57(3) *Journal of Finance* 1147.

[10] See also Thomas O'Connor, Stephen Kinsella and Vincent O'Sullivan, 'Legal Protection of Investors, Corporate Governance, and Investable Premia in Emerging Markets' (2014) 29 *International Review of Economics and Finance* 426.

Typical examples of oppression sections are ss 232–235 of the *Corporations Act 2001* (Cth). These four sections provide minority shareholders with judicial access in situations where they have been 'oppressed, unfairly prejudiced, or unfairly discriminated'.[11] Minority shareholders in Australia can bring an action to the Federal Court or Supreme Court of a state or territory, which have wide powers to direct specific acts, including winding up a company, as provided in s 233(1)(a). This thesis will cover these four sections because are very broad, based on the principle of fairness, and comprised of a wide range of remedies, thereby necessary for minority shareholder protection (Chapter 5).

This thesis investigates how Vietnam could effectively adopt and implement the above oppression sections that enable minority shareholders to seek judicial remedies for oppressive conduct in companies. Australia has enabled all shareholders to access such remedies by transferring the British oppression sections to the *Uniform Companies Act 1961* (Cth). These transferred sections have been successful and well established since 2001 because they are aided by a supportive legal and institutional architecture (see Part I in Chapters 3 and 4). The Australian experience could provide useful lessons for Vietnam, given that the litigation provisions in Vietnam's *Enterprise Law 2014* still fall short of offering equivalent protection, as will be discussed in Part II of Chapter 5.

Vietnam has relied on legal transfer, which is a commonplace around the world, to develop all of its enterprise laws since 1990.[12] It has tried to regulate misconduct by majority shareholders and directors through the gradual liberalisation of litigation measures in an attempt to hold them accountable. For example, the *Enterprise Law 2014* reformed the

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[11] *Corporations Act 2001* (Cth) s 232(e).

[12] See, eg, Franklin A Gevurtz, 'The Globalization of Corporate Law: The End of History or a Never-Ending Story?' (2011) 86 *Washington Law Review* 475, 485–90. See also Henry Hansmann and Reinier Kraakman, 'Reflections on the End of History for Corporate Law' in Abdul Rasheed and Toru Yoshikawa (eds), *The Convergence of Corporate Governance: Promise and Prospects* (Palgrave Macmillan, 2012) 32; Michelle Welsh et al, 'The End of the 'End of History for Corporate Law'?' (2014) 29(2) *Australian Journal of Corporate Law* 147. For Vietnam, see Part II of Chapter 3.

following three litigation measures.[13] First, direct litigation against general meeting resolutions included collective actions and personal actions, introduced in 1999 and amended in 2005. Second, direct lawsuits against directors replaced indirect lawsuits piloted in 2010. Third, derivative actions against directors were added. These legal transfer practices have been ongoing for 25 years.

However, these litigation measures are inadequate to protect minority shareholders, as discussed in greater detail in Part II of Chapter 5. While *Enterprise Law 2014* retains broad discretion for directors and differential rights for majority shareholders, the rights of minority shareholders are limited to specific situations.[14] Moreover, this law only provides for legal actions based on the interest ground. Such narrow coverage effectively means that litigation measures are not wide enough to counter unfair conduct. This deficiency creates conditions that allow directors and majority shareholders to oppress minority shareholders because these litigation measures do not enable lawsuits on the grounds of unfairness.

In addition, in the Vietnamese emerging market, directors and majority shareholders are closely related. Majority shareholders often hold or control directorships, given that their voting power arising from share capital, their exclusive rights under the *Enterprise Law 2014* and the scarcity of non-executive directorships assist them to achieve these goals. This is also the case when state-owned enterprises (SOEs) are institutional shareholders. These state shareholders are usually majority shareholders and their representatives are often directors or control directorships. This is because SOEs are funded by the state and controlled by high-ranking bureaucrats who can legally act as de facto or shadow directors under this law.[15]

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[13] The legal challenge to majority resolutions at general meetings first existed in *Enterprise Law 1999* s 79 (effective 1 July 2000). Indirect lawsuits against board members, directors and general directors were piloted in *Decree 102/2010/ND-CP Dated 1 October 2010* (Vietnam) s 25. Direct lawsuits against directors and derivative actions against directors existed in *Enterprise Law 2014* (effective 1 June 2015).

[14] For example, *Enterprise Law 2014* s 114 (2) in essence excluded minority shareholders from access to financial reports, important documents, nomination of board candidates and requests for internal investigation and extraordinary general meetings.

[15] See, eg, *Enterprise Law 2014* ss 93–4, 97–8. For detailed discussion, see Chapter 3, Section 3.9.3.

For these reasons, directors and majority shareholders can legally use their voting power and company constitutions to oppress minority shareholders. Moreover, directors and majority shareholders can illegally perform such conduct in a collusive or separate manner, thereby continuing their exploitative corporate practices.[16]

Therefore, this thesis examines the legal transfer of ss 232–235 in Australia's *Corporations Act 2001* (Cth) to the litigation provisions in Vietnam's *Enterprise Law 2014* for protecting minority shareholders from oppressive conduct within companies. Specifically, this investigation is aimed at exploring the legal and institutional preconditions that would allow minority shareholders to bring action against oppressive conduct by majority shareholders and directors. Moreover, Section 2.2 of Chapter 2 will explain reasons why the thesis adopts the law and approach of Australia rather than those of the UK and US, thereby justifying why discussions on minority shareholder protection following the principle of fairness mainly focus on the Australian jurisdiction. Australia protects such fairness through judicial remedies for unfair conduct because proving that particular conduct is fair would be more onerous than proving that it is unfair (Chapter 5, Part I).

1.2 Socioeconomic and Legal Significance of Protecting Minority Shareholders

Minority shareholder protection is important for various reasons. This protection is crucial for promoting corporate prosperity, market integrity and socioeconomic welfare[17] because it involves safeguarding the interests of small businesses, individual retailers and millions of employees that purchase shares in shareholding companies.

Moreover, the values of this protection are consistent with the core of the Vietnamese regime. In the Vietnamese *Constitution 2013*, the state is committed to 'implement the objectives of

[16] See discussions on surveys and reports in Chapter 3, Sections 3.9.1, 3.9.2.

[17] See, eg, Larry Lang et al, above n 8; Johnson et al, above n 8, 141; La Porta et al, 'Investor Protection and Corporate Valuation', above n 9, 1147; Klapper and Love, above n 9, 703; Jean Michel Lobet, 'Protecting Minority Shareholders to Boost Investment' in Penelope J Brook et al (eds), *Celebrating Reform 2008 — Doing Business Case Studies* (World Bank, 2008) 61; Gevurtz, above n 12, 478; Claessens and Yurtoglu, above 9, 1.

the prosperous people, a strong nation, democracy, *fairness* and civilisation so that everyone has a comfortable life, liberty, happiness, and conditions for well-rounded development, by encouraging and creating conditions for entrepreneurs, enterprises, individuals and other organisations to invest, produce, and do business' [emphasis added].[18] Overall, minority shareholder protection would demonstrate that the state is prepared to respect ethical, economic and constitutional foundations underpinned by the principle of fairness.

While the principle of fairness is a constitutional foundation for protecting minority shareholders in Vietnam's enterprise law, it also underpins Australia's oppression sections. These sections provide judicial remedies for oppressive conduct to reinstate fairness, including fair price and fair dealing (see Chapter 5, Part I). This similarity suggests that minority shareholder protection based on the principle of fairness is important in both countries. Such protection would depend on how this principle is embraced in the lawmaking process, legislative design and judicial implementation, which are informed by reform policies, lawmaking institutions, judicial institutions, political leadership, and their treatment of civil society. These factors inform a frame of reference necessary for examining Vietnam's enterprise law transfer regarding minority shareholder protection.

'Minority shareholder' is a relative concept because of the lack of an exact definition in corporate law.[19] This term may be better understood if considered together with the majority shareholder concept. According to Timmerman, Doorman and Pham, a key feature distinguishing between minority and majority shareholders is the ability to exert significant

[18] *Constitution 2013* (Vietnam) ss 3, 51(3). These are faithful translations without streamlining clumsy structures.

[19] A minority shareholder was an investor holding less than 1% of voting share: *Decree No 48/1998/NĐ-CP* Dated 11 July 1998 of the Government on Securities and Securities Market (Vietnam) s 2 (repealed). *Securities Law 2006* (Vietnam) s 6.9 regulated a majority shareholder to be a shareholder owning at least 5% of voting shares; however, this was intended for disclosure of shareholders, rather than their rights.

influences over the company management.[20] Likewise, Cubbin and Leech as well as Bich and Cung submitted that an important proxy for these influences is shareholder rights.[21]

In *Enterprise Law 2014*, many shareholder rights are conditional on a minimum 10% of total voting ordinary shares of a company held during at least six successive months.[22] These dual conditions are not based on a clear rationale, yet are mandated by this law. For example, such conditions are prerequisites for nominating board candidates, calling an extra general meeting, accessing financial reports and commencing collective legal actions against general meeting resolutions.[23] Shareholders who fail such preconditions are unable to exert influence on corporate affairs.[24] Therefore, this thesis will regard minority shareholders in Vietnam as those that do not hold a minimum 10% of total voting ordinary shares of a company during at least six successive months. Remaining shareholders are considered majority shareholders.

Minority shareholders in Vietnam are mainly private investors, including small businesses and individuals.[25] Many of these individual shareholders are employees who are loyal to the company and reluctant to question decision-making within the company. It is a common practice for employees to 'become shareholders practically overnight' — often without having invested material funds — owing to initial internal issuance of shares with peppercorn charges.[26] Likewise, Vietnam's policy of SOE equitisation (partial privatisation) allows

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[20] L Timmerman and A Doorman, 'Rights of Minority Shareholders in the Netherlands' (2002) 64 *Electronic Journal of Comparative Law* 181, 181–211; L Timmerman and A Doorman, 'Rights of Minority Shareholders in the Netherlands: A Report Written for the XVI World Congress of the International Academy of Comparative Law' (Rijksuniversiteit Groningen, 2005); Pham Duy Nghia, *Economic Law Textbook* (People's Public Security Press, 3rd ed, 2011) 225.

[21] John Cubbin and Dennis Leech, 'The Effect of Shareholding Dispersion on the Degree of Control in British Companies: Theory and Measurement' (1983) 93(370) *Economic Journal* 351; Ngoc Bich Nguyen and Dinh Cung Nguyen, *Company: Capital, Management and Dispute Following Enterprise Law 2005* (Knowledge Press, 2009) 349. Bich is an eminent Vietnamese corporate lawyer who graduated from Harvard. Cung is a drafting member of all enterprise laws since 1990.

[22] *Enterprise Law 2014* s 114 (2).

[23] See *Enterprise Law 2014* ss 114(2)(3), 147.

[24] See Bui Xuan Hai, 'Shareholder Protection: Some Theoretical and Practical Problems in Enterprise Law 2005' (2009) 1 *Journal of Legal Science* 17.

[25] World Bank, 'Financial Sector Assessment: Vietnam' (June 2014) 5.

[26] State Securities Commission of Vietnam and International Finance Corporation, *Corporate Governance Manual* (2nd ed, 2010) 275.

employees to use working years to buy shares with a 40% discount on initial public offerings, while the state usually retains over 50% of stakes to maintain control.[27] These fundraising methods often turn employees into loyal minority shareholders with modest investments. This result strengthens the corporate powers of majority shareholders, especially in SOEs, thereby affecting the manner in which many minority shareholders may act.

In addition, the evolving security market has gradually augmented other types of minority shareholders, such as office workers and retailers. To encourage share trading, Vietnam has operated two stock exchanges since 2000, with a total of 785 listed companies as of 31 May 2018.[28] In these companies, as with public companies, minority shareholders account for a vast number of shareholders, and coexist with majority shareholders, such as large private investors, foreign firms and SOEs.[29] As Vietnam became a lower middle-income economy from 2010, with steady growth of gross domestic product (GDP) per capita and a population of 90 million,[30] this has increased the number of minority shareholders over time.

This development has not yet changed the pattern of concentrated share ownership with the domination of SOEs. This is the case in private, public and listed companies. For instance, listed companies tend to have powerful majority shareholders who are often SOEs, each usually holding over 30% of shares and up to 90% of shares.[31] SOE influence can occur in

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[27] See Pietro Masina, 'Vietnam Between Developmental State and Neoliberalism: The Case of the Industrial Sector' in Chang Kyung-Sup, Ben Fine and Linda Weiss (eds), *Developmental Politics in Transition: The Neoliberal Era and Beyond* (Palgrave Macmillan, 2012) 188, 188–210; World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, *Changing Attitudes to the Market and the State (CAMS) 2011* (Hanoi, 2012) 29; *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48 (27 October 2006) (Report of the Working Party on the Accession of Viet Nam) [80]–[95].

[28] For continuous updates, see https://www.hnx.vn/en-gb/; https://www.hsx.vn/

[29] See, eg, Truong Vinh Xuan, 'Rights of Small Shareholders to Participate in General Shareholder Meetings of Joint-Stock Companies Nowadays' (2010) 5(166) *Legislative Study Journal* 48, 48–51, 59; Bui Xuan Hai, 'Some Theoretical and Practical Problems of Minority Shareholder Protection' (2010) 3(58) *Journal of Legal Science* 24, 26; Ha Minh, 'Protecting Minority Shareholders: Knowing Disease But Yet Finding Remedies' (2008) 6 *Vietnam Securities* 9, 10–11.

[30] The development of the stock exchanges gradually increases the number of minority shareholders. In 2014, GPD per capita was USD 2052. For updates, see http://data.worldbank.org/indicator/NY.GDP.PCAP.CD.

[31] In listed companies, the ownership concentration is approximately 50% on average. Nguyen Ngoc Dieu Le and Nguyen Ngoc Dieu Thi, 'An Examination of the Relationship of Corporate Governance to Firm Performance: Empirical Evidence from Vietnamese Listed Companies' (2016) 7(4) *International Journal of Financial Research* 190, 195; International Finance Corporation, Global Corporate Governance Forum and

three ways, namely, when SOEs (1) are companies that provide services and goods, (2) are majority shareholders in other state and private companies, and (3) combine their shareholding to become a collective majority shareholder in a company because they are all owned by the state. Managers in listed companies often own a substantial number of shares, which allows them to influence corporate operation.[32] When shareholders individually or collectively hold over 51% of total voting shares, they become controlling shareholders, which are again often SOEs.

This pattern of concentrated share ownership has become a prevalent feature of the Vietnamese transitional market in which SOE shareholders are often the majority shareholders and hold or control directorships.[33] Therefore, the protection of minority shareholders from the oppressive conduct of majority shareholders and directors in Vietnam in essence depends on the treatment of SOEs in policy, law and practice.

1.3 Main Objectives and Areas of Focus of the Thesis

This thesis examines the legal transfer of the oppression sections ss 232–35 in Australia's *Corporations Act 2001* (Cth) to the litigation provisions in Vietnam's *Enterprise Law 2014*. This thesis has two main objectives:

1. Identifying which major factors and how they influence the effectiveness of this legal transfer. This takes into account both the established practices of legal transfer since

State Securities Commission of Vietnam, 'Corporate Governance Scorecard Report' (2011), 60; Bui Xuan Hai, *Enterprise Law: Shareholder Protection — Law and Practice* (National Politics Press, 2011) 216. For updates, see http://www.cophieu68.com/companylist3.php?o=si&ud=d&currentPage=1.

[32] Le and Thi, above n 31, 195; My Tran Ngo, Walter Nonneman and Ann Jorissen, 'Government Ownership and Firm Performance: The Case of Vietnam' (2014) 4(3) *International Journal of Economics and Financial Issues* 628, 644; Quang Truong, 'Vietnam: An Emerging Economy at a Crossroads' (Working Paper No 09/2013, Maastricht School of Management School, 2013) 8.
For updates, see http://www.cophieu68.com/companylist3.php?o=sf&ud=d.

[33] See empirical studies by Tuan Nguyen, Stuart Locke and Krishna Reddy, 'Ownership Concentration and Corporate Performance from a Dynamic Perspective: Does National Governance Quality Matter?' (2015) 41 *International Review of Financial Analysis* 148; Ngo, Nonneman and Jorissen, above n 32, 628; K A Vu, G Scully and G Tower, 'Corporate Communication for Vietnamese Listed Firms' (2011) 19(2) *Asian Review of Accounting* 125; GTZ and CIEM, 'Corporate Governance of Shareholding Companies in Vietnam: Regulations, Effectiveness in Practice and Problems' (Hanoi 2008) 46–67. See also World Bank, above n 25; OECD, *OECD Survey of Corporate Governance Frameworks in Asia* (2017) 5–6.

the inception of enterprise legislation in 1990 and the ongoing implementation of the *Master Plan on Economic Restructuring 2013–2020* in Vietnam.

2. Recommending reforms necessary for an effective legal transfer of oppression sections from Australia to Vietnam in both lawmaking and legal implementation to strengthen protection for minority shareholders from oppressive conduct. The first objective's results inform these recommendations, which, in turn, assist with the ongoing implementation of this master plan.

The principle of fairness is the underlying theme on which this thesis is based. This principle is the foundation of the oppression sections. An examination of the potential transfer of these sections requires close attention to how the principle of fairness has been integrated into the lawmaking process and judicial implementation of shareholder litigation provisions in both Australia and Vietnam.

Legal transfer in enterprise law reform involves different issues, including primary jurisdictions, private litigation, and impacts from roles of SOEs. This thesis focuses on these three areas, as follows.

1.3.1 Legal Transfer of Oppression Sections from Australia to Vietnam

Legal transfer requires identifying the receiver and the giver of rules. Vietnam is classified as the main beneficiary jurisdiction because this study is an assessment of Vietnamese enterprise law reforms. Australia is the giving system in which the oppression sections operate. Although the Australian oppression sections were rooted in Anglo-Saxon jurisdictions, the rationale for, and manner in which, Australia adopted, developed and interpreted these statutory sections explain why the legal transfer from Australia to Vietnam is considered practicable.[34] This is explained in Chapter 2. This thesis examines the transfer of the

[34] Anglo-Saxon capitalist countries include the United Kingdom, the United States, Canada, New Zealand, Australia and Ireland. While discussions touch some problems in Australia, solutions fall outside the scope of this thesis.

oppression sections from Australia to Vietnam. As such, these two countries are the main focus.

This thesis also recognises the influences of other countries. Anglo-Saxon countries, such as Canada, the United Kingdom and the United States (US), play important roles because trade agreements with these economies and their aid for reforms encouraged Vietnam to reform enterprise laws towards fairness. East Asian developing countries are also mentioned, given that Vietnam is developing its laws in line with its neighbouring markets and pursuing their international rankings of minority investor protection to compete for investments.[35] Moreover, the historical influences of China, the former Soviet Union and France are acknowledged, as their legacies in terms of state thinking have affected how Vietnam regulates SOEs.

1.3.2 Private Litigation as a Means of Regulating Misconduct in Companies

Private litigation has helped develop the standards that have evolved into legal rules and guidelines in Vietnam, while public litigation is not recognised.[36] Many studies have demonstrated that private litigation represented by lawyers is usually more effective for less developed countries than public interest litigation, which is often brought by bureaucratic regulators that may lack independence or even be corrupt.[37] Public interest litigation needs independent regulators to act for the public interest. This is less likely in Vietnam than in developed countries because the State Securities Commission is subordinate to the Ministry of

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[35] These neighbouring markets include markets of Singapore, Malaysia, Thailand and the Philippines. See Resolution No 19-2016/NQ-CP Dated 28 April 2016, 1–2; Resolution No 19-2016/NQ-CP Dated 28 April 2016; Resolution No 19/NQ-CP Dated 18 March 2014 of the Government on Primary Missions and Solutions to Continue Improving Business Environment and Increasing the National Competitiveness Capacity ('Resolution No 19/NQ-CP Dated 18 March 2014').

[36] The Supreme People's Court of Vietnam has a legal obligation to annually review experiences of trial to issue regulations and guidelines to complement laws: *Law on Court Organisation 2014* (Vietnam) s 20. The deputy chief justice and court officials are often members of the drafting committee for enterprise laws. See Chapter 4, Section 4.5.3; Chapter 5, Section 5.8.

[37] See Erik Berglöf and Stijn Claessens, 'Corporate Governance and Enforcement' (Policy Research Working Paper 3409, World Bank, 2004), 33–4, 41; Bernard Black and Reinier Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109(8) *Harvard Law Review* 1911; John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems, Legal Strategies, and Enforcement' (Harvard Law and Economics Research Paper Series No 644, Harvard Law School, 2009); Rafael La Porta, Florencio Lopez-De-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61(1) *Journal of Finance* 1.

Finance while state officials, SOEs and many big businesses are linked.[38] It is uncertain whether state regulators would query the actions of these majority investors in courts.

These realities render private litigation an important way to protect minority shareholders. This litigation type provides many advantages. For example, affected parties can actively bring legal action without having to rely on the resources, willingness and independence of the state regulators, as in the case of public litigation. Private litigation also leads to changing behaviours, thereby playing an important role in enforcing legal provisions. Thus, private litigation is practical for investors and legal developments.

Private litigation can be compared with other methods of protecting minority shareholders. There are three main avenues for addressing corporate misconduct: general meetings of shareholders, market exit via sale of shares and litigation. The first two measures are important, yet they cannot always provide effective relief for oppressed shareholders. The main reasons for this are the differential rights for majority shareholders, the overuse of replaceable statutory provisions at majority shareholders' advantage and the young stock market.[39] While improvements in the provisions regulating general meetings and market exit are necessary, this way is not enough to stop majority shareholders and directors from continuing their oppression, consequently damaging both the affected shareholders and the national economy. Shareholders need legal action to hold wrongdoers accountable. This necessity further justifies the focus on private litigation.

1.3.3 Role of State-owned Enterprises in Vietnam

In Vietnam, SOEs play an important role, both as major corporations and institutional shareholders. It is recognised that SOEs, private investors and foreign investors are integral to economic activity. However, the dominant presence of SOEs in the market — in which they control 40% of total investments — as well as their political, economic and legal connections

[38] See Chapter 3, Section 3.9.3.

[39] For further details, see Chapter 5, Section 5.6.

with the party-state and senior bureaucrats, are reasons why SOEs are often majority shareholders and hold or control directorships (see Chapter 3, Section 3.9.3). These positions of SOEs have underpinned the manner in which enterprise laws have retained legal advantages for majority shareholders and directors, as explored in Chapters 3, 4 and 5.

These preferential practices have resulted in SOEs in shareholding companies being able to engage in oppressive conduct towards minority shareholders. This can also affect private and foreign investors, thereby undermining the developments and objectives of the enterprise legislation. In essence, the preference for SOEs is an underlying factor mediating legal reforms regarding minority shareholder protection. Thus, a focus on SOEs, or the SOE sector, will provide deeper insights into legal transfer, although this study does not exclude non-state shareholders and their oppression towards minority shareholders.

1.4 Research Question and Thesis Structure

1.4.1 Research Question and Answer Approach

This thesis examines the following research question: how effective could the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions be? It addresses this question by examining two areas central to the legal transfer of oppression sections from Australia to Vietnam: (1) the lawmaking process that introduces this reform to the enterprise legislation and (2) the legal implementation that requires an effective judiciary. Each of these areas will determine the effectiveness of this reform. The necessity to examine these two areas is explained as follows.

(1) The lawmaking process is an important conduit through which foreign statutory rules are transferred. It provides a platform for the interests of all actors to be considered and to shape the content of the legal transfer. One of the risks is that this process could be captured by powerful interest groups both inside and outside the state system. This has been widely discussed in the regulatory capture discourses by prominent scholars such as Stigler,

Peltzman, Becker, Laffont, Tirole, De Soto, Shleifer and Vishny.[40] This thesis relies on this scholarship to explicate the manner in which the lawmaking process shaped the reform of Australia's oppression sections and Vietnam's litigation provisions.

Legislative drafting is an integral part of the lawmaking process. It is recognised that, when this task is undertaken by independent drafters, the risk of regulatory capture is alleviated. Seidman and Seidman as well as Stefanou and Xanthaki have argued that independent, well-trained and experienced drafters are important preconditions for fair and effective legislative design.[41] This means that these drafters are less susceptible to regulatory capture and can draft effective legislation, thereby giving effect to the aims of the legal reforms.

(2) Judicial implementation of legislative design in accordance with the principle of fairness will inform the effectiveness of transferred rules. This necessitates a capable, functional and independent judiciary. An examination of judicial qualities will demonstrate the need to explore legal transfer effects beyond mere statutory rules. Moreover, unlike Australia, with its common law tradition and established shareholder litigation practices, Vietnam is still transitioning from its legacy of French colonial capitalism, the period of US involvement and an SOE-controlled economy, to the gradual development of a market-based economy. Therefore, changes in public awareness, attitudes towards the courts and the role of lawyers need to be considered when discussing legal transfers.

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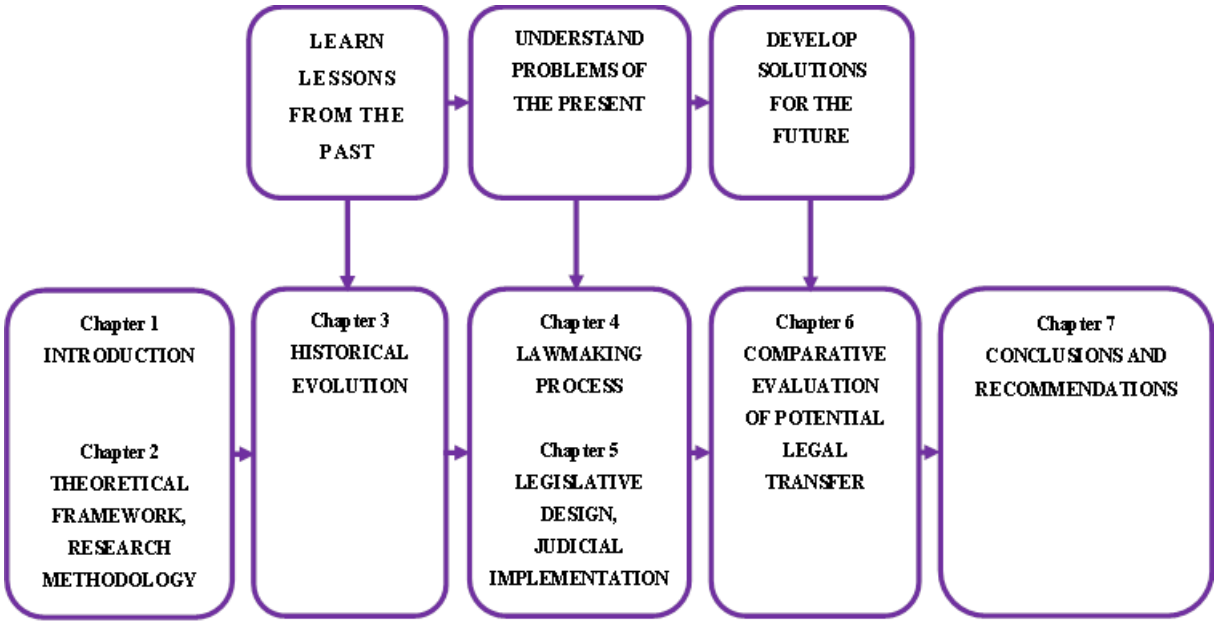
[40] For discussions on contributions of these scholars to the regulatory capture theories, see Section 2.4 of Chapter 2.

[41] See A Seidman and R B Seidman, 'Drafting Legislation for Development: Lessons From a Chinese Project' (1996) 44(1) *American Journal of Comparative Law* 1; Ann Seidman and Robert B Seidman, 'Between Policy and Implementation: Legislative Drafting for Development' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 287; Constantine Stephanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Routledge, 2016).

1.4.2 Thesis Structure

This thesis looks to the past to contextualise Vietnam's legal transfer of litigation provisions. As shown in Figure 1.1, the discussion connects past and present to assess the potential transfer of Australia's oppression sections to Vietnam's litigation provisions in the future.

Figure 1.1: Past Lessons, Present Problems and Future Solutions



As this thesis focuses on Vietnam in light of Australia's experience, the timeframes in Figure 1.1. refer to Vietnam. In particular, the 'past lessons' represent the historical context from 1858. The focus is on the events from the Renovation in 1986 until the economic restructuring in 2013 when shareholder protection policies were introduced (Chapter 3). The 'present problems' represent the period from the economic restructuring in 2013 until 2016 when Vietnam reviewed the initial phase of reform for 30 years (Chapters 4 and 5).[42] Chapter 6 examines the 'future solutions' for Vietnam's next developmental phase from 2017.

The thesis comprises seven chapters, with four chapters forming the main body. Chapters 3, 4 and 5 are each divided into two parts. Part I discusses the Australian oppression sections. Part II discusses the Vietnamese litigation provisions in a similar manner to avoid unnecessary

[42] See Communist Party of Vietnam, *Comprehensive Review of Some Issues in Theory — Practice After 30 Years of Renovation (1986–2016)* (National Politics–Truth Press, 2015).

repetitive explanations, while maintaining organisational coherence and facilitating the flow of discussions in Chapter 6. Regarding the main themes, Chapter 3 focuses on the historical contexts, Chapter 4 on the lawmaking processes, and Chapter 5 on the legislative design together with judicial implementation of Australia's oppression sections and Vietnam's litigation provisions, whereas Chapter 6 connects these themes in a comparative way. A brief synopsis of the seven chapters is provided below.

Chapter 1 introduces the research context and the significance of protecting minority shareholders from oppressive conduct through legal transfer. It then outlines the main objectives, research question, structure and contributions of the thesis.

Chapter 2 provides the justifications for legal transfer from Australia. A legal transfer framework for investigating this option is synthesised from Teubner's legal irritation theory and an empirical study of Berkowitz, Pistor and Richard on the effects of corporate legal transfers. To facilitate the application of this framework, Stigler's regulatory capture theory is reviewed to identify which and how major factors interact with each other in legal transfer. Chapter 2 also explains the research methodologies and the access to the unpublished materials together with internal data that are necessary for this thesis.

Chapter 3 elaborates the historical context for this thesis. It examines how major political, economic and social factors informed the evolution of the Australian oppression sections in corporate law programs since 1960 (Part I) and the Vietnamese litigation provisions in enterprise law development, especially since 1986 (Part II). This chapter highlights the roles of endemic market problems, corporate law deficiencies and comprehensive reform policies in shaping legal transfers and institutional building.

Chapter 4 builds on this context to scrutinise the lawmaking process that generated major reforms in the Australian oppression sections in 1983 and the Vietnamese litigation provisions

in 2014. This chapter focuses on the two most influential stages of drafting and deliberating the oppression sections (Part I) and litigation provisions (Part II) in their legislative processes.

Part I demonstrates that the inclusive lawmaking process, functional lawmaking institutions, effective political leadership and active civil society, together with the aforementioned widespread market problems, prevented interest groups from capturing the expansion of oppression sections in Australia. However, the Australian oppression sections only became well established after their language was simplified and clarified in 2001.

In contrast, Part II elucidates that, in Vietnam, the influence of an active civil society and widespread market problems only alleviated the regulatory capture of the extension of litigation provisions because the lawmaking process, lawmaking institutions and political leadership were not very effective.

Chapter 5 continues the discussion by examining the legislative designs of oppression rules and litigation provisions, as well as the judicial capacity for implementing these designs. Part I reveals that the Australian judiciary effectively applied oppression sections because their designs were sound, while the judicial merits of independence, impartiality, transparency and expertise were well established. Conversely, Part II assesses that the Vietnamese judiciary cannot always ensure the effective implementation of litigation provisions because their designs are problematic and the judicial merits are vulnerable to the capture of the court by undue influence. However, the public's need for court access, the rising legal profession, binding precedents and press attention to adjudication may gradually reduce such capture.

Chapter 6 brings together the findings from the previous three chapters. The legal transfer framework, developed in Chapter 2, is applied to assess the effectiveness in the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions. This chapter presents a comparative evaluation of the facilitation and irritation factors as well as their contrasting effects on this legal transfer, and examines national leaders' management of these

tensions. It argues that, although the effectiveness of transferring and implementing oppression sections is low in the present institutional environment, ongoing reforms may improve this result. Therefore, such transfer still enables minority shareholders to challenge widespread oppressive practices before the court.

Chapter 7 draws on the preceding findings to conclude the thesis. This chapter reflects on the use of the legal transfer framework to test the potential legal transfer of oppression sections. It synthesises major impediments to this transfer to recommend substantial reforms to policies, laws, institutions and practices as a pathway to effective legal transfers, considering the reality that Vietnam's single-party state lacks effective checks and balances. Finally, it suggests the main areas where further research is needed.

1.5 Thesis Contributions

This thesis makes three main contributions to Vietnam. These contributions offer a more nuanced understanding of legal reform for minority shareholder protection, demonstrate theoretical applications and address some limitations in the literature. These contributions are distinct because they result from new facts, independent critical examination and opportune research into topical issues that are influential for legal, market and national development.

First, this thesis is a new study into minority shareholder protection from oppression by examining the legal transfer of Australian oppression sections. Such protection is an under-researched area in Vietnam. It only emerged as an official policy in the *Master Plan on Economic Restructuring 2013–2020*, in the annual Resolutions 19/NQ-CP (issued in 2014, 2015 and 2016) on improving the business environment, and in the enactment of *Enterprise Law 2014*.[43]

[43] Decision No 339/QĐ-TTg Dated 19 February 2013 of the Prime Minister Ratifying Master Plan on Economic Restructuring Associated with Shifting Growth Model Towards Enhancing the Quality, Effectiveness and Capacity of Competition in the Period of 2013–2020; Resolution No 19/NQ-CP Dated 18 March 2014; Resolution No 19/NQ-CP Dated 12 March 2015 of the Government on Primary Missions and

This thesis presents nuanced insights into the evolution of this area since the inception of enterprise legislation in 1990. This study started when the making of this law began, with updates on subsequent policy developments until 31 December 2016. The ongoing prevalent oppressive practices and recent recommendations from the World Bank and EuroCham on oppression sections for Vietnam further indicate the timely practicality of this thesis.[44]

This thesis goes beyond the traditional corporate interest standpoint in Vietnam.[45] By examining minority shareholder protection under the modern principle of fairness that also underpins Australia's oppression sections, this thesis demonstrates a paradigm shift towards sustainable corporate law research for Vietnam, because fairness is an optimal benchmark to harmonise different interests.

Second, this thesis contributes to the application of theories in examining legal transfers. It is one of the first studies to expand, combine and apply Teubner's legal irritation theory and Stigler's regulatory capture theory to explore the legal transfer of oppression sections from Australia to Vietnam (Chapter 2).[46]

Although Teubner's theory was built on legal–social connections, it highlighted their differences (irritations). This thesis further elaborates this theory by examining their similarities, which also inform legal transfers. This expansion is useful because of the similarities and differences between Australia and Vietnam (Chapter 6). In effect, Vietnamese society embodies an East–West synthesis arising from Western colonialism legacies, increasing international integration and ongoing assistance from Australia (Chapter 3).

Solutions to Continue Improving Business Environment and Increasing the National Competitiveness Capacity 2015–2016; Resolution No 19-2016/NQ-CP Dated 28 April 2016.

[44] See World Bank, above n 5; European Chamber of Commerce in Vietnam, *Whitebook 2016: Trade/Investment Issues & Recommendations* (8th ed, 2016).

[45] For studies on minority shareholder protection based on the traditional corporate interest, see, eg, Bui Xuan Hai, above n 31; Phan Duc Hieu et al, 'Protecting Minority Shareholders: Theory, International Experiences and Recommendations for Enterprise Law Amendment' (Report of Ministerial Research 2013, Central Institution of Economic Management, Ministry of Planning and Investment, Hanoi, July 2014).

[46] Teubner's legal irritation theory is synthesised in the legal transfer framework in Chapter 2, Section 2.3.

Likewise, Stigler's regulatory capture theory focuses on the influence of vested interests on lawmaking through the legislature. In using recent literature, this thesis adds to his theory by considering the regulatory capture of the judiciary which can create 'law' through judicial precedents. The Vietnamese Supreme People's Court also has regulatory powers but lacks independence, rendering it susceptible to regulatory capture tactics (Chapter 2). Thus, this addition is realistic, although regulatory capture instances are more prevalent in Vietnam than in Australia (Chapters 4 and 5).

The expanded and combined application of these two theories demonstrates independent critical thinking beyond a mechanical adoption of these theories. The expansion and combination of these theories enhances their applicability and practicality. This thesis illustrates that these theories complement each other, and their combination is effective in exploring potential enterprise legal transfers (Chapter 7).

Third, this thesis adds to the limited legal literature on Vietnam. It unveils many undisclosed realities, gleaned from varied unpublished original materials that contain new information, such as growing public debts, policy directions, Renovation's results from 1986 until 2016, lawmaking exchanges, court activities, and aid initiatives from Australia via AusAID and the Federal Court of Australia from 1999 until 2013 (Chapters 2 and 3). The low transparency in Vietnam's single-party state and the high sensitivity of much of this information indicate its significance.

This information was processed, together with the limited literature on Vietnam and diverse secondary sources in Australia, to present a more complete picture of the reforms in Vietnam in light of Australia's development lessons.[47] These results are synthesised in the findings of the eight major factors that inform the Vietnamese litigation provisions (Chapters 3–6) and the eight concluding recommendations (Chapter 7).

[47] In this thesis, the past of Vietnam is considered to be from 1858–2013 (the economic restructuring began in 2013), the present is from 2013–16 (cut-off thesis events) and the future is from 2017 onwards.

These findings deepen understandings of the underlying reasons for Vietnam's piecemeal enterprise law changes over the last 25 years. These reasons encompass the obstacles of inadequacy, incoherence and ineffectiveness in the policies, laws, institutions and actions of the party-state in enterprise legal transfer. These obstacles lead to regulatory capture and legal irritation which are the underlying factors that undermined enterprise legal transfers since Vietnam's Renovation 1986. The thesis traced these obstacles to fundamental inconsistencies in Vietnam's *Constitution 2013* that reiterated the principle of fairness while also retaining preferences for SOEs. In this context, the eight recommendations seek to enable reconfirming, reconfiguring or renewing of the existing directions in the policies, laws, institutions and actions of the party-state towards making the rule of law effective for all.

Conclusion

This thesis was informed by Vietnam's lack of effective provisions in the enterprise law to protect minority shareholders from oppressive practices by majority shareholders and directors. In search of remedies to these practices, this thesis developed a legal transfer framework to examine the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions. The next chapter elaborates the selection of Australian law and this framework.

CHAPTER 2: JUSTIFICATIONS, THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY FOR LEGAL TRANSFER

Introduction

In Vietnam, minority shareholders are in a weak legal position for numerous reasons. The primary factors are the deficiencies of both sophisticated statutory provisions and well-functioning state institutions in law implementation required for the effective protection of minority shareholders. One solution is to adopt oppression sections to enhance fairness and protection for minority shareholders because of their vital roles in funding the market.

This chapter examines why Australian oppression sections may be suitable for transfer to Vietnam from the perspectives of the bilateral relationships, institutional development assistance and functionality of Australian regulations. To determine which theoretical framework would be most useful for examining prospective legal transfers, this chapter investigates four theories: (1) easy transplantation by Alan Watson, (2) limited transferability by Kahn-Freund, (3) impossible transplantation by Pierre Legrand and (4) legal irritation by Teubner.

The result of the evaluative process is that Teubner's overarching flexible propositions reconcile the other three theories. His legal irritation theory offers an appropriate method to explore the potential for legal transfer between countries. This theory is cross-checked against the findings of an empirical study of Berkowitz, Pistor and Richard about the transfer effect in corporate law reform. This extra task confirms the practicality of this theory and an expansion on it. The aggregate outcomes assist with compiling the legal transfer framework, used for exploring factors that inform the degree of effectiveness in the legal transfer of oppression sections from Australia to Vietnam in this thesis. This chapter concludes with a description of how internal reports, unpublished documentation and data were obtained to assist in the analysis and discussion.

2.1 Definitions of Institutions Used in the Thesis

Institution is a very broad concept used in many disciplines, including law, economics, politics and sociology, without a unanimity of meanings.[1] In the literature, it has two specific definitions. First, institutions refer to organisations that have their own members and operational arrangements.[2] Second, institutions indicate the 'rules of the game in a society' that shape the incentives, disincentives and interactions of its members.[3] These rules can be legal and enforced by the court, such as constitutions and statutes (legal institutions), and non-legal rules, such as social norms and human behaviours (non-legal institutions).[4] In this respect, institutions seem open-ended.

In reform policies, Vietnam usually applies the term 'institutions' with the first meaning of 'organisations' to avoid confusion with legal institutions, such as enterprise and investment laws.[5] This is also the case in Australia. For example, the *Harper Competition Policy Review 2015* stated that, 'reinvigorating competition policy requires leadership from an institution [organisation] specifically constituted for the purpose'.[6]

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1 Lindsey Carson and Ronald J Daniels, 'The Persistent Dilemmas of Development: The Next Fifty Years' (2010) 60 *University of Toronto Law Journal* 491, 504. This reality makes it impossible to list all functions and forms of institutions.

2 Geoffrey M Hodgson, 'What Are Institutions?' (2006) 40 *Journal of Economic Issues* 1, 18–21; Ron Duncan, 'Assessing the Political Economy Factors Important for Economic Reform' in Jonathan Aspin and Richard Bolt (eds), *Managing Reforms for Development: Political Economy of Reforms and Policy-Based Lending Case Studies* (Asian Development Bank, 2013) 119, 121. North also differentiated between institutions as organisations, and institutions as formal and informal rules. C Mantzavinos, Douglass C North and Syed Shariq, 'Learning, Institutions, and Economic Performance' (2004) 2 *Perspectives on Politics* 75, 77; Douglass C North, 'Institutions and Credible Commitment' (1993) 149 *Journal of Institutional and Theoretical Economics* 11, 12–13.

3 Douglass C North, 'Institutions' (1991) 5(1) *Journal of Economic Perspectives* 97; Douglass C North, 'Prologue' in John N Drobak and John V C Nye (eds), *The Frontiers of the New Institutional Economics* (Academic Press, 1997) 3, 6.

4 Correspondence between Douglass C North and Geoffrey M Hodgson in Hodgson, above n 2, 19–21; Mantzavinos, North and Shariq, above n 2, 77; Douglass C North, 'Institutions and Economic Theory' (1992) 36(1) *American Economist* 3, 4.

5 See, eg, Socioeconomic Development Strategy 2011–2020 of the Communist Party of Vietnam, Part V. See also Booz Allen Hamilton, 'Southeast Asia Commercial Law and Trade Diagnostics — Vietnam' (Final Report produced for review by the United States Agency for International Development, September 2007).

6 Ian Harper et al, 'Competition Policy Review: Final Report' (2015) ch 4 Institutions and Governance, 75–83 about the National Competition Council, the Productivity Commission, the Australian Energy Market Commission and the recommended Australian Council for Competition Policy.

To provide clarity and consistency, institutions in this thesis refer to organisations, such as parties as political institutions, governments as executive institutions, ministries as bureaucratic institutions, and courts as judicial institutions. Other institutions will be mentioned according to their usual names, such as legislative process, oppression sections and litigation provisions.

2.2 Justifications for Considering Legal Transfer from Australia

Legal transfers from developed countries, including Australia, to developing countries in Asia and the Pacific have been undertaken over many decades. The wealth of scholarship on the effectiveness of this approach highlights that caution is needed and that any legal transfer must be considered on the merits of each specific case.[7] Accordingly, the transfer of Australian rules to Vietnamese law requires careful consideration. Three relevant factors are: (1) the traditional relationship between Vietnam and Australia since 1973; (2) Australia's academic and practical assistance; and (3) Australia's international credibility in the field of shareholder protection regulation which is deemed among best practices.

First, the relationship between the two countries has been developing since 1973 and was raised to a new level through the *Declaration on Enhancing the Australia-Viet Nam Comprehensive Partnership 2015*.[8] These growing ties have boosted ongoing exchanges across all fields, especially in the fields of politics, trade and investment, as well as reforms of enterprise law, state-owned enterprises (SOEs) and institutions.[9]

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7 See Section 3 below.

8 See <http://www.vnembassy-australia.gov.vn/en/>. The relationship began on 26 February 1973, and the declaration was signed in Canberra on 18 March 2015 during the visit by Prime Minister Nguyen Tan Dung and his ministers. For the details of this declaration, see <http://dfat.gov.au/geo/vietnam/pages/vietnam-country-brief.aspx>.

9 See, eg, Australian Bureau of Statistics, *Year Book Australia: A Comprehensive Source of Information about Australia* (2012) 197; AusAID, *Australia's Strategic Approach to Aid in Vietnam 2010–2015* (2010) 3; AusAID, *Australia–Vietnam Joint Aid Program Strategy 2010–2015* (2012). Aid also covers reforms that support economic integration, such as competition, finance, banking, industry and infrastructure.

While these outcomes are part of the *Australia in the Asian Century* strategy,[10] they have greatly benefited Vietnam. Vietnam has been receiving financial aid, technical assistance with institutional building, and market regulations from Australia for the last 25 years.[11] For example, given the strong national interests in Vietnam, Australia has provided consistent and extensive support for Vietnamese enterprise law reforms, including those in 2014.[12] These reforms have also received commentaries from Canada, New Zealand and the United States (US).[13] Moreover, intergovernmental links facilitate private relationships stemming from investments, consulting, managerial direction from Australian organisations, and regular comments on draft regulations from AusCham Vietnam.[14]

Australia also helped bring together its own reform experiences with that of other democracies in a specialised study on economic institutions and in the *Vietnam Report 2035* towards 'prosperity, creativity, equity and democracy'.[15] These reforms will assist Vietnam to attain a sustainable reform vision in light of Australian lessons. Moreover, the focus of Australia's changing aid paradigm (2016–2020) on enabling and engaging the Vietnamese

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[10] See Australian Government, *Australia in the Asian Century* (White Paper, October 2012).

[11] This began with the first *Enterprise Law 1990*. See Chapter 2, Section 2.2; Chapter 3, Sections 3.8, 3.9; Tu Giang, *Behind a Law That Changes Vietnam* (13 February 2016) The Restructuring for a Competitive Vietnam (RCV) Project <http://rcv.gov.vn/Phia-sau-mot-luat-lam-thay-doi-Viet-Nam.htm>.

[12] See Department of Foreign Affairs and Trade (Cth), *Australian Aid to Vietnam* (2015). Australian assistance for *Law on Enterprises 2014* (Vietnam) ('*Enterprise Law 2014*') is part of the ongoing RCV project. See Robert Warner, David Barber and Pham Lan Huong, 'Restructuring for a More Competitive Vietnam Program: Mid-Term Review' (Final report prepared for the Department of Foreign Affairs and Government of Vietnam, 1 August 2016) 36, 46. See also John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 1st ed, 2006).

[13] Aid for enterprise law reforms is not a focus of these countries because of contexts and priorities. The United States and Vietnam normalised the relationship only in 2001. While Canada has not targeted enterprise laws, its aid given to Vietnam (793 million until December 2012) is more than that of New Zealand but less than that of Australia.
See <http://www.international.gc.ca/development-developpement/countries-pays/vietnam.aspx?lang=eng>.

[14] Examples include the English Language Institute (as a joint initiative of Vietnam's University of Danang and the University of Queensland), RMIT Vietnam, BlueScope Steel, QBE, Commonwealth Bank, ANZ and Phillip Fox law firm (acquired by DLA Piper in 2011). For activities of AusCham Vietnam, see <http://auschamvn.org/>.

[15] See Nguyen Van Giau, Nguyen Van Phuc and Nguyen Dinh Cung (eds), *Economic Institutions of Some Countries in the World* (Specialised book sponsored by the RCV Project of Australia) (2016); World Bank and Ministry of Planning and Investment of Vietnam, *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy* (World Bank, 2016). The sponsors for the Vietnam 2035 report included Australia, Korea and the UK.

private sector for investment and economic development will improve perceived market fairness and encourage small-scale investors.[16] These stronger relationships form the bedrock for ongoing interactions that foster mutual international understanding, which could inform the transfer of other Australian minority shareholder protection laws.[17]

While all aspects of the Australia–Vietnam relationships are relevant, from a legal transfer perspective, academic linkages have practical importance. For example, Australia has provided over 5300 scholarships to Vietnam, around half of which were allocated to state public service officials.[18] Although Australia reduced its aid by about 40% from 2015 to reflect Vietnam's achievement of a lower middle-income status, as European donors did earlier, it refocused on strengthening human resources for economic integration via higher education scholarship and investment.[19] This shift promotes knowledge exchange and research linkages, while informing new ways of thinking inside the state apparatus. Familiarising state actors with Australian and Western democratic values lays the foundations for further legal transfers.

Moreover, robust academic linkages provide ongoing advantages. Australian experts, such as Nicholson, Gillespie and Mallon, are often invited to comment on reforms, while dedicated

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[16] Department of Foreign Affairs and Trade, *Aid Investment Plan: Vietnam 2015–16 to 2019–20* (2015). This is in line with Vietnam's Socioeconomic Development Strategy 2011–2020.

[17] Strong relationships have driven legal transfer. See generally David Nelken, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 *Windsor Yearbook of Access to Justice* 349; David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart, 2001); David Nelken, *Beyond Law in Context: Developing a Sociological Understanding of Law* (Routledge, 2009).

[18] This statistic was counted from 1977. Alumni have actively contributed to change in policy, business and academia, and reforms. See Department of Foreign Affairs and Trade (Cth), *Aid Program Performance Report 2014–15* (2015) 5; <http://aid.dfat.gov.au/countries/eastasia/vietnam/Pages/home.aspx>.

[19] See AusAID, *Australia's Strategic Approach*, above n 9, 8; Australian Education International, 'Australian Scholarships and Support for International Students' (2013); The Minister for Foreign Affairs, Julie Bishop, 'The New Aid Paradigm' (Media Release, 18 June 2014); The Department of Foreign Affairs and Trade (Cth), *A Declaration on Enhancing the Australia–Viet Nam Comprehensive Partnership* (18 March 2015) <http://dfat.gov.au/geo/vietnam/pages/a-declaration-on-enhancing-the-australia-viet-nam-comprehensive-partnership.aspx>. In 2015, Australia cut aid for most countries in Southeast Asia by approximately 40%. For details, see <http://dfat.gov.au/about-us/corporate/portfolio-budget-statements/Pages/budget-highlights-2015-16.aspx#allocations>. Major recent aid to Vietnam included the Beyond WTO Program (January 2007–March 2014, funded by Australia and the UK); Australia's RCV Project (2014–present). See Department of Foreign Affairs and Trade (Cth), *Aid Program*, above n 18; Department of Foreign Affairs and Trade (Cth), *Management Response to Mid-term Review Report of the Restructuring for a more Competitive Vietnam Program (RCV)* (EDRMS File: HN16/225, 2016).

research facilities at top universities facilitate the active academic study of Vietnam's progress.[20] Further, a broader transfer of knowledge occurs when self-funded citizens graduate and return home with their Australian qualifications (some 24 000 Vietnamese students are enrolled annually in Australian institutions).[21] Like foreign experts, these domestic graduates act as cultural bridges that bring new ideas and greater support for civil society. Overall, Vietnam could easily benefit from Australia's experience, expertise and extensive resources to improve its own efficacy and efficiency in formulating complex corporate rules and regulations.

Second, Australia has helped lay the groundwork to improve the functionality of the Vietnamese judicial system. From 1999 to 2013, the Federal Court of Australia has introduced judicial merit, experience and management tools to Vietnam to assist in court reform programs, including developing expertise to implement a case law system (See Appendix 2).[22] While judicial changes take time and effort, Vietnam has welcomed such support. This has been exemplified in the recent localisation of some court organisations and shareholder litigation rules of derivative actions that existed in Australia.[23] Vietnam also officially adopted the binding case law, with the first six judicial precedents effective from 1

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[20] See Raymond Mallon, 'Reforming Viet Nam's Economic Institutions to Accelerate the Transition to a Market Economy' (Paper presented at the CIEM Internal Seminar, Hanoi, January 2015); Raymond Mallon, 'Restructuring for a more Competitive Vietnam: Project Context' (2014). Professor Pip Nicholson and Mr Cait Storr of the Law School, Melbourne University, Australia, commented on and revised the English version of Ministry of Justice and UNDP, 'Report on the Survey of the Reality of Local Court Governance in Vietnam' (2014). Melbourne University has dedicated research on Vietnam, whereas ANU has the Vietnam Update Program with annual conferences updating developments in Vietnam. Gillespie is one of the frequent advisers for Vietnam's projects as he is an adviser for many donors in Vietnam, including ADB and AusAID. For cooperation between VIED and Australian universities, see <http://www.vied.vn/en/for-foreign-partners/international-partners.html>.

[21] Department of Foreign Affairs and Trade, *Aid Investment Plan*, above n 16, 2; Christine A Farrugia, 'Charting New Pathways to Higher Education: International Secondary Students in the United States' (Research Report, Institute of International Education, July 2014) 22; Australian Bureau of Statistics, above n 9, 197. For updates, see <https://internationaleducation.gov.au/research/pages/data-and-research.aspx>.

[22] Appendix 2's information and materials are provided by the Federal Court of Australia. Former Justice Michael Moore was among justices of this Court who conducted training in Vietnam. See, eg, Michael Moore, 'Free Access to Law and the Development of the Rule of Law in Asia' (2009) *Federal Judicial Scholarship* 2; Michael Moore, 'The Judiciary in a Shrinking World: The International Exchange of Ideas among the Judiciary of Vietnam and Australia' (1999) *Federal Judicial Scholarship* 4. See also Report No 95/BC-BTP of 29 April 2016 of the Ministry of Justice on international cooperation on law in 2015 (including with Australia).

[23] Derivative actions and court structural changes are examined in Chapter 5, Sections 5.6.1.2, 5.8 respectively.

June 2016.[24] Thus, the future legal transfer of the judicially enforced oppression sections is justifiable.

Third, Australia has gained international credibility in developing effective shareholder protection regulations. For example, studies of Richard Mitchell et al and Helen Anderson et al showed that Australia has stronger shareholder protection regulations than those of the United Kingdom and the United States (US).[25] These regulations include oppression sections which are based on the principle of fairness.[26]

The Organisation for Economic Co-operation and Development (OECD) guidelines have also incorporated various Australian selective legal principles, especially competitive neutrality underpinned by legal fairness between state-owned and private businesses, and between majority and minority investors.[27] Competitive neutrality has meant that state-owned businesses and private businesses are treated according to the principle of fairness. More broadly, contributions to the OECD guidelines illustrate the wider acceptance of the Australian approach.

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[24] Decision No 220/QĐ-CA of 6 April 2016 of the Chief Justice of the People's Supreme Court on the announcement of judicial precedents; Decision No 698/QĐ-CA of 17 October 2016 of the Chief Justice of the People's Supreme Court on the announcement of judicial precedents. See also Resolution No 03/2015/NQ-HĐTP of 28 October 2015 of the Justice Council of the People's Supreme Court on procedures to select, announce and apply judicial precedents; Decision No 129/QD-TANDTC of 29 June 2017 of the People's Supreme Court establishing advisory council on judicial precedents.

[25] See, eg, Richard Mitchell et al, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 *Melbourne University Law Review* 68; Helen Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison' (2012) 61 *International and Comparative Law Quarterly* 171; Helen Anderson et al, 'Investor and Worker Protection in Australia: A Longitudinal Analysis' (2012) 34 *Sydney Law Review* 573; Helen Anderson et al, 'Shareholder and Creditor Protection in Australia: A Leximetric Analysis' (2012) 30 *Company and Securities Law Journal* 366. US corporate law provides weak protection for minority shareholders and is not appropriate for developing countries. Troy A Paredes, 'The Importance of Corporate Law: Some Thoughts on Developing Equity Markets in Developing Economies' (2007) 19 *Global Business & Development Law Journal* 401, 404.

[26] For further discussion, see Part I of Chapter 5. For the concept of fairness, see Patricia H Werhane and R Edward Freeman, *Blackwell Encyclopaedic Dictionary of Business Ethics* (Blackwell Business, 1997) 272–3.

[27] See, eg, Matthew Rennie and Fiona Lindsay, 'Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries' (Corporate Governance Working Paper No 4, OECD, 2011); Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options' (Corporate Governance Working Paper No 1, OECD, 2011); Working Party on State Ownership and Privatisation Practices, 'National Practices Concerning Competitive Neutrality' (DAF/CA/SOPP(2011)9/FINAL, OECD, 2012); Working Party on State Ownership and Privatisation Practices, 'A Compendium of OECD Recommendations, Guidelines and Best Practices Bearing on Competitive Neutrality' (DAF/CA/SOPP(2011)10/FINAL, OECD, 2012).

In addition, Vietnam's legal harmonisation goals have increased legal transfers from Australia. Vietnam agreed to harmonise differential enterprise legislation with sound international regulations and practices, as required by World Trade Organization (WTO) accession in 2007.[28] For example, it requested the World Bank to assess investor protection laws following the OECD principles, which are also used by other donors.[29] While Vietnam has accordingly directed enterprise law developments towards these principles, it has capitalised on its traditional relationships with Australia and the legislative reputation of Australia for legal transfers to address this goal.[30] The government's Resolutions 19/NQ-CP in 2014, 2015 and 2016 reiterated the need to improve minority shareholder protections following these practices.[31]

In summary, the legal transfer of Australia's oppression sections based on the principle of fairness would signal that Vietnam is serious about tackling unfair conduct in companies and regulating corporate governance following this principle. The resulting benefits could include creating an enabling business environment that attracts both domestic investors and foreign investors who are familiar with the principle of fairness.

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[28] See generally Working Party on the Accession of Viet Nam, 'Accession of Viet Nam' (Report WT/ACC/VNM/48, WTO, 27 October 2006); see especially at [32]; John Gillespie, 'Developing a Decentred Analysis of Legal Transfers' in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff Publishers, 2008) 25; Zentaro Kitagawa, 'Development of Comparative Law in East Asia' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) 237, 254. Legal harmonisation drives legal transplants. Mathias M Siems, 'The Curious Case of Overfitting Legal Transplants' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Bloomsbury, 2014) 133, 144–6; Esin Örücü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 222.

[29] See World Bank, 'Corporate Governance Country Assessment: Vietnam' (Report, June 2006). The International Monetary Fund and Asian Development Bank also used this assessment. See also World Bank, 'Corporate Governance Country Assessment: Vietnam' (Report, August 2013).

[30] See detailed discussion in Section 2.2 of Chapter 2 and Sections 3.8, 3.9 of Chapter 3. Legal transfers of functional foreign laws are seen as a signal for a desired turn towards modernity. Curtis J Milhaupt and Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 209; Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Wiley, 2008) 19–20, 142.

[31] Goals of Resolutions 19/NQ-CP in 2014 and 2015 were reiterated in Resolution No 19-2016/NQ-CP of 28 April 2016 of the Government on primary missions and solutions to improve the business environment and increase the national competitiveness capacity for the two years 2016–2017, with orientation towards 2020. See also Decision No 12/2007/QD-BTC of 13 March 2007 of the Minister of Finance on issuing corporate governance rules applicable to companies listed on the Stock Exchange/the Securities Trading Centre, s 1.

2.3 Synthesis of a Legal Transfer Framework from Theories and Practices of Legal Transfers

2.3.1 Coming to Terms with Terminology

Legal transfer is generally understood as the movement of legal rules, principles, doctrines, legal systems and related institutional structures between nations.[32] It has also been described as colonial impositions and voluntary imports, both of which have occurred in Vietnam.[33] Legal transfer is an efficient method for both developed and developing countries to improve their legal system because designing specific laws and processes can be 'very expensive' and time consuming.[34] For developing economies, including Vietnam, legal transfer is often linked to legal harmonisation projects sponsored by trading partners and international donors.[35]

Scholars have attempted to explain legal transfers by adopting metaphors from different disciplines, including medical science, biology, language and even music. Theorists advanced propositions using the terms 'legal transplants' and 'legal irritants'. Dissatisfied with these terms, commentators suggested alternatives, such as 'legal translation' by Langer, 'legal formants' by Sacco and 'legal transposition' by Örücü.[36] These alternatives provided

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[32] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993) 21; Gillespie, 'Developing a Decentred Analysis', above n 28, 27.

[33] Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) xii. For Vietnam, see Part II of Chapter 3.

[34] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79, 81; Michael W Dowdle, 'Completing Teubner: Foreign Irritants in China's Clinical Legal Education System and the "Convergence" of Imaginations' in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff Publishers, 2008) 169, 171. See also Thomas W Waelde and James L Gunderson, 'Legislative Reform in Transition Economies: Western Transplants: A Short-Cut to Social Market Economy Status?' (1994) 43 *International and Comparative Law Quarterly* 347; Gary Goodpaster, 'Law Reform in Developing Countries' (2003) 13(2) *Transnational Law and Contemporary Problems* 659.

[35] See, eg, John Gillespie and Penelope Nicholson, 'Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development' in John Gillespie and Penelope Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge University Press, 1st ed, 2012) 1; Kitagawa, above n 28, 254.

[36] Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanisation Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1, 17;

opportunities to fine-tune legal transfers to their local contexts, which was overlooked by earlier theorists.[37] Theorists and commentators share a common aim to devise a simple term that could fully describe multifarious legal transfers.

Although these various metaphors illustrate the contributions of scholars, they convey the impression that such metaphorical features inform the substance of complex legal reform processes. Although metaphors deserve care, they are essentially suggestive in nature. An excessive focus on them may oversimplify transfer processes, while further obfuscating the complexities already complicated by the metaphorical language used in theories. An over-concentration on linguistic aspects may also blur the central issues, including how to assess transferability. This has caused great confusion because scholars 'pay too much attention to descriptive metaphors'.[38] Perceiving these problems, Nelken advised that a focus on the implicit messages and elements conveyed by different metaphors is vital for transfer examination.[39]

While legal transfer intersects with various themes — including convergence and divergence in legal harmonisation,[40] legal comparison,[41] and legal sociology[42] — the focus of this thesis is law reform. On this basis, the following discussion summarises the main factors informing

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Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *American Journal of Comparative Law* 1; Örücü, Above n 28.

37 Örücü, above n 28, 208. See also Gillespie, *Transplanting Commercial Law Reform*, above n 12, 3.

38 Gillespie, 'Developing a Decentred Analysis', above n 28, 28.

39 David Nelken, 'Toward a Sociology of Legal Adaptation' in David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart, 2001) 7, 16, 39.

40 See also Abdul Rasheed and Toru Yoshikawa (eds), *The Convergence of Corporate Governance: Promise and Prospects* (Palgrave Macmillan, 2012); Ronald J Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 *American Journal of Comparative Law* 329; John C Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications' (1999) 93(3) *Northwestern University Law Review* 641. Watson supported convergence while Legrand and Teubner argued for divergence.

41 See, eg, Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008); Esin Örücü and David Nelken, *Comparative Law: A Handbook* (Hart, 2007); Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff Publishers, 2008).

42 David Nelken, 'The "Gap Problem" in the Sociology of Law: A Theoretical Review' (1981) 1 *Windsor Yearbook of Access to Justice* 35; Roger Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, London, 2nd ed, 1992).

theories on legal transfers, and then measures the theories against empirical studies. It draws on these findings to formulate a legal transfer framework to guide the structure and analysis in the next chapters. To avoid metaphorical controversies, this thesis relies on the term 'legal transfer',[43] except when discussing specific theories.

2.3.2 Mapping Legal Transfer Theories

Scholars have generated a substantial body of literature discussing legal transfer complexities.[44] The debates can be grouped into four main themes associated with each of the propositions presented by prominent theorists, such as Alan Watson, Otto Kahn-Freund, Pierre Legrand and Gunther Teubner. Table 2.1 summarises their selective insights together with the observations of Berkowitz, Pistor and Richard.

[43] 'Legal transfer' was often used to discuss law reforms in Vietnam. See, eg, Gillespie, 'Towards a Discursive Analysis' (2007–8) 40(3) *New York University Journal of International Law and Politics* 657.

[44] Watson alone wrote 20 books and more than 100 articles on this theme. See William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489. For anecdotal accounts of Watson's works, see John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 *Georgia Journal of International and Comparative Law* 637.

Table 2.1: Summary of Theories and Empirical Studies of Legal Transfers

Scholars	Legal transfer theories and an empirical study	Factors most affecting legal transfer	Noticeable features
Alan Watson	Easy legal transplantation	Preference of legislators	Separation between law and society
Otto Kahn-Freund	Limited legal transplantation	Interest group politics	Role of state power structure Role of foreign legal knowledge
Pierre Legrand	Impossible legal transplantation	Differences between legal cultures	Inextricable connection between law and legal culture
Gunther Teubner	▪ Transferred rules become legal irritants that irritate the receiving law and its connecting factors ▪ Main reasons are differences regarding connecting factors	▪ Particular laws (rules) have own connecting factors ▪ Influential connecting factors include historical, political, economic and legal cultural elements	▪ Irritations inform transfer outcomes that are case specific ▪ Complementary changes in the receiving country increase transfer effectiveness ▪ This legal irritation theory reconciled all above theories
Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard	▪ Empirical study on transplant effect in corporate law ▪ Unreceptive transfers outnumbered receptive transfers ▪ Transfer outcomes are case specific, yet diverse	▪ Legislative process affects legal transfer outcomes in statutes ▪ Judicial implementation affects such outcomes in practice ▪ Social needs influence legal transfers	▪ Study on 49 countries (common law, civil law, developed and developing countries) ▪ Transfer is possible, yet challenging ▪ Same legal family transfers are not essential ▪ Political and economic elements are interconnected and influential in the process ▪ Ongoing adaptation is crucial to effectiveness

2.3.3 Easy Legal Transplantation by Alan Watson

In the early 1970s, Alan Watson 'popularised' the issue of legal transplant by proposing that it is 'easy' (see Table 2.1 above).[45] He considered law separate from society and culture because it has its own life and vitality, largely determined by legal professional elites.[46] For example, a key factor determining transplantability was the preference of legislators for foreign laws — indeed, a political element. They borrowed selective rules from the legal tradition with which they felt most comfortable and familiar.[47] Thus, successful legal transplants may be achieved easily, despite great contextual differences between countries and the limited knowledge of legislators about these differences.[48]

The idea of easy transplantation is unsurprising in that Watson employed a historical approach with a macro-legal view to frame this proposition.[49] This was mainly generalised from his rich evidence on massive Roman law transplants into Europe in the Middle Ages.[50] While this broad generalisation was supported by Twining and Ewald,[51] Allison and Cohn

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[45] Watson, 'Legal Transplants and Law Reform', above n 34, 81; Watson, *Legal Transplants: An Approach* (2nd ed), above n 32, 7, 95, 107. See also Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974); P G Monateri, 'The Weak Law: Contaminations and Legal Cultures' (2003) 13(2) *Transnational Law and Contemporary Problems* 575, 575. Scholars stated that Watson 'popularised' the term legal transplant. See Langer, above n 36, 29; Julie Mertus and Elizabeth Breier-Sharlow, 'Power, Legal Transplants and Harmonization' (2004) 81 *University of Detroit Mercy Law Review* 477; Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantine Stephanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Routledge, 2016) 1–2, 16.

[46] Eric Stein, 'Use, Misuse — and Nonuse of Comparative Law' (1977–8) 77 *Northwestern University Law Review* 198, 202–3. See also Alan Watson, *Legal Origins and Legal Change* (Hambledon Press, 1st ed, 1991) 293–7; Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press, 2nd ed, 2001) ch 8.

[47] Alan Watson, 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 335, 335; Gillespie, *Transplanting Commercial Law Reform*, above n 12, 23.

[48] Watson, 'Legal Transplants and Law Reform', above n 34, 79–82; Alan Watson, 'Legal Transplants and European Private Law' (2000) 4(4) *Electronic Journal of Comparative Law* 9, 9; Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *Cambridge Law Journal* 313, 314–5.

[49] Watson acknowledged this approach. Watson, *Legal Origins*, above n 46, 293–7. Watson at times mentioned laws in 'modern time', such as the Japanese Civil Code of 1898, the Turkish Civil Code of 1926 and the Ethiopian Civil Code of 1960. See also Stein, above n 46, 202–3.

[50] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583, 598. However, Allison questioned Watson's evidence. J W F Allison, *A Continental Distinction in the Common Law* (Oxford University Press, 1st revised ed, 2000) 14.

[51] See, eg, William Twining, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203; Ewald, above n 44.

argued that it seemed credible only in the early development of states, especially when colonisers imposed entire legal systems or large legal transplants.[52] Thus, Watson's easy transplant theory appeared to have limited validity, especially when considered in contemporary contexts.[53] It triggered subsequent heated debates.

2.3.4 Limited Legal Transplantation by Otto Kahn-Freund

Unlike Watson, Kahn-Freund argued cautiously that 'there are degrees of transferability'.[54] These degrees are mostly affected by politics, such as state power distributions and especially interest groups in lawmaking (see Table 2.1).[55] He warned about the gulf between democratic capitalism and dictatorial communism, and about the need for legislators to acquire deep contextual knowledge of transplanted laws.[56] These reminders are pertinent to this thesis because it examines legal transfer from Australia's democratic multiparty system to Vietnam, where a single-party state still persists. Moreover, Kahn-Freund claimed that globalisation has greatly diminished or 'flattened out' the importance of socioeconomic and cultural diversities as environmental obstacles, even in developing countries, as a result of trade law harmonisation.[57]

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[52] Allison argued that 'Watson's theoretical argument is flawed and his empirical evidence is unconvincing': Allison, above n 50, 14; Cohn, above n 50, 598; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 16–17.

[53] For example, '[p]erhaps the most serious problem with Watson's theory is that it is not a theory at all': Richard L Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785, 793.

[54] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 6, 27. He considered the transplantation of labour laws from the United States to Britain. Kahn-Freund's argument appeared conflicting because he claimed 'we cannot take for granted that rules or institutions are transplantable', but concluded that 'there are degrees of transferability'.

[55] See Kahn-Freund, above n 54. See also Steven J Heim, 'Predicting Legal Transplants: The Case of Servitudes in the Russian Federation' (1996) 6(1) *Transnational Law and Contemporary Problems* 187, 215; Michal S Gal, 'The "Cut and Paste" of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant' (2007) 9(3) *European Journal of Law Reform* 467, 470.

[56] Kahn-Freund, above n 54, 14, 27. Agreeing with Kahn-Freund, Stein reasoned that, for enhancing the successful possibility of legal transplants, lawmakers require better knowledge and deeper understanding of the international scene and particularly of the foreign legal systems from which rules are transplanted. Stein, above n 46, 216. Even Watson admitted a 'systematic knowledge of the donor system' would make a law reformer 'more efficient': Watson, 'Legal Transplants and Law Reform', above n 34, 79.

[57] Kahn-Freund claimed that 'this is my central thesis' and he invoked 'the role played in society by the law of tort' as an explanation. Kahn-Freund, above n 54, 8–9. Kahn-Freund argued for political overarching importance in legal transfer because he mainly focused on Western transfers in the early seventies when the

Although the limited transferability propositions appeared realistic in terms of interest group politics and the knowledge of legal transplantation, the relegation of environmental obstacles is contentious. For instance, Forsyth and Cooney et al observed that interest groups alone have not dictated collective labour law transplants, as these propositions maintained.[58] To put this into perspective, the political propositions of Kahn-Freund were notable, yet not the sole determinants of legal transplants.

2.3.5 Impossible Legal Transplantation by Pierre Legrand

Two decades later, Legrand invoked European civil legislations to refute the propositions of both Watson and Kahn-Freund by arguing that 'legal transplants are impossible'.[59] As a legal-culturalist, he ascribed this impossibility to legal cultures as blocking factors. He explained that the meaning of legal rules cannot be transferred because they are culturally unique or inextricably connected with legal cultures (see Table 2.1).[60] With such viewpoints, meaningful legal transplants require a complete coincidence of legal cultures. Conversely, all that can be transplanted is merely 'bare propositional statements' or 'meaningless …

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emphasis on law's political connections reflects the all-important political differences. See Teubner, 'Legal Irritants', above n 52, 22.

[58] See, eg, Abel, above n 53; Sean Cooney et al, 'Labour Law and Labour Market Regulation in East Asian States: Problems and Issues for Comparative Inquiry' in Sean Cooney et al (eds), *Law And Labour Market Regulation In East Asia* (Routledge, 2002) 1, 9–11; Johannes Schregle, 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections about International Comparison' in Janice R Bellace and Max G Rood (eds), *Labour Law at the Crossroads: Changing Employment Relationships* (Kluwer Law International, 1st ed, 1997) 155.

[59] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 111–13. See also, Pierre Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44; Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern Law Review* 262.

[60] Pierre Legrand, 'What Legal Transplant' in David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart, 2001) 55, 59–61. Legrand is considered a cultural pessimist. See Martin Krygier, 'Is There Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law' (1996) 26(4) *International Journal of Sociology* 17.

words'.[61] In short, Legrand reinforced Montesquieu's earliest ideas of legal borrowing that 'it is a great accident that law of one country would suit another'.[62]

Although cultural distinctions between countries could cause transfer failures, this factor has not always nullified legal transfers completely. Siems highlighted some cases of 'legal transplants that "work better" abroad than at home'.[63] Moreover, the successful legal transfers into Japan and Turkey from distinct Western legal cultures identified by Dean, Small and Stack have challenged the impossible transplantation claims.[64]

Legrand's pessimistic attribution of impossible transplantation to legal culture overlooked the possibility of adjusting transplanted rules to new contexts. Örücü called this adjustment 'tuning'.[65] This also occurred in Vietnam under the influence of globalisation forces and donor assistance. For example, Vietnamese cosmopolitan elites often absorbed 'globalised legal knowledge rather quickly', while private companies were responsive to Western transfers.[66] In conclusion, the spread of civil law and common law throughout the world[67] provides a means for cross-checking culturalist claims.

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61 Legrand, 'The Impossibility of "Legal Transplants"', above n 59, 114.

62 Robert Launay, 'Montesquieu: The Specter of Despotism and the Origins of Comparative Law' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Bloomsbury Publishing, 2001) 22. See generally Charles Baron De Montesquieu, *The Spirit of Laws — Complete Edition* (Cosimo Classics, 2011).

63 Siems called these cases 'overfitting legal transplants': Siems, above n 28, 133–46.

64 See, eg, Meryll Dean, 'Legal transplants and Jury Trial in Japan' (2011) 31(4) *Legal Studies* 570; Richard G Small, 'Towards a Theory of Contextual Transplants' (2005) 19 *Emory International Law Review* 1431, 1436, 1454; Robert Stack, 'Western Law in Japan: The Antimonopoly Law and Other Legal Transplants' (2000) 27(3) *Manitoba Law Journal* 391. Nichols also found that 'transplanted law can survive even when it has little relationship to the host culture': Philip M Nichols, 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code' (1997) 18 *University of Pennsylvania Journal of International Economic Law* 1235, 1271.

65 See Örücü, above n 28.

66 Gillespie, 'Towards a Discursive Analysis', above n 43, 672, 693–713.

67 See Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 445, 445–55.

2.3.6 Legal Irritation by Gunther Teubner

Teubner's propositions centred around the term 'legal irritants' as a variation of 'legal transplants'. He used this term to explicate the effects of introducing German good faith rules (transferred rules) into British contract law (receiving law), which required the British courts to void contract provisions as 'unfair' if contrary to good faith.[68]

Teubner examined the major factors connected with the transferred rules and the receiving law, such as historical, political, economic and legal cultural factors. He illustrated this by comparing the evolution of the transferred rules and the receiving law, market structure, corporate governance, and judicial implementation of such rules in both countries. The result was that significant differences in these specific factors have caused *transferred rules to become 'legal irritants' that 'irritate' the receiving law and its connected factors*, resulting in relative changes to both (see Table 2.1).[69] This effect is the core of the legal irritation theory.

As Teubner explained, legal irritants 'will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.[70] This means that legal transfer activates interactive evolutionary change in the content of external rules and in the internal context of the receiving society. This is the key contribution of the legal irritation theory, with three important points as follows.

First, Teubner's legal irritation theory submitted that particular rules or laws have specific connecting factors.[71] Kahn-Freund had similar views when contending that legal transfer of

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[68] Such transplantation is done through the European Consumer Protection Directive 1994. Teubner, 'Legal Irritants', above n 52, 11.

[69] Ibid 12, 18, 31–2. Teubner here regarded connections of law with factors in a society as 'law's binding arrangements to society'. For such arrangements, see Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443.

[70] Teubner, 'Legal Irritants', above n 52, 12.

[71] Teubner, 'Legal Irritants', above n 52, 17–18, 22. Cotterrell argued similarly about the types of law in legal transfer. Roger Cotterrell, 'Is There a Logic of Legal Transplant?' in David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart, 2001) 71.

trade-related laws generally faces less difficulty than legal transfer of family legislation because it is more tightly connected with morals and beliefs.[72] Likewise, according to Fleischer, Garoupa and Ogus, corporate law transfers cause less 'transplant shock' than do many other legal fields.[73] This suggests that the types of laws and the strength of their connecting factors influence the effectiveness of legal transfer.[74]

Second, differences between the major connecting factors cause irritations that inform the level of effectiveness of legal transfer. In Teubner's findings, the different operations of transferred rules in the receiving country do not always indicate ineffectiveness. This was confirmed by Dowdle, who observed that, in Britain, the good faith remained functional, even though it did not operate identically as in Germany.[75] In other words, irritations and their effects are normal when foreign rules are implemented in new operational contexts.[76] Transferred rules are seen as workable as long as they address problems in the specific receiving systems.

Third, as transferred rules create changes to the receiving law, complementary alterations to the major factors connected with this law will increase the effectiveness of legal transfer. These complementary alterations are especially important when the development levels of the giving and receiving systems are not comparable, such as in the case of Australian legal transfers to Vietnam.

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[72] Kahn-Freund, above n 54, 13–16.

[73] Holger Fleischer, 'Legal Transplants in European Company Law — The Case of Fiduciary Duties' (2005) 2 *European Company and Financial Law Review* 378, 386; Nuno Garoupa and Anthony Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35 *Journal of Legal Studies* 339. For 'transplant shock', see Lynn A Stout, 'On the Export of U.S. Style of Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take Place?' in Curtis J Milhaupt (ed), *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals* (Columbia University Press, 2003) 46, 46–7.

[74] Teubner argued that the connecting strength ranges from 'loose coupling' to 'tight coupling', which causes more obstacles to legal transfer. However, his argument that private laws (eg, corporate and contract laws) are more strongly connected with economics than with politics, needs more debate, even in democracies, such as Australia, as discussed in Part I of Chapter 3. See Teubner, 'Legal Irritants', above n 52, 21–2.

[75] A primary reason is that Britain and Germany have similar levels of legal and institutional development. Dowdle, above n 34, 173.

[76] See, eg, Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge, Hoboken, 2006).

To recap, Teubner's legal irritation theory does not predetermine the outcomes or effectiveness of legal transfer. Transfer outcomes are case specific and depend on the level of differences in the major factors connecting the transferred rules and the receiving rules (or law) in their respective societies. These factors can be identified by examining the evolution of the transferred rules and receiving rules. As Frankenburg stated, the interesting question is not really whether legal transfers are possible, but how they occur and which elements are important.[77]

2.3.7 Comparing Four Legal Transfer Theories

The conclusions of these theorists are divergent. Watson, Legrand and Kahn-Freund were portrayed as adversaries because of their mutually exclusive theories of easy legal transplantation, impossible legal transplantation and limited legal transplantation, respectively.[78] However, they employed similar methods to emphasise one major factor influential in legal transfer, such as the preference of legislators (Watson), different legal cultures (Legrand) and interest group politics (Kahn-Freund). Accordingly, their theories each addressed one main aspect of the legal transfer puzzle. This limited validity did not generate a comprehensive framework for examining multifaceted legal transfers.

Teubner's legal irritation theory reconciled these three divergent theories and placed them into an overarching framework of diverse connections between law and society.[79] This framework accommodated the adaptive, comprehensive and flexible features that the other three theories overlooked. It recognised the important roles of historical, political, economic and legal cultural factors, while also enabling the customisation of these factors and the additions of other factors, as discussed above. Such adaptive and comprehensive features are

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[77] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563.

[78] See Heim, above n 55, 190–2; Ewald, above n 44, 498–502.

[79] Teubner took into account propositions of Kahn-Freund, Watson and Legrand. Teubner, 'Legal Irritants' , above n 52, 17–18.

significant because these factors and other social forces together have shaped law reform, as demonstrated by Trebilcock's corpus of law and development.[80]

The adaptability of the legal irritation theory is also attributable to its acknowledgement of dynamic social change in legal transfer. This allows for more nuanced explanations of prospective legal transfers and potential adaptations in the long term. For instance, when Small analysed the transfer of insider trading law from the US to Japan, he found that Japan's changing social context facilitated the successful implementation of this law.[81]

Moreover, the legal irritation theory emphasised the need to consider specific factors. For example, Teubner examined the judicial implementation of transferred rules, instead of Legrand's overall legal culture, which Bell, Cotterrell and Nelken considered vague.[82] A clear focus in examining legal transfer is 'essential to sharpen it' because insufficient attention to detail could misrepresent its true nature.[83]

These features have made the legal irritation theory responsive to the changing societies in which laws and institutions operate. This theory is flexible enough to accommodate all possibilities proposed by other theorists. Legal transfer can be easy, impossible or limited, as Watson, Legrand and Kahn-Freund respectively argued. The legal transfer outcomes can be receptive, unreceptive or unpredictable.[84] Agreeing with Teubner, Nelken stated that different

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[80] See, eg, Kevin E Davis and Michael J Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 *American Journal of Comparative Law* 895; Ronald J Daniels and Michael J Trebilcock, 'The Political Economy of Rule of Law Reform in Developing Countries' (2004) 26 *Michigan Journal of International Law* 99. For Trebilcock's corpus, see Carson and Daniels, above n 1; Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge, 4th ed, 2013).

[81] Small, above n 64, 1436, 1454. See also Siems, above n 28.

[82] See, eg, John Bell, 'English and French Law — Not So Different?' (1995) 48(2) *Current Legal Problems* 63, 70; Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997) 13; David Nelken, 'Rethinking Legal Culture' in Michael D A Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) vol 8.

[83] Cohn, above n 50, 590; B S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart, 1997) 15, 25. See also Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years* (Hart, 2003).

[84] Teubner, 'Legal Irritants', above n 52, 12.

factors create variables peculiar to particular legal transfers.[85] As Langer also argued, legal transfers may prompt a series of transformations in both the receiving legal and social systems.[86]

Overall, the important merit of Teubner's legal irritation theory is that it enables flexibility in the examination, prediction and evaluation of legal transfers, rather than just static prescriptions, as seen in the approaches of Watson, Legrand and Kahn-Freund.[87] Therefore, it provides a guide to explore how far foreign rules can be transferred and adapted to a new system of laws and institutions.

Nevertheless, these leading theorists mainly examined legal transfers in mature Western legal systems. This indicated an indifference to South East Asia, where legal transfers often came from more diverse jurisdictions. This raises questions as to whether their propositions are useful for investigating legal transfers from Australia, as an OECD member, to Vietnam, as a developing economy in South East Asia. Moreover, Ewald posited that legal transfer is too complicated to create a theory that perfectly explicates all complexities.[88] These realities require a cross-check of legal transfer theories against empirical studies.

2.3.8 Cross-Checking Legal Transfer Theories with the Practices of Corporate Law Transfers

An empirical study of Berkowitz, Pistor and Richard was among the most comprehensive in the field. They investigated corporate law transfers, focusing on investor protection, in 49 countries. These included common law and civil law jurisdictions with different development

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[85] Nelken, 'Toward a Sociology', above n 39, 40, 43. See also Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 61 *International and Comparative Law Quarterly* 1, 11, 13.

[86] Langer, above n 36, 32.

[87] See Randall Peerenboom, 'Toward a Methodology for Successful Legal Transplants' (2013) 1 *Chinese Journal of Comparative Law* 4.

[88] Ewald, above n 44, 509. See also Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 *American Journal of Comparative Law* 887, 887, 889; Watson, 'Aspects of Reception of Law', above n 47, 335.

levels in the OECD and South East Asia.[89] Pistor and her associates also conducted two similar studies with smaller samples of 10 and six countries.[90] At the same time, researchers such as Forsyth, Dowdle and Gillespie appraised Teubner's propositions in different contexts. These studies together generated three significant findings to test and verify the above legal transfer theories.

First, unreceptive transfers outnumbered receptive transfers because of various factors.[91] The operation of the lawmaking process, underpinned by the interaction of political, economic and social elements, largely affected the design outcomes of transferred rules in statutes, while ineffective judicial implementation undermined these outcomes in practice.[92] This meant that the merits of the lawmaking process, legislative design and judicial implementation, as well as the functionality of legislature, executives, drafting bodies, the judiciary and the legal profession, were all important factors. However, ongoing adaptation of transferred rules to local conditions became crucial for increasing their compatibility and effectiveness over time in both developed and developing countries.[93]

In South East Asia, the outcomes appeared more complex. As Harding observed, both transferred rules and receiving laws change when they interact with each other and with their

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[89] The study sample included 49 countries, with 10 countries as origins, which largely developed their law internally, and 39 countries as transplants, which received law externally. This sample covered four legal families including English common law, French civil law, German civil law and Scandinavian civil law (such as Norway, Russia and Sweden). This sample contained developed countries (including Australia, Canada and New Zealand) and most developing countries in Southeast Asia (including Malaysia, Indonesia, Philippines and Thailand). Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163, 171–2; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 *European Economic Review* 165, 175. For comments on this study, see Inga Markovits, 'Exporting Law Reform — But Will It Travel?' (2004) 37(1) *Cornell International Law Journal* 95, 97.

[90] See, eg, Katharina Pistor et al, 'Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries' (2003) 18 World Bank Research Observer 89; Katharina Pistor, 'Innovation in Corporate Law' (2003) 31 *Journal of Comparative Economics* 676.

[91] For example, there were 11 receptive transplants as opposed to 28 unreceptive transplants. Berkowitz, Pistor and Richard, 'The Transplant Effect', above n 89, 179–82.

[92] Berkowitz, Pistor and Richard, 'The Transplant Effect', above n 89, 189; Pistor et al, above n 90, 109. Arvin shared similar ideas. See generally, T T Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65.

[93] Berkowitz, Pistor and Richard, 'The Transplant Effect', above n 89, 167; Berkowitz, Pistor and Richard, 'Economic Development', above n 89, 167, 174, 175, 180, 192. See also Pistor et al, above n 90; Siems, above n 28.

evolving contexts, causing unintended outcomes that are neither a complete success nor a total failure.[94] Moreover, the legal culture factor was found to be very influential in post-transfer application, but does not always act as a blocking factor.[95] These outcomes are actually transfer effects, as explained in Teubner's legal irritation theory. Thus, theory and practice confirmed that, despite the challenges and unintended outcomes, legal transfers are possible.

Second, some fundamental factors were not covered by theories, including Teubner's legal irritation theory. One factor was social needs, which are significant to legal transfers, especially when there is increasing public demand to address deficiencies in the law and its implementation.[96] Another factor was the selection of foreign rules. Although legal transfers within the same legal tradition have occurred often, they are not always optimal.[97] For example, the legal transfer of German law to the French law on commercial companies in 1966 was uneasy, despite the enormous efforts involved.[98] Vietnam had similar problems when it imported this French law in 1990, before shifting towards Anglo-American corporate laws (see Chapter 3).

For legal choice, La Porta et al's empirical studies on 150 countries suggested that investor protection law transfers from common law tradition are potentially more effective because of common law's sophistication and efficacy in advancing economic life.[99] Fairness and

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[94] Andrew Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 *International and Comparative Law Quarterly* 35, 45. See also Nelken, 'The Meaning of Success', above n 17, 349.

[95] Harding, 'Global Doctrine', above n 94. Harding examined legal transplantation in Indonesia, Malaysia and Thailand. See also Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart, 2001) 199; Katharina Pistor, Philip A Wellons and Jeffrey D Sachs, *The Role of Law and Legal Institutions in Asian Economic Development: 1960–1995* (Oxford University Press, 1st ed, 1999) 280–4.

[96] Berkowitz, Pistor and Richard, 'The Transplant Effect', above n 89, 189. See also Peerenboom, above n 87, 12.

[97] Berkowitz, Pistor and Richard, 'The Transplant Effect', above n 89, 169. See also Arvind, above n 92, 66.

[98] A limited transplant in this case was caused by politics. Stein, above n 46, 204–5.

[99] See Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3; Florencio Lopez-de-Silanes, Rafael La Porta and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 288, 327.

flexibility are also integral to this result. While this legal tradition claim remains debatable,[100] it was supported by Mahoney, Mattei, Zweigert and Kötz. They believed that the true logic of legal transfer derives from the effectiveness of foreign laws.[101] These views support the examination of Australian oppression sections in this thesis.

Third, researchers have tested Teubner's legal irritation theory in different jurisdictions. Forsyth assessed that this theory provides 'the sophisticated conceptual framework' for considering the transplantability of European worker participation laws to Australia regarding corporate restructuring.[102] Likewise, when Dowdle analysed the legal transfer of legal aid measures from the democratic US to the authoritarian China, he assessed that Teubner's explication is 'robust, nuanced and compelling'.[103] These cases demonstrate that the legal irritation theory is useful for examining legal transfers from democratic common law countries to authoritarian civil law countries.

This result supports the examination of legal transfer from Australia as a common law country to Vietnam as a civil law country. Gillespie — a frequent adviser to the Vietnamese Government and an academic who specialises in market laws — remarked that the legal irritation propositions generated 'fresh insights' to legal transfers.[104] What really matters is how Vietnamese authorities adopt and implement foreign rules when political, economic,

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[100] For example, Donald disagreed with the legal origin findings of La Porta et al, although offering no comparable empirical evidence. David C Donald, 'Approaching Comparative Company Law' (2008–9) 14(1) *Fordham Journal of Corporate and Financial Law* 83, 92. See also Franklin A Gevurtz, 'The Globalization of Corporate Law: The End of History or a Never-Ending Story?' (2011) 86 *Washington Law Review* 475.

[101] See Paul G Mahoney, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30 *Journal of Legal Studies* 503; Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press, 1997) 126; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, New York, 3rd ed, 1998) 16.

[102] See Anthony Forsyth, 'The "Transplantability" Debate Revisited: Can European Social Partnership Be Exported to Australia?' (2006) 27(3) *Comparative Labor Law and Policy Journal* 305.

[103] See Dowdle, above n 34, 173, 189.

[104] See Gillespie, 'Towards a Discursive Analysis', above n 43; Gillespie, 'Developing a Decentred Analysis', above n 28. Gillespie is the director of the Asia-Pacific Business Regulation Group. For details about his studies and consultancy, see <http://www.monash.edu.au/research/people/profiles/profile.html?sid=10377&pid=4212>.

legal culture and social factors are all at stake.[105] For commercial legal transfers, his works further intimated that, while success appeared circumstantial, it is promising because of Vietnam's gradual shift towards Western liberal legislation, especially from 2001 onwards.[106] These remarks confirm the suitability of the legal irritation theory for examining Australia–Vietnam legal transfers.

In summary, empirical findings of Berkowitz, Pistor and Richard demonstrate that the factors affecting legal transfers are more complex, diverse and specific than those portrayed in the relevant theories. These findings confirm the fixed outcomes that Watson, Legrand and Kahn-Freund had proposed. Although their theories seem valid in some circumstances, they are unable to satisfactorily explain nuanced legal transfer practices. In contrast, these findings strongly support Teubner's legal irritation theory that overcomes the 'one-size-fits-all' approach.[107] These results, combined with the above assessments of Forsyth, Dowdle and Gillespie on this theory, confirm that the legal irritation theory is useful for examining the factors informing the legal transfer of oppression sections from Australia to Vietnam.

2.3.9 Synthesising a Legal Transfer Framework to Guide the Examination of Prospective Legal Transfers

In light of the prior reviews, Teubner's legal irritation theory requires identification of factors that inform the transferred rules and factors that inform the receiving law in two countries, especially from historical, social, political, economic and judicial aspects. The next task is a comparative evaluation of these factors to identify their *differences* and the resultant

[105] See Gillespie, *Transplanting Commercial Law Reform*, above n 12, ch 2. Gillespie however invoked 'four interrelated problems in using culture as a basis for understanding legal transfers'. See Gillespie, 'Developing a Decentred Analysis', above n 28, 36–7.

[106] Gillespie, *Transplanting Commercial Law Reform*, above n 12, 288. See Gillespie, 'Towards a Discursive Analysis', above n 43, 693–712.

[107] For one-size-fits-all arguments in legal transfer, see Ralf Michaels, '"One Size Can Fit All" — Some Heretical Thoughts on the Mass Production of Legal Transplants' in Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, 2013) 56.

irritations in legal transfer. Teubner's emphasis on such differences is useful because this helps determine their impediments to legal transfer.

Teubner's legal irritation theory can be expanded by considering *similarities* between factors that inform the transferred rules and factors that inform the receiving law. In reality, both similarities and differences between countries inform legal transfer outcomes.[108] Moreover, the essence of legal transfer lies in understanding the similarities and differences regarding how law operates in both countries. The concomitant examination of these both sides could provide a more balanced and satisfactory explanation of legal transfer. This result enables pragmatic recommendations on the complementary reforms of law and institutions to make legal transfer more effective in long term.

The factors affecting legal transfer have to be assessed through the lawmaking process and judicial implementation of legislative design as an outcome of this process. The above empirical study of Berkowitz, Pistor and Richard clarified that political, economic and social factors are interconnected and need to be considered in the lawmaking process.[109] This empirical study also confirmed the significant roles of the legislature, government and judiciary in informing legal transfer. Moreover, Claessens and Yurtoglu emphasised that legal changes need to consider judicial qualities in legal implementation.[110]

In this thesis, the transferred rules are the oppression sections 232–235 in Australia's *Corporations Act 2001* (Cth), while the receiving law is Vietnam's *Enterprise Law 2014*, focusing on litigation provisions. A synthesis of Teubner's legal irritation theory and

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[108] Xanthaki, above n 45, 2; Örücü, above n 28, 219–22; Watson, 'Legal Transplants and European Private Law', above n 48, 3.

[109] For similar arguments about the interrelationship of political powers, economic interests and social pressures in legal reform, see, eg, Daniels and Trebilcock, above n 80; Edmund Malesky and Jonathan London, 'The Political Economy of Development in China and Vietnam' (2014) 17 *Annual Review of Political Science* 395; Frank Stilwell, 'Heterodox Economics and Political Economy' (2015) 75 *Journal of Australian Political Economy* 5, 8; Andrew Gamble, 'The New Political Economy' (1995) 143(3) *Political Studies* 516, 517.

[110] Stijn Claessens and B Burcin Yurtoglu, 'Corporate Governance in Emerging Markets: A Survey' (2013) 15 *Emerging Markets Review* 1, 23.

empirical findings of Berkowitz, Pistor and Richard enables a legal transfer framework with four steps:[111]

- investigating turning points in the historical evolution of the oppression sections in Australian corporate legislation and litigation provisions in Vietnamese enterprise legislation (Chapter 3);

- examining the lawmaking processes that most significantly changed the oppression sections and the litigation provisions (Chapter 4);

- scrutinising the legislative designs of the oppression sections and the litigation provisions, as well as judicial capability to implement such designs (Chapter 5); and

- comparing and contrasting factors that inform the oppression sections and factors that inform the litigation provisions, which the three steps above have identified (Chapter 6).

The similarities between factors that inform Australia's oppression sections and factors that inform Vietnam's litigation provisions will facilitate the legal transfer of these oppression sections to these litigation provisions. In contrast, the differences between factors that inform Australia's oppression sections and factors that inform Vietnam's litigation provisions will cause irritation between Australia's oppression sections and the latter factors,[112] which might impede this legal transfer. The impacts of both facilitation and irritation are examined in order to identify the level of effectiveness in this legal transfer in Vietnam's contexts.

[111] In this legal transfer framework, the connecting factors of Australia's oppression sections refer to the major factors that have strong influence on the evolution of these oppression sections. The connecting factors of Vietnam's litigation provisions refer to the major factors that have strong influence on the evolution of these litigation provisions.

[112] There may be irritation between elements of Australia's oppression sections and elements of Vietnam's litigation provisions if these elements are different. Irritation does not necessarily block legal transfer but may negatively affect it.

2.4 Regulatory Capture in Legal Transfer

Regulatory capture is a wide-ranging concept that refers to the excessive impact which influential actors have on regulatory reform, including legal reform through legal transfer, to advance their own benefits.[113] In the Economic Theory of Regulation, Stigler demonstrated that 'regulation is designed and operated primarily for the benefit of the industry' and 'if a political party has hegemonic control over the state system, the party could collect most regulatory benefits for itself'.[114]

Many scholars, including Peltzman and Laffont,[115] have expanded Stigler's regulatory capture theory. Four main points can be drawn from it.

First, regulatory capture occurs in both democratic multiparty and authoritarian single-party countries, including Australia and Vietnam.[116] Such capture stems from many factors, such as low information transparency, excessive regulatory discretion, low regard for public interests, and ineffective actions of political leaders, thereby undermining the principle of fairness in

[113] See Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2014), 451–465, 467. In regulatory capture, "regulation" refers to both law and by-laws while regulators are actors creating these regulations. For a regulation concept, see Julia Black, 'Critical Reflections on Regulation' (2002) (27) *Australian Journal of Legal Philosophy* 1; Dimity Kingsford Smith, 'What is Regulation?: A Reply to Julia Black' (2002) (27) *Australian Journal of Legal Philosophy* 37.

[114] George J. Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *Bell Journal of Economics and Management Science* 3, 3, 12. This econometrical study of Stigler provided new momentum for the regulatory capture theory. Hence, the name of Stigler is associated with this theory, built on the public choice literature of Down, Olson and Tullock. See Peltzman, 'George Stigler's Contribution to the Economic Analysis of Regulation' (1993) 101(5) *Journal of Political Economy* 818.

[115] See eg, Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) *The Journal of Law and Economics* 211; Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT Press, 1993).

[116] For examples of regulatory capture in Australia and Vietnam, see respectively Kerrie Sadiq and Janet Mack, '"Re-thinking" the Influence of Regulatory Capture in the Development of Government Regulation' (2015) 43(5) *Australian Business Law Review* 379; Thi Bich Tran, R. Quentin Grafton and Tom Kompas, 'Institutions matter: The case of Vietnam' (2009) 38(1) *The Journal of Socio-Economics* 1.

legal reform.[117] Regulatory capture is an important issue in this thesis as it examines the legal transfer of Australia's oppression sections to Vietnam's litigation provisions.

Second, tactics for regulatory capture are varied. They often include the lobby of influential figures, corrupt agreements, political contributions, future lucrative job promises, and a reliance on affiliations.[118] Such diverse tactics make the prevention of regulatory capture difficult.

Third, regulatory capturers are often private interest groups and lobbyists. Regulatory capturers can also include state interest groups that have personal interests and regulatory powers in legal reform, such as Vietnamese ministries and the Cabinet which control SOEs.[119] In effect, the internal regulatory capturers may work with the external regulatory capturers, or act alone to advance own interests through legal reform.[120]

Fourth, judges may encounter regulatory capture tactics.[121] This is likely in Vietnam where all judges must be party members, thereby lacking independence.[122] Moreover, the Supreme People's Court selects binding judicial precedents and can propose Bills, whereas its Chief Justice can issue Circulars and other Justices often join enterprise legal drafting

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[117] See Laffont and Tirole, above n 115. See also Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22(2) *Oxford Review of Economic Policy* 203, 207–11. Cf David Thaw, 'Enlightened Regulatory Capture' (2014) 89(2) *Washington Law Review* 329.

[118] For capture tools and how they are deployed by interest groups, see Dal Bó, above n 117.

[119] See Peltzman, 'Toward a More General Theory of Regulation', above n 115, 211–40; Peltzman, 'George Stigler's Contribution', above n 114, 826–7; Sam Peltzman, Michael E. Levine and Roger G. Noll, 'The Economic Theory of Regulation after a Decade of Deregulation' (1989) 1989 *Brookings Papers on Economic Activity. Microeconomics* 1.

[120] See Gary S Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98(3) *Quarterly Journal of Economics* 371; Andrej Shleifer and Robert W Vishny, 'Politicians and Firms' (1994) 109(4) *The Quarterly Journal of Economics* 995, 1007; Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (June Abbott trans, Harper and Row, 1989) 134, 192; Jean-Jacques Laffont and David Martimort, 'Separation of Regulators against Collusive Behavior' (1999) 30(2) *RAND Journal of Economics* 232; S. Djankov et al, 'The Regulation of Entry' (2002) 117(1) *Quarterly Journal of Economics* 1, 3, 28, 34, 35.

[121] This is an expansion of regulatory capture. Makkai and Braithwaite 1992 stated that regulatory capture is a multidimensional issue which covers regulatory enforcement. See Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) *Journal of Public Policy* 61. See also Carpenter and Moss, above n 113.

[122] For detailed discussion on the Vietnamese and Australian judiciaries, see Chapter 5.

committees.[123] These mixed functions make judges susceptible to regulatory capture tactics, including corrupt agreements and political interference.

To recap, the regulatory capture theory explained the interrelation and interaction of influential political, economic, social and judicial factors in lawmaking and law implementation. These factors fall under the law-society connections in Teubner's legal irritation theory which informed the above legal transfer framework. The two theories and this framework complement each other.

2.5 Research Methodology and Data Collection

A methodology is a frame of reference that includes theories, principles and values underpinning a particular approach to legal research.[124] This thesis examines the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions, taking account of their similarities and differences in historical developments and existing social–legal connections. Aarnio, Westerman, and Pearce, Campbell and Harding have classified such an approach as reform-oriented doctrinal research that embodies interdisciplinary aspects and requires combined methodologies.[125]

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[123] *Law on Court Organisation 2014* (Vietnam) s 20(1); *Law on the Making of Legal Instruments 2015* (Vietnam) s 4(7)(8). Moreover, the Supremes' People Court issues official letters and its Justice Council issues Resolutions to instruct legal application in particular cases.

[124] Bridget Somekh and Cathy Lewin (ed), *Research Methods in the Social Sciences* (Sage Publications, 2005) 346; Maggie Walter, *Social Science Methods: An Australian Perspective* (Oxford University Press, 2006) 35.

[125] Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer, 2011) 19; Pauline C Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart, Oxford, 2011) 87, 89; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) 7. The Pearce Report grouped legal research into doctrinal research, reform-oriented research and theoretical research. See also Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm (Australia)' (2008) 32 *Melbourne University Law Review* 1065; Brendon Murphy and Jeffrey McGee, 'Phronetic Legal Inquiry: An Effective Design for Law and Society Research?' (2015) 24(2) *Griffith Law Review* 1, 3.

The methodology is interlinked with the theoretical framework.[126] As explained in Chapter 2, such a framework comprises four steps that consider the Australian oppression sections and the Vietnamese litigation provisions in four chapters — namely historical evolution (Chapter 3), lawmaking process (Chapter 4), legislative design together with judicial implementation (Chapter 5), and comparative evaluation (Chapter 6). Therefore, four methodologies are used, such as theoretical reasoning, historical review, doctrinal analysis, and comparative evaluation.

First, the theoretical reasoning enables the critical review of theories in Chapter 2. Four theories, including easy legal transplantation by Alan Watson, limited legal transplantation by Otto Kahn-Freund, impossible legal transplantation by Pierre Legrand, and legal irritation by Gunther Teubner, are investigated to see how legal transfer works. The legal irritation theory is broadest as it embraces the three others. To reinforce its validity, it is expanded and cross-checked with the most extensive empirical study of corporate law transfer practices to devise a theoretical framework suitable for examining the Australia–Vietnam legal transfer.

In addition, George Stigler's regulatory capture theory about the influence of vested interests on regulatory reform, including legal transfer by the legislature through lawmaking, is reviewed. This theory is expanded to address the reality that such influence could also affect legal transfer by the judiciary through law implementation. The primary purpose is to explain how major factors, including political, economic, social and institutional elements, interact with each other in legal transfer. This assists in the application of the theoretical framework in Chapters 3–6 where major factors relevant to regulatory capture are examined.

Second, the historical review provides an understanding of why the oppression sections have been transferred and the manner in which they have been transformed. This traces the evolution of the Australian oppression sections to Western legal transfers, changing societal

[126] Noella Mackenzie and Sally Knipe, 'Research Dilemmas: Paradigms, Methods and Methodology' (2006) 16(2) *Issues in Educational Research* 193, 196.

contexts and corporate law schemes from 1961 until 2016 in Chapter 3. The focus is placed on exploring which and how major contextual factors have informed the significant changes of these oppression sections, especially their content transformation in 1983 and their language simplification in 1998, which remain unchanged thereafter.

The historical review is also useful for investigating the evolution of the Vietnamese enterprise law regarding Western legal transfers, changing societal contexts and minority shareholder protection via litigation provisions. This examination begins with institutional transfers and the first corporate legal transfers in the French colonialism (1858–1954), then proceeds to the North–South partition period (1954–1975) and the Communist Party of Vietnam's command economic period (1975–1986). This examination highlights milestone contextual changes in enterprise law transfers and state institution developments (1986–2016), largely resulting from the Renovation 1986, the accession to the World Trade Organisation 2007, and the *Master Plan on Economic Restructuring 2013–2020*. Such careful historical reviews clarify the complexities of Western corporate law transfers to Vietnam.

Third, the doctrinal analysis is used in the examination of legal transfer. This is a well-established methodology, particularly useful for testing Teubner's legal irritation theory in legal transfer, as demonstrated by the assessments of Forsyth and Dowdle. This methodology is also considered a rigorous form of text-based reasoning essential to legal research in Australia and around the world.[127] It is particularly suitable for this thesis because the Australian oppression sections are grounded on the doctrine of fairness underpinning judicial remedies for unfair conduct.[128] Moreover, this doctrine informs the constitutional principle of

[127] See Council of Australian Law Deans, 'The CALD Standards for Australian Law Schools' (CALD meeting adopted 17 November 2009 and amended to March 2013) 4–5; Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005); Nigel Duncan and Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 104–5. For a definition of 'doctrine', see Mann, above n 127. See also Kelly, above n 127; Murphy and McGee, above n 125, 22.

[128] Moira Paterson, 'Legitimate Expectations and Fairness: New Directions in Australia' (1992) 18(1) *Monash University Law Review* 70, 70–1. See also Part I of Chapter 5. For a definition of 'doctrine', see Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2013) 197. See Erin Kelly (ed), *Justice as Fairness: A Restatement of John Rawls* (Harvard University Press, 2001).

fairness that Vietnam has transferred from Western jurisdictions, including France and the US (see Chapter 3, Section 3.8.4). Such doctrinal congruence supports the use of doctrinal analysis to examine the legal transfer from Australia to Vietnam.

The doctrinal analysis includes discussing, explicating or applying statutory law, court cases, legal doctrines, and relevant literature (including review reports and reform policies) to discover, construct or reconstruct legal rules or legal principles.[129] For example, Chapters 4–5 investigate oppression sections, litigation provisions, judicial precedents, reform policies, Australia's application of the separate power doctrine, and Vietnam's application of the concentrated power doctrine. Such a close examination facilitates deeper understanding of the factors that influence the making, reform and application of the Australian oppression sections and the Vietnamese litigation provisions.

Fourth, the comparative evaluation is helpful for examining the major factors that link with the Australia oppression sections and the Vietnamese litigation provisions (Chapter 6). The applications of the historical review and doctrinal analysis methodologies demonstrate that these factors are market problems, legal deficiencies, reform policies, roles of civil society, preference for state-owned enterprises, structure of lawmaking process, qualities of lawmaking institutions, and political leadership over legal reform. They are compared to identify similar factors and different factors, whose aggregate impacts are appraised to explore primary irritations and the national leaders' management of the consequent tensions.

The comparative evaluation emphasises law in its contexts and the social dimensions of law for several reasons.[130] Teubner's key proposition is based on the relationship between law and

[129] See Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing, 2005) 1, 7; Murphy and McGee, above n 125, 1.

[130] This is considered a socio-legal approach: Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2nd ed, 2006) 161–2. See also Reza Banakar and Max Travers (eds), *Law and Social Theory* (A&C Black, 2nd ed, 2014).

society.[131] Moreover, the thesis explores legal remedies for protecting minority shareholders to improve the long-term social and economic welfare of Vietnam. Strict comparisons of legal rules are insufficient to explain their effectiveness because any such analysis requires an integrated contextual study. Given the developmental asymmetries between Vietnam and Australia, Vietnam's socioeconomic needs and development goals need to be considered so as to provide the necessary sophistication in insight and understanding. Such comparative evaluation informs sensible conclusions on how effective the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions could be in order to recommend pragmatic reforms (Chapter 7).

Data collection

The context and methodology of research inform the data collection method. According to May, Punch and Patton, doctrinal research often correlates with a qualitative method in which the data may arise from document analysis, observations or interviews.[132] Yin and Webley argued that this document analysis enables past, current and future accounts, while observations and interviews often stress contemporary dimensions.[133] Bloch also submitted that documents 'provide evidence of policy directions, legislative intent, understandings of perceived shortcomings or practice in the legal system, and agenda for change'.[134] This wide coverage of the document analysis is particularly relevant to this thesis because it considers

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[131] See Teubner, 'Legal Irritants', above n 52, 17–24. 'Teubner provide a clear and thoughtful understanding of how autopoiesis [which underpinned his legal irritation thesis in legal transfer] can be used to conduct socio-legal research'. Banakar and Travers, 'Law, Sociology and Method', above n 129.

[132] Tim May, *Social Research: Issues, Methods and Research* (Open University Press, 4th ed, 2011); Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, 3rd ed, 2014) 139–68; Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage, 2014) 1–13. Qualitative methods help legal researchers to build 'a complex, holistic picture', to analyse 'words, reports detailed views of informants' and to conduct 'the study in a natural setting': John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Sage, 1998) 15. See also John W Creswell, *A Concise Introduction to Mixed Methods Research* (Sage, 2014); John W Creswell, *30 Essential Skills for the Qualitative Researcher* (Sage, 2015).

[133] See Lisa Webley, 'Qualitative Approach to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2012) 926; Robert K Yin, *Case Study Research: Design and Methods* (Sage, 2nd ed, 1994) 3–6; Robert K Yin, *Case Study Research: Design and Methods* (Sage, 5th ed, 2014).

[134] See Marc Bloch, *The Historian's Craft* (Manchester University Press, 1992).

historical experiences, ongoing developments and potential changes. This broad coverage of events also renders empirical surveys, observations or interviews unsuitable and ineffective in the thesis.[135]

The documents used in this thesis are diverse and extensive, including academic resources, lawmaking profiles, court cases, internal reports, national surveys, expert commentaries and unpublished data. In aggregate, these largely internal materials span the entire post-colonial historical developments of Vietnamese enterprise laws from 1990 to early 2016. In particular, the material includes major works jointly prepared by experts, such as the national strategies to 2020 and the intriguing report, *Vietnam 2035*.[136] The document analysis provides the background for discussing the adaptive evolution of enterprise legal reform in Vietnam's emerging market.

The documents used in this thesis were obtained in many ways. Apart from library and online searches, personal contacts were critical in gaining access to undisclosed materials and statistics. This was facilitated in Australia because of the federal sponsorship for this study, and the author's personal interactions with officials and scholars at major events and conferences.[137] Another key factor was the support of the author's supervisor, who has connections with many multilateral organisations, including the Asian Development Bank. In contrast, gathering data in Vietnam was an arduous task because of the scarcity of research on

[135] Moreover, Trubek stated that "a mere search for empirical details will lead to nothing more than the accumulation of unrelated and unrelatable bits of data". As such, empirical methods need to be used with care and justified by the context of the study. See David M Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82(1) *Yale Law Journal* 1, 50. See also Davis and Trebilcock, above n 80.

[136] The Vietnam 2035 Report was penned by over 100 experts after several years of research. World Bank and Ministry of Planning and Investment of Vietnam, above n 15.

[137] The author attended the annual conferences of the 2013 Vietnam Update and 2014 Vietnam Update at ANU, as well as annual professional development events in 2013, 2015 and 2016 held by the Endeavour Award Initiative with the presence of representatives from the Federal Government. Moreover, the author attended the Inter-University School Postgraduate Research Excellence 2014 (InSPiRE) co-organised by Usyd, Macquarie, UTS, UWS and UNSW. Attendees comprised approximately 250 research students and many experts.

minority shareholder protection law reform, limited transparency, and political vigilance over studies concerning state operations.[138]

Overall, data collection was very productive as a result of careful planning and the kind assistance from many individuals and institutions, listed in the acknowledgement section. In addition to online exchanges, there were 12 informal meetings with 10 senior professionals involved in drafting, designing and implementing the Vietnamese enterprise law. These exchanges were with two members of the Enterprise Bill Editing Group, two senior judges, three judicial managers and three legal research experts. These exchanges informed the way in which the analysis was undertaken in this thesis. However, no individual has been identified in order to preserve their anonymity.[139] As seen in Appendix 1, they were allocated numbers, with general information provided about the positions held.

The successful interactions with these professionals, who were largely experts in their fields engaging in issues that the thesis addressed, brought two major advantages. The first advantage was access to extensive and valuable materials covering the long-term Australia–Vietnam cooperation in the enterprise lawmaking process and judicial operations. In particular, access to internal records provided a comprehensive background to this lawmaking process because such records are difficult to obtain from online disclosures.[140] Likewise, undisclosed court documents over 14 years, as summarised in Appendix 2, facilitated a deeper understanding of the judicial functions.[141] These internal materials, combined with other resources collected through the library services in Australia and Vietnam, supported the discussions in this study.

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[138] See Gillespie, *Transplanting Commercial Law Reform*, above n 12, 37.

[139] Personal records are kept by the author of this thesis.

[140] See Chapter 4, Part II.

[141] See Chapter 2, Section 2.2; Chapter 5, Part II.

The second advantage of the informal discussions was that they enabled knowledge and actual experiences to be shared in confidence. These discussions provided interesting insights to the lawmaking and implementation processes. These insights, combined with the understandings gleaned from internal and published documents, helped facilitate the discussions in Chapters 3, 4 and 5, and the analysis in Chapter 6.

It is important to mention the issue of the Vietnamese language and translation of the reviewed documents. Many documents obtained were written in Vietnamese. However, as a native Vietnamese speaker, the author generally did not use translation services. This means that most translations into English were undertaken by the author, unless otherwise specified.[142]

[142] Some legal instruments were translated by the Australian law firm Allens Arthur Robinson. See also Vietnam's official gazette published in English <http://vietnamlawmagazine.vn/>. Translated references in footnotes did not included Vietnamese language. The titles in Vietnamese are usually very long, even over 50 words per title, especially reports, by-laws and conference proceedings. The inclusion of titles in Vietnamese drew out footnotes and broke many pages, thereby making the page layout an eyesore and the reading difficult. Therefore, titles in Vietnamese in the translated references are included only in the Bibliography.

Conclusion

This chapter has identified the primary reasons for the legal transfer of Australia's oppression sections to Vietnam's litigation provisions. These reasons include (1) Vietnam's ongoing practice of corporate law transfers from Australia for legal harmonisation with OECD principles, (2) the Australia–Vietnam Comprehensive Partnership, (3) Australia's long-term assistance with Vietnam's institutional development and corporate legal reform, and (4) the strong academic connections between the two countries.

This chapter has developed a legal transfer framework to assess the major factors informing the effectiveness of this legal transfer. This framework is synthesised from Teubner's legal irritation theory, together with an expansion of this theory, and an empirical study of Berkowitz, Pistor and Richard on transfer effects in corporate law. This framework has four steps.

The first step, 'historical evolution' (Chapter 3), investigates turning points in the evolution of the oppression sections and the litigation provisions, with the objective of exploring the major factors that inform such evolution.

The second step, 'lawmaking process' (Chapter 4), examines the lawmaking processes that most significantly reformed the oppression sections and the litigation provisions, with the aim of unveiling the major factors that inform these reforms.

The third step, 'legislative design together with judicial implementation' (Chapter 5), scrutinises the legislative designs of the oppression sections and the litigation provisions, as well as the judicial capacity for implementing these designs, with the goal of identifying the major factors that inform the designs and judicial implementation of them.

The fourth step, 'comparative evaluation' (Chapter 6), compares and contrasts the major factors found in Chapters 3–5, with the purpose of elaborating the facilitation and the

irritation that together inform the level of effectiveness in the legal transfer of the oppression sections to the litigation provisions.

The following chapter traces the evolution of Australia's oppression sections and Vietnam's litigation provisions to the political, economic and social contexts in which corporate statutes have been reformed.

CHAPTER 3: HISTORICAL EVOLUTION OF AUSTRALIAN OPPRESSION SECTIONS AND VIETNAMESE LITIGATION PROVISIONS

Introduction

An examination of the historical evolution of Australian corporate acts and Vietnamese enterprise laws is necessary to identify the major factors that informed the evolution of Australian oppression sections and Vietnamese litigation provisions. As explained in the legal transfer framework (Chapter 2), these factors are critical for assessing effectiveness in the legal transfer of Australian oppression sections to Vietnamese litigation provisions, aimed at providing protection for minority shareholders from oppressive conduct in Vietnam.

Part I of this chapter presents a historical overview of the factors that shaped the evolution of Australian corporate acts, with regard to oppression sections and minority shareholder protection. The purpose is to identify what has been essential to the transformation of oppression sections and how this affects the legal transfer of these sections to Vietnam's litigation provisions.

Part II examines Vietnam's transition from a state-monopolised economy and Western colonialist-capitalism to a 'socialist-oriented market economy'. In the current transition period, socialist-oriented policies still favour state-owned enterprises (SOEs) over domestic and foreign private investors. As such, SOEs play a central role in the evolution of Vietnamese enterprise laws, and shape their effectiveness in protecting minority shareholders. SOEs' privileges and close ties with authorities, as well as the political commitment to legal fairness, are the major issues influencing such effectiveness.

The evolution of the Australian oppression sections in 1961, 1983 and 1998 offers insights to the gradual reform of the sections that improved their functionality. This enables reflection on the origins of enterprise laws and the way both contemporary authorities and civilians in Vietnam perceive prospective legal transfers from Australia. These outcomes provide the

underpinnings necessary to examine the legislative process and judicial implementation in the following two chapters.[1]

[1] See Randall Peerenboom, 'Toward a Methodology for Successful Legal Transplants' (2013) 1(1) *Chinese Journal of Comparative Law* 4, 9; David C Donald, 'Approaching Comparative Company Law' (2008–2009) 14(1) *Fordham Journal of Corporate and Financial Law* 83; Mark J Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120(2) *Harvard Law Review* 462.

Part I: Evolution of Australian Oppression Sections in the Trajectories of Western Legal Transfers, Changing Societal Contexts and Corporate Law Schemes

3.1 Limited Protection for Minority Shareholders under Common Law and the Origin of Statutory Oppression Sections

Prior to 1 January 1901, Australia was six separate self-governing British colonies. This meant that a substantial part of Australian corporate law and federal institutions were transferred from the British equivalents, through both parliamentary statutes and judicial precedents.[2]

Minority shareholders received some protection under British common law, which was also adopted in Australia.[3] For example, in the early 1870s, courts recognised that equitable limits must be placed on the voting power of majority shareholders to prevent them altering company articles legitimately, yet fraudulently or oppressively, towards minority shareholders.[4] With modifications over time, this judicial principle based on equity to address fraud perpetrated on minority shareholders was the precursor to the future statutory oppression sections. This indicates historical recognition of the need to protect minority shareholders from corporate misconduct.

Both fraud and oppression are considered misconduct. Fraud is serious illegal conduct and can include oppression, whereas oppression can occur with or without fraud because

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[2] See, eg, Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31(3) *Melbourne University Law Review* 805; R I Barrett, 'Towards Harmonised Company Legislation — "Are We There Yet?"' (2012) 40 *Federal Law Review* 141; Hon T F Bathurst, 'The Historical Development of Corporations Law' (2013) 37(3) *Australian Bar Review* 217.

[3] The development of common law can be traced to the Magna Carta 1215. For the role of this landmark document in Australia, see Susan Crennan, 'Magna Carta, Common Law Values and the Constitution' (2015) 39(1) *Melbourne University Law Review* 331; David Clark, 'The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law' (2000) 24(3) *Melbourne University Law Review* 866.

[4] See *Menier v Hooper's Telegraph Works* [1874] LR 9 Ch App 350, 353 (James LJ); *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671 (Lindley MR); *Cook v Deeks* [1916] 1 AC 554, 564.

oppression can arise from either illegal conduct or legal conduct that is unfair (see Chapter 5, Section 5.3).

The original oppression sections were written into the *Companies Act 1948* (UK). These were transferred to the *Uniform Companies Act 1961* (Cth).[5] The Australian oppression sections developed through three distinct phases: 1961 to 1983, 1983 to 1996 and 1996 to 2016. These phases were associated with serious market problems that led to corporate law reform schemes. These problems were significant in that they reshaped the oppression sections. The content of these sections was transformed in 1983. They were reworded in 1998 and relocated to the current *Corporations Act 2001* (Cth) ss 232–235.

In addition, the transfer and change of Australia's oppression sections were part of the evolution of corporate regulation, with efforts to unify the parallel legal regimes of the Commonwealth and states through corporate regulation schemes. The recognition of the need for a unified approach was an important feature in corporate law reform.

3.2 Contexts and Effects of the Legal Transfer of Oppression Sections and Need for Further Reform (1961–1983)

Australia transferred these oppression sections to Section 186 of the *Uniform Companies Act 1961* (Cth). This Act was also adopted by the states and territories[6] because corporate regulation remained under the constitutional powers of the states.[7] Although the states maintained various differences, they did not change the oppression sections so as to reinforce

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5 *Companies Act 1948* (UK) s 210. British oppression sections were first transferred to the *Companies Act 1958* (Vic) s 94. For more details of the British origin of Australian oppression sections, see *Heydon v NRMA Ltd* [2000] NSWCA 374 [188] (Malcolm AJA).

6 The *Uniform Companies Act 1961* (Cth) was based on the *Company Act 1858* (Vic) and was adopted in NSW, WA and Qld in 1961, and in Tas and SA in 1962. The ACT and NT passed the Companies Ordinance in 1962 and 1963. See Harold Ford, 'Uniform Companies Legislation' (1962) 4 *University of Queensland Law Journal* 133.

7 This came from the High Court's interpretation of the *Constitution* s 51(xx) regarding the legislative powers of the Federal Parliament. *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330 (overruled by *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468); *New South Wales v Commonwealth* (1990) 169 CLR 482; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

attempts at legislative uniformity.[8] These sections essentially remained a clone of the British original.

Three primary factors underpinned Australia's legal transfer of the United Kingdom's oppression sections. These factors were legal deficiencies, market problems and public criticism. As discussed, these factors were interrelated and informed the subsequent evolution of oppression sections in corporate legislation.[9]

First, both common law and corporate legislation had deficiencies in providing protection for minority shareholders. The common law against fraud on the minority had not sufficiently protected minority shareholders against oppression in companies, as noted above. Meanwhile, winding-up a company as a statutory remedy to oppression was seen as too drastic because it 'would not always do justice to the minority'.[10] For example, the courts in *Campbell v Backoffice Investments* and *Re Dernancourt Investments Pty Ltd* noted that this remedy might cause effects worse than those caused by oppression.[11] In essence, traditional corporate law strongly emphasised the majoritarian rule to satisfy majority interests.[12]

Second, market problems were rife because of legal deficiencies. Frequent fraud and oppressive practices caused 'a great deal of abuse of the investing public', such as insider trading, manipulating shareholder meetings, and making misleading announcements —

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[8] Geoffrey Sawer, 'Federal–State Co-Operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4 *Melbourne University Law Review* 238; Ian Hannay Macarthur, *Final Report of the Special Committee to Review the Companies Act* (McArthur Report, Government Printer, 1973), 20; Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15(1) *University of New South Wales Law Journal* 1.

[9] For the most significant reform of oppression sections in 1983 and in 1998, see Sections 3 and 4 below.

[10] Board of Trade, *Report of the Committee on Company Law Amendment* (Cohen Report, His Majesty's Stationery Office, 1945) [60], [152], and recommendations 11 (I, II): at 95. See also Chapter 5, Sections 5.1–5.4 where oppression remedies and other shareholder remedies, including statutory derivative actions, injunctions and winding-up, are discussed.

[11] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 [61]; *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588, 619–620.

[12] *Heydon v NRMA Ltd* [2000] NSWCA 374, 467 (Ormiston AJA). See also Allen B Afterman, 'Statutory Protection for Oppressed Minority Shareholders: A Model for Reform' (1969) 55(6) *Virginia Law Review* 1043, 1045; Keith Fletcher, 'CLERP and Minority Shareholder Rights' (2001) 13(3) *Australian Journal of Corporate Law* 290; Vanessa Mitchell, 'Has the Tyranny of the Majority Become Further Entrenched?' (2002) 20(2) *Company and Securities Law Journal* 74. See also Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1996).

largely arising out of the mining share boom.[13] Consequently, 'disorganised capitalism emerged in the market from the 1960s'.[14] This reality further demonstrated that corporate governance provisions, including those on director duties and corporate reporting, could not provide effective remedies for oppressive practices. Oppression sections were accordingly adopted to empower the court to make orders addressing such deteriorating problems. This demonstrated the critical role of these sections in improving market integrity.

Third, there was strong public criticism of legal deficiencies in addressing widespread market problems. This continuing criticism led to the establishment of the Eggleston Committee after the legal transfer of oppression sections. The Eggleston Committee scrutinised the rise of corporate scandals with oppressive conduct of 'nouveau capitalists' detrimental to minority shareholders, as exemplified with instances concerning the Poseidon NL and Stanhill groups of companies.[15] This also demonstrated a growing awareness among the business community of the need for effective oppression sections as can be seen through this committee's reports.

With seven reports released between 1969 and 1972, the Eggleston Committee recommended rectifying the failures of the *Uniform Companies Act 1961* (Cth) to regulate many issues, including the misuse of confidential information, insider trading, director duties and minority shareholder protection.[16] This committee's thorough reviews were useful for implementing

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[13] Paul Redmond, *Corporations and Financial Markets Law* (Thomson Reuters, 6th ed, 2013), 46–7. For the mining share boom, see John Simon, 'Three Australian Asset-Price Bubbles' in Anthony Richards and Tim Robinson (eds), *Asset Prices and Monetary Policy* (Reserve Bank of Australia, 2003) 8. See also the Senate Select Committee on Securities and Exchange, the Parliament of Commonwealth of Australia, *Australian Securities Markets and their Regulation* (Australian Government Publishing Service, 1974).

[14] Roman Tomasic, 'The Modernisation of Corporations Law: Corporate Law Reform in Australia and Beyond' (2006) 19(1) *Australian Journal of Corporate Law* 2, 7–8; Boaventura de Sousa Santos, 'The Postmodern Transition: Law and Politics' in Austin Sarat and Thomas R Kearns (eds), *The Fate of Law* (University of Michigan Press, 1993), 81–6.

[15] The Eggleston Committee was a Company Law Advisory Committee. For Australian corporate scandals, see, eg, Martin Indyk, 'Establishment and Nouveau Capitalists: Power and Conflict in Big Business' (1974) 10(2) *Australian and New Zealand Journal of Sociology* 128; Trevor Sykes, *Two Centuries of Panic: A History of Corporate Collapses in Australia* (Allen and Unwin, 1998), 296–358; Frank Clarke, Graeme Dean and Kyle Oliver, *Corporate Collapse: Accounting, Regulatory and Ethical Failure* (Cambridge University Press, 2nd ed, 2003), 55–70.

[16] These reports are at http://www.takeovers.gov.au/content/Resources/eggleston_committee_reports.aspx.

substantial corporate legal reforms to contain pervasive oppressive conduct, market crashes and regulatory failures.

However, two major factors limited the effects of the oppression sections on remedying oppressive practices.[17] Both the legislative design and judicial interpretation of these original sections were insufficiently broad to address multitudinous oppressive practices.[18] For example, Afterman stated that this interpretation turned these 'most conservative' sections into 'dead letters', with only two successful claims in three decades from the introduction of the oppression sections.[19] This demonstrated that the faithful legal transfer of oppression sections without expansion to meet the market needs did not work well. Consequently, oppressive practices against minority shareholders continued.

In a broader context, legal deficiencies stemmed from ineffective institutions, legal inconsistencies, problematic legislative process and the government's slow actions. The Rae Committee's report in 1974 shed light on these problems. For example, this committee criticised the performance of Australian stock exchanges in regulating stock markets, lack of uniformity in state regulations, and bureaucracy in administering the complicated state-based corporate legal system.[20] Moreover, this committee recommended the government 'upgrade substantially legislative procedures so as to guard against repetition of serious misconduct, abuse and incompetence on the scale of recent years'.[21]

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17 Afterman, above n 12.

18 L C B Gower, *Gower's Principles of Modern Company Law* (Sweet and Maxwell, 4th ed, 1979) 665; J F Corkery, 'Oppression or Unfairness by Controllers — What Can a Shareholder Do about It? An Analysis of S 320 of the Companies Code' (1983–1985) 9(4) *Adelaide Law Review* 437; David Wishart, 'A Fresh Approach to Section 320' (1987) 17(1) *University of Western Australia Law Review* 94, 101.

19 Afterman, above n 12; Explanatory Memorandum, Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 (Cth), 171. From 1948 to 1980, there were only two successful cases under s 210, such as *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, followed by *Re HR Harmer Ltd* [1958] 3 All ER 689. These cases are discussed further in Part I of Chapter 5.

20 See the Senate Select Committee on Securities and Exchange, above n 13, Part I, Volume 1, chs 15–16. This report of the Rae Committee had 3 volumes.

21 Ibid Part I, Volume 1, [15]–[15.4]

The Rae Committee also recommended the establishment of the Australian Securities Commission, with full regulatory and investigative powers of a federal statutory body. The role of this commission was to act against corporate misconduct speedily and efficiently to enable the 'utmost protection' of investors and national interests.[22] This commission was instrumental in dealing with the ongoing 'sharp, unethical and dishonest industry behaviour' and 'the continuing tendency of exploiting investors'.[23] For example, this commission (now the Australian Securities and Investments Commission) intervened in some serious oppressive practices for public interests.[24]

Despite extensive recommendations, the progress of reforming corporate legislation and oppression sections was slow. The disrupted political leadership was a main obstacle among the abovementioned problems. As Australian legal reforms were informed by economic concerns and political realities, abruptly changing government leadership had a negative effect, with five different Prime Ministers in 10 years (1966–1975).[25] For example, the corporate legal changes introduced by the Whitlam Government lapsed with its 'most sensational' dismissal in 1975.[26]

The evolution of corporate legislation took a different path under the Fraser Coalition Government (1975–1983). This government initiated the cooperative scheme of corporate legislation to mitigate the complications and costs of the convoluted state-based legal

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[22] Ibid Part I, Volume, [16.21]. However, interstate corporate affairs commissions were formed in various states in 1974, followed by the National Companies and Securities Commission in 1979, the Australian Securities Commission in 1989 and the Australian Securities and Investments Commission in 2001.

[23] See, respectively, Bernard Mees and Ian M Ramsay, *Corporate Regulators in Australia (1961–2000): From Companies' Registrars to the Australian Securities and Investments Commission* (Research Report, Centre for Corporate Law and Securities Regulation, the University of Melbourne, 2008) 14; Ibid Part I, Volume 1, [15]–[15.4].

[24] For a detailed discussion see Chapter 5, Section 5.1. The Australian Securities and Investments Commission (ASIC) has roles, functions and powers under the *ASIC Act 2001* (Cth).

[25] Peter Fitzsimons, 'Australia and New Zealand on Different Corporate Paths' (1994) 8(2) *Otago Law Review* 267, 271. See also Brian Carroll, *Australia's Prime Ministers: From Barton to Howard* (Rosenberg, 2004). For updates on all PMs, see http://primeministers.naa.gov.au/primeministers/.

[26] Eg, a National Companies Bill, and a Corporations and Securities Industry Bill. For such dismissal, see Paul Kelly and Troy Bramston, *The Dismissal in the Queen's Name: A Groundbreaking New History* (Penguin Books Australia, 2015); Paul Kelly, *The Dismissal: Australia's Most Sensational Power Struggle: The Dramatic Fall of Gough Whitlam* (Angus and Robertson, 1983).

regime.[27] Cooperation is essential to create effective corporate legislation. However, this scheme was mainly a change in policy, without complementary changes in the practices of institutions. The Fraser Coalition Government stressed 'economic rationalism' in debating reforms, while relying on the Keynesian approach of rigorous government intervention to correct market problems.[28] As Pusey remarked, this showed a change of mind, yet actions essentially still reflected a tight legislation tradition more than market liberalism.[29] This meant that reasonable balance in executing the necessary reforms was not achieved.

Among the many problems in this scheme were the continuation of the old ministerial practices, administrative duplication and collegiate decision making.[30] This continuation diminished ministerial accountability to Parliament and caused general operational inefficiency. In line with this, regulatory reforms were captured by 'well-heeled business lobby groups', vested interests of state governments to preserve the status quo of 'fuzzy' laws, and the close relationships between market regulators of the Fraser Coalition Government and large companies.[31]

Moreover, the Fraser Coalition Government neglected major recommendations of the 1981 Campbell Report into the financial system, where minority shareholders were highly

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[27] The cooperative scheme aimed to enhance legislative uniformity through states' adoption of legislation enacted by the Commonwealth for the Australian Capital Territory, based on the *Constitution* s 122, to avoid the gridlock of s 51(xx). See also Redmond, above n 13, 48–50.

[28] See John Quiggin, 'Economic Rationalism' (1997) 2(1) *Crossings* 3, 3–12; Georgina Murray, 'The Intellectual Dynamics of the New Capitalism: A Review Article' (1995) 1(15) *Social Alternatives* 61, 63. For a discussion on economic rationalism, see, eg, Stuart Rees, Gordon Rodley and Stilwell Frank (eds), *Beyond the Market: Alternatives to Economic Rationalism* (Pluto Press, 1993).

[29] See generally Michael Pusey, *Economic Rationalism in Canberra: A Nation-Building State Changes its Mind* (Cambridge University Press, 1991).

[30] Roman Tomasic, 'Business Regulation and the Administrative State' in *Business Regulation in Australia* (CCH Australia Limited, 1984) 45; Senate Standing Committee on Constitutional and Legal Affairs, the Parliament of the Commonwealth of Australia, *The Role of Parliament in Relation to the National Companies Scheme* (1987) [3.8–3.9], [6.7].

[31] Tomasic, above n 30; Mark Considine and Jenny M Lewis, 'Networks and Interactivity: Making Sense of Front-Line Governance in the United Kingdom, the Netherlands and Australia' (2003) 10(1) *Journal of European Public Policy* 46. See also John M Green, '"Fuzzy law" — A Better Way to Stop "Snouts in the Trough?"' (1991) 9(3) *Company and Securities Law Journal* 144; Rob McQueen, 'Limited Liability Company Legislation — The Australian Experience' (1991) 1 *Australian Journal of Corporate Law* 22.

vulnerable.[32] Important recommendations included strengthening corporate disclosure to improve transparency and information access, which aimed to increase the accountability of directors and reduce misconduct. Likewise, this report also recommended enhancing the accountability of authorities and public consultation in legal reform. This meant an inclusive lawmaking process was needed.

A change in policy, rather than in unsound practices, did not generate significant outcomes. Achievements of market and law reforms under the Fraser Coalition Government remained limited, despite political stability. For example, Quiggin observed that, 'failures outnumbered successes in the overall reforms in this period because of the naked pursuit of self-interest' under the influence of interest groups.[33] This government's efforts were concentrated more on 'making cosmetic changes to the existing legislation' to secure the passage of legislation and avoid the consequent constitutional challenges.[34] Hence, the restrictive oppression sections remained the same, even after the *Companies Act 1981* (Cth) was introduced.

In a parallel development, there was some important progress in building and promoting the institutions necessary for better regulatory changes. For example, the first *Federal Court of Australia Act 1976* (Cth) established the Federal Court of Australia as the adjudicator of oppression claims to provides flexible options of bringing oppression claims before either this new judicial body or the Supreme Court of States and Territories.[35] Subsequently, the first *Freedom of Information Act 1982* (Cth) formed the legal basis for disclosing information and proactively engaging the public in the lawmaking process. These acts were significant

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[32] See *Australian Financial System: Final Report of the Committee of Inquiry* (Campbell Report, September 1981). The recent inquiry was *Financial System Inquiry: Final Report* (Murray Report, November 2014).

[33] Quiggin, above n 28, 3, 7–8. See also John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (Princeton University Press, 2012) 209–237.

[34] McQueen, above n 8, 1, 27–30. See also Fitzsimons, above n 25, 267; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Law Book, 2nd ed, 1992), 79.

[35] Jurisdiction over claims against oppression is given to the Federal Court of Australia, the Supreme Court of States and Territories, and the High Court: *Corporations Act 2001* (Cth) s 232. See also Table 5.7: Summaries of Jurisdictions over Shareholder Litigation in Vietnam Compared with Australia, at page 290.

because they informed a new phase in the evolution and implementation of oppression sections (discussed in Chapters 4 and 5).

3.3 Substantial Reforms of Oppression Sections and Federal Institutions (1983–1996)

The limited achievements of the Fraser Coalition Government in improving economic governance and regulatory measures were ineffective in mitigating the market problems and economic recession in the early 1980s. As Mees and Ramsay observed, 'a clamorous tide of takeover activities, corporate misconduct and outright wrongdoings continued rising'.[36] These pressing widespread concerns turned the functionalities of corporate law and federal institutions into matters of intense public debate, with growing demands for substantial reforms.

This context provided the Hawke Labour Government (1983–1991) with an undeniable mandate to tackle mounting market problems, as well as political, economic, legal and institutional complexities. As a result, sweeping and substantial changes were introduced and subsequently reinforced by the Keating Government (1991–1996).

3.3.1 Shift towards Liberal Economic Thinking and Policy of the Hawke Government

One of the underlying reasons for the limited achievements of the Fraser Coalition Government was its reliance on Keynesian interventionist economics. The then Prime Minister (PM) Malcolm Fraser was not interested in the more liberal viewpoints of Hayek when discussing policy problems with Hayek during his five-week visit to Australia in

[36] Mees and Ramsay, above n 23, 8.

1976.[37] This led to inflexible and inadequate reforms on law and institutions, thereby failing to meet market needs.

Learning this lesson, the Hawke Labour Government shifted towards Hayekian liberal viewpoints.[38] This shift in economic thinking enabled the selective application of these viewpoints to broad policies on reforming the market, corporate law and institutions. Thus, it is necessary to elaborate Hayekian liberal viewpoint. They provide important background for the immediately following discussions on this first wave of major changes by this government in Australia,[39] while also influencing enterprise law reforms in Vietnam (see Chapter 3, Sections 3.8.2.1, 3.9.4).

Hayek's viewpoints were interdisciplinary and wide ranging. For instance, apart from theories on business cycle and money policies, his penetrating analysis was extended to the interdependence of political, economic, social and legal institutions.[40] In this respect, Hayek strongly defended private business freedom against overprotection for big enterprises, coalitions of organised interests, and especially state-owned monopolies.[41] Privatisation of state industries, deregulation of private sectors and liberalisation of restrictive provisions accordingly played an important role in facilitating this freedom and market competition.

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[37] See generally Rafe Champion, 'Hayek in Australia, 1976' in Robert Leeson (ed), *Hayek: A Collaborative Biography — Part VI Good Dictators, Sovereign Producers and Hayek's 'Ruthless Consistency'* (Palgrave Macmillan, 2015) 233, 233–248. See also Friedrich A von Hayek, *Social Justice, Socialism & Democracy: Three Australian Lectures* (Centre for Independent Studies, 1979).

[38] See Alan Fenna and Alan Tapper, 'The Australian Welfare State and the Neoliberalism Thesis' (2012) 47(2) *Australian Journal of Political Science* 155. See also Organisation for Economic Cooperation and Development, *Welfare State in Crisis* (Paris, 1981). For the downturn of Keynesian economics in the mid-1970s, see Bruce Caldwell, *Ten (Mostly) Hayekian Insights for Trying Economic Times* (First Principles Series No 36, The Heritage Foundation, 2011) 5–6.

[39] Peter Carroll et al, *Minding the Gap: Appraising the Promise and Performance of Regulatory Reform in Australia* (ANU E Press, 2008) 5–6.

[40] The Royal Swedish Academy of Sciences, 'Economics Prize For Works In Economic Theory And Inter-Disciplinary Research to Professor Gunnar Myrdal and Professor Friedrich von Hayek' (Press Release, 9 October 1974) http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/press.html.

[41] See Friedrich A von Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, 1960) 87, 95; Friedrich A von Hayek, *Freedom and the Economic System* (Martino Fine Books, reprinted ed, 2012); F A Hayek, *The Denationalization of Money* (Institute of Economic Affairs, reissued ed, 2007). See also Jonathan Crowe, 'Radicalising Hayekian Constitutionalism' (2014) 33(2) *University of Queensland Law Journal* 379.

These required the operational independence of market regulators to oversee the market integrity and advise on complementary changes.

Moreover, according to Hayek's viewpoints, the institutional setting for an effective liberal socioeconomic system would include a free and competitive market economy in a democratic polity, underpinned by a strong constitution and the rule of law.[42] Legislation is necessary as long as it ensures these factors are mediated through a broad representative legislature and an independent judiciary to achieve fair and predictable law and enforcement.[43]

Informed by Hayekian economics and reform movements in the economies of Organisation for Economic Co-operation and Development (OECD), the Hawke Labour Government initiated major reforms in different areas of the economy.[44] While it is not within the scope of this section to review all these changes, four issues were particularly pertinent to the evolution of oppression sections within the corporate law trajectory. These included reforms on: (1) corporate legislation, as exemplified by oppression sections; (2) business freedom, as illustrated by the privatisation of SOEs; (3) the legislative process with public consultation; and (4) institutions participating in this process. These issues are now discussed in turn.

3.3.2 Transformation of Oppression Sections and Complementary Privatisation of State-Owned Enterprises

The Hawke Labour Government liberalised oppression sections as part of corporate law reforms. This government seized opportunities created by the economic recession in the early 1980s to depart from the gradual reform tradition. In particular, the 1983 sweeping

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[42] These themes underpinned major works, eg, F A Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519; F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy with a New Foreword by Paul Kelly* (Taylor & Francis, Reprinted ed, 2013). See also Suri Ratnapala, 'The Jurisprudence of Friedrich A Hayek' in Oliver Hartwich (ed), *The Multi-layered Hayek* (Centre for Independent Studies, 2010) 45, 45–60; Suri Ratnapala, 'The Trident Case and the Evolutionary Theory of F A Hayek' (1993) 13(2) *Oxford Journal of Legal Studies* 201.

[43] See Bruce Caldwell (ed), *The Collected Works of F A Hayek, Volume 10 Socialism and War: Essays, Documents, Reviews* (Routledge, 2013) chs 8–9; Caldwell, *Ten (Mostly) Hayekian Insights*, above n 38, 6–9.

[44] Carroll et al, above n 39, 5; Organisation for Economic Co-operation and Development, *Structural Adjustment and Economic Performance* (1987).

amendments removed various wording limitations that tightened these sections, by significantly expanding legal standing, litigable conduct, grounds for court order and available remedies.[45] The thrust of these expansions was to free oppression sections from the fetters imposed by judicial interpretations.[46] These expansions were essentially aimed at enhancing the protection for all shareholders and business freedom within the concept of fairness, as part of broader objectives to reclaim Australian investment advantages.[47] As these amendments transformed oppression sections, they are scrutinised in Chapters 4 and 5.

As a complement to these amendments, different measures were taken to accelerate private business freedom. The government began streamlining the public sector through the privatisation of SOEs to alleviate their problems of monopoly and misconduct.[48] This was because, earlier in its development, Australia had relied heavily on government monopolies to provide key services, such as banking, aviation, telecommunication, electricity and ports. The government also introduced the minimum effective regulation policy in 1986 to deregulate the over-regulated private sectors — notably, finance and trade.[49]

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[45] Cf the *Companies Act 1981* (Cth) s 320 with the *Companies and Securities Legislation Amendment Act 1983* (Cth) s 89. See also Corkery, above n 18; Jennifer Hill, 'Protecting Minority Shareholders and Reasonable Expectations' (1992) 10(2) *Company and Securities Law Journal* 86; Redmond, above n 13, 686. For a detailed discussion on oppression sections, see Chapter 5, Part I.

[46] Commonwealth of Australia, *Parliamentary Debates*, Senate, 5 October 1983, 1082 (Gareth Evans, Attorney-General); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 November 1983, 2885 (Lionel Bowen, Minister for Trade).

[47] Peter Costello, 'Is the *Corporations Law* Working?' (1992) 2(1) *Australian Journal of Corporate Law* 12, 17–8. See also Fletcher, above n 12; Australian Government, 'Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors' (Corporate Law Economic Reform Program, Proposals for Reform Paper No 3, 1997), 8.

[48] For the problems of SOEs in Australia, see Stephen Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53(4) *Australian Journal of Public Administration* 521; *Joint Committee of Public Accounts, Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector* (Report No 336, 1995); Ross Grantham, 'The Governance of Government Owned Corporations' (2005) 23(3) *Company and Securities Law Journal* 181; Roman Tomasic and Jenny Jian Rong Fu, 'Government-Owned Companies and Corporate Governance in Australia and China: Beyond Fragmented Governance' (2006) 3(4) *Corporate Ownership & Control* 123.

[49] See Ann Nevile, 'Financial Deregulation in Australia in the 1980s' (1997) 8(2) *Economic and Labour Relations Review* 273; Ross Milbourne and Matthew Cumberworth, 'Australian Banking Performance in an Area of Deregulation' (1991) 30(57) *Australian Economic Papers* 171; Peter J Drake, 'Financial Deregulation in Australia: A Success Story?' in Kanhaya L Gupta (ed), *Experiences with Financial Liberalization* (Springer Science + Business Media, 1997) 45; Justin Douglas, 'Deregulation in Australia' (2014) (2) *Economic Round-up* 53, 55, 73.

Moreover, the Keating Government (1991–1996) dramatically expanded the privatisation program. It was considered one of the largest programs in the OECD, with the sale of iconic SOEs, such as the Commonwealth Bank and Qantas.[50] This was driven by the Hilmer Report of 1993, which highlighted significant gains to the community from opening up government enterprises and other areas of the economy to private competition.[51]

The market restructuring via privatisation and the relaxation of corporate legislation via deregulation caused huge changes in the market. These measures freed business sectors, reduced regulatory costs on business and augmented business opportunities.[52] Likewise, the number of minority shareholders surged because the securities markets were rapidly maturing and demutualisation significantly increased.[53] Accordingly, share ownership concentration in companies declined and shareholdings became more dispersed.[54] These changes boosted market competition as a driver for corporate efficiency with 'stellar performances' in the 1990s.[55]

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[50] Reserve Bank of Australia, *Privatisation in Australia* (1997); Margaret Mead and Glenn Withers (eds), *Privatisation: A Review of the Australian Experience* (Committee for Economic Development of Australia, 2002); M McKenzie, 'Privatization and Economic Growth in Australia: The Shorthand of a Long Process' (2008) 40(15) *Applied Economics* 1953. The Howard Government (1996–2007) continued privatisation. For previous and upcoming privatisation until 2020, see National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit, Phase One* (2014), 220–4.

[51] See generally The Committee of Inquiry into National Competition Policy Review, *National Competition Policy* (Hilmer Report, 1993). See also Ian Harper et al, *Competition Policy Review: Final Report* (2015); Australian Government, *Australian Government Response to the Competition Policy Review* (2015).

[52] Carroll et al, above n 39, 110; Douglas, above n 49, 53, 56–64; Productivity Commission, 'Potential benefits of the National Reform Agenda: Report to the Council of Australian Governments' (Productivity Commission Research Paper, 2006) 154.

[53] See 'Demutualisation in Australia' (Reserve Bank of Australia Bulletin, January 1999); Kerr Jarrod, Qiu Mei and C Rose Lawrence, 'Privatisation in New Zealand and Australia: An Empirical Analysis' (2008) 34(1) *Managerial Finance* 41. In 1980, minority investors already held 40% of shares in the market: Mees and Ramsay, above n 23, 37.

[54] Brian Cheffins, 'Comparative Corporate Governance and the Australian Experience' in Ian M Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 28. See also Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16(1) *Transnational Lawyer* 13; Roman Tomasic, 'The Theoretical Foundations of Australian Corporations Law Reform: Some Lessons for Reformers' (2003) 1(3) *Journal of International Commercial Law* 323.

[55] Mead and Withers, above n 50, 7; Mees and Ramsay, above n 23, 66. See also Linda Katurah Colley and Brian Head, 'Privatisation and New Public Management: Asset Sales and Commissions of Audit in Queensland, 1990–2013' (2014) 49(3) *Australian Journal of Political Science* 391.

However, increasing privatisation and deregulation also increased self-regulation, which diluted corporate accountability.[56] The previous surge in corporate misconduct was matched with a recurrent bout of corporate scandals and oppressive conduct against minority shareholders.[57] These unintended negative effects necessitated finding an appropriate balance between privatisation alongside deregulation to facilitate business freedom and effective legal reforms to protect minority shareholders from being oppressed. Thus, the abovementioned transformation of oppression sections became essential to support this balance. As these sections were based on the concept of fairness, they did not infringe business freedom, while being used to hold oppressors accountable.

3.3.3 Reforming Institutions and the Legislative Process for Improving Market Regulation

The Hawke Labour Government reshaped federal institutions to address the ongoing challenges of market problems.[58] As political leadership is the critical ingredient for reform success, PM Bob Hawke showed determination to tackle political, legal and institutional complexities.[59] Action was taken after reports revealed that market problems were rooted in institutional failures that involved interest groups capturing legal reform for their own benefits.[60] Moreover, a proliferation of overlapping policy institutions, under the then

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[56] See Michael Blakeney and Shenach Barnes, 'Industry Self-regulation: An Alternative to Deregulation? Advertising — A Case Study' (1982) 5(1) *University of New South Wales Law Journal* 133; John Quiggin, 'Does Privatisation Pay?' (1995) 28(2) *Australian Economic Review* 23; Mead and Withers, above n 50; Chris Aulich and Mark Hughes, 'Privatizing Australian Airports: Ownership, Divestment and Financial Performance' (2013) 13(2) *Global Journal* 175.

[57] See generally Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Australian Institute of Criminology in Association with Oxford University Press, 1986); Senate Standing Committee on Constitutional and Legal Affairs, above n 30, 41, 80, 81; John D Adams (ed), *Collapse Incorporated: Tales, Safeguards & Responsibilities of Corporate Australia* (CCH Australia, 2001); Clarke, Dean and Oliver, above n 15.

[58] Hawke, R J 1986 Prime Minister's Speech to the 3rd AGM of the Business Council of Australia, Commonwealth Record, 11 (36), 1598–1601; Ian McAllister and Rhonda Moore (eds), *Party Strategy and Change: Australian Political Leaders' Policy Speeches Since 1946* (Longman Cheshire, 1991).

[59] Gary Banks, 'Return of the Rent-Seeking Society?' (2013) 32(4) *Economic Papers* 405, 415.

[60] See Industries Assistance Commission, *Annual Report 1987–1988* (Australian Government Publishing Service, 1988) 4; Industries Assistance Commission, *Annual Report 1988–1989* (Australian Government Publishing Service, 1989) 6–15.

cooperative corporate lawmaking scheme, was seen to be assisting such capture.[61] Institutional reforms also targeted this scheme and the legislative process, as discussed in the following.

From 1989, institutions taking charge of different aspects of the reform process were created, restructured or streamlined. For example, the Corporations and Markets Advisory Committee (CAMAC) undertook *ex ante* reviews on reform issues (ceded in 2014). The Office of Regulation Review (Office of Practice Regulation [OBPR] from 2006) conducted regulatory impact assessments. The Office of Parliamentary Counsel (OPC, created in 1970) drafted Bills professionally. The Australian Securities Commission (Australian Securities and Investments Commission [ASIC] from 1998) administered corporate laws. Finally, the Industry Commission (Productivity Commission from 1998) undertook ex post reviews of regulatory effectiveness.[62]

These bodies shared many common features. Their revised functions, operational independence, expertise-based appointments and consultative working methods were consolidated and enunciated in statutes. These attributes played an important role in dispersing influence from interest groups and mitigating their capture of legal changes. As a result, institutional reforms improved their overall performance, although ongoing institutional adjustments remained necessary to address the evolving economic situation.[63]

These institutional improvements were reinforced with two important changes in the legislative process. One change was better consultation requirements (such as more time and disclosure) to address problems of rushed legislation and filters by ministries sponsoring

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[61] Carroll et al, above n 39, 26, 78. See also Kerrie Sadiq and Janet Mack, '"Re-thinking" the Influence of Regulatory Capture in the Development of Government Regulation' (2015) 43(5) *Australian Business Law Review* 379.

[62] These reforms were continued under subsequent governments. The Office of Parliamentary Counsel drafted the oppression sections. The Australian Securities Commission can apply them in public interest litigation.

[63] See Organisation for Economic Cooperation and Development, *Government Capacity to Assure High-Quality Regulation in Australia* (2010).

Bills.[64] These requirements increased opportunities for people to be 'active participants in the life of the nation',[65] and ensured that broad viewpoints received greater attention. This enabled capitalisation of human capital in implementing reform policies. The other change was the gradual departure from complicated drafting. This problem became so serious that 'legislation needed over 90 words to define the word "give"'.[66] The 1987 Senate inquiry accordingly recommended the use of a plain English drafting style to remove 'obscurity, repetition and surplusage' to convey meaning as clearly and simply as possible.[67] However, noticeable changes in the practice of drafting 'indigestible and incomprehensible' provisions by the OPC took another decade.[68] For example, the language and structure of oppression sections were only improved in 1998.

In parallel with changes to the legislative process, the Hawke Government reached an agreement with states to replace the cooperative corporate law scheme with the national scheme in 1991. This was an effort to federalise the corporate lawmaking authority of states after the High Court in *New South Wales v Commonwealth* revived the earlier strict view in *Huddart, Parker & Co Pty Ltd v Moorehead* that the Constitution s 51(xx) did not authorise the Commonwealth to legislate for incorporation.[69] With the states fully adopting legislation enacted by the Federal Parliament, the national scheme created a uniform statutory text for

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[64] Senate Standing Committee on Constitutional and Legal Affairs, above n 30, 47, 54. Carroll et al, above n 39, 78.

[65] *Governments Working Together: A Third Wave of National Reform, a New National Reform Initiative for COAG — The Proposals of the Victorian Premier* (August 2005) 7.

[66] Robert Baxt, 'Editorial' (1992) 10 *Company and Securities Law Journal* 163, 163. See also Fitzsimons, above n 25, 267; New Zealand Law Commission, *Company Law: Reform and Restatement*, NZLC R9, 1989), 11.

[67] Senate Standing Committee on Constitutional and Legal Affairs, above n 30, 45, 59, 177–9. For an association of 1000 legislative drafters, see Peter PSM Quiggin, 'CALC: Commonwealth Association of Legislative Counsel' (2011) 37(3) *Commonwealth Law Bulletin* 453.

[68] Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2 *Australian Journal of Corporate Law* 1, 1; Stephen Bottomley, 'Where Did the Law Go? The Delegation of Australian Corporate Regulation' (2003) 15(2) *Australian Journal of Corporate Law* 1, 10.

[69] *New South Wales v Commonwealth* (1990) 169 CLR 482, 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ). Deane J dissented at 505–6. Section 51(xx) of the *Constitution* provides that 'the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The judgement centred around the term 'formed'. *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] HCA 36, (1909) 8 CLR 330 was the first case.

Australia.[70] This scheme reduced regulatory deviations, thereby better facilitating the growth of the stock market and protection for minority shareholders.[71]

The Keating Labour Government (1991–1996) continued the reform process by initiating the Corporate Law Simplification Program in 1993. This program was led by a taskforce comprising a senior policy lawyer from the Attorney-General's Department, a senior drafter from the OPC, an experienced lawyer from the private sector, and a plain English expert (Dr Robert Eagleson). Despite the efforts of this versatile panel, legislative changes under this program were unsuccessful. The primary reason was the continuing doctrinal law approach of the Attorney-General's Department and a narrow focus on the technical aspects of simplifying the drafting.[72]

3.4 Change of Sponsor Ministry to Modernise the Legislative Design of Oppression Sections and Strengthen the Economic Reform of Corporate Law (1996–2016)

The Corporate Law Simplification Program was short lived. The Howard Coalition Government (1996–2007) substituted it with the Corporate Law Economic Reform Program (CLERP) in 1997. This important shift informed the new approach to reforming and drafting corporate legislation, which included oppression sections.

CLERP was a comprehensive policy to improve both the expression and content of corporate law in six major areas.[73] These included corporate governance provisions aimed at clearer

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[70] The federalisation of corporate lawmaking was based on recommendations by the Senate Standing Committee on Constitutional and Legal Affairs, above n 30, [6.7].

[71] See also Redmond, above n 13, 48–51.

[72] Bottomley, above n 68. Limited opportunities for public debate, and interest groups' regulatory capture of the taskforce had also rendered the Corporate Law Simplification Program less effective. David Wishart, 'Corporate Law Reform: A Note on the Process and Program' (2000) *Australian Company Secretary* 140, 142–3.

[73] The six areas included accounting standards, corporate governance, electronic commerce, financial markets, fundraising and takeovers, with 60 important reforms and extensive consultation with stakeholders. Commonwealth of Australia, *Corporate Law Economic Reform Program: Policy Reforms* (1998), 31.

duties for directors and their greater accountability to shareholders. Reforms in these areas were driven by the need to harmonise with the laws applied in major financial markets and the key principles of legal change, such as consistency, flexibility and efficiency.[74] CLERP also consolidated efforts to find the elusive balance between regulation to govern business, deregulation to enhance economic activity, and re-regulation to address market problems.[75]

Thus, CLERP reached beyond just the simplification process. It aimed to increase the efficacy of the economy through reforms designed to promote free enterprise and greater competition, while providing investors with adequate avenues for redress to maintain market integrity.[76] A change of the sponsor ministry from the Attorney-General's Department to the Treasury (under CLERP) shifted the attention to the reform effectiveness, rather than just legal technicalities. Illustrating these goals, the then Federal Treasurer Peter Costello stated that the Australian corporate law would be strongly enforced against corporate wrongdoers when he announced CLERP to ease the burdens of corporate legislation on investors by introducing less onerous and less prescriptive provisions.[77]

The goals of CLERP informed further evolution of oppression sections. Although these sections were expanded in 1983 and renumbered in various acts, the language remained dense. These sections were reworded and restructured in the *CLERP Act 1998* (Cth) to increase their clarity. This Act also clarified that the judiciary had absolute flexibility to make

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[74] See Commonwealth of Australia, above n 73; Wishart, above n 72, 140; The Hon Justice Idf Callinan, 'The Corporate Law Economic Reform Programme: An Overview' (Paper presented at the Corporations Law Update, Sydney Marriott Hotel, 20 October 1998).

[75] See Corporate Law Economic Reform Program: Proposals for Reform Paper No 6, *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (Australian Government Publishing Service, 1997), 26–30; Angus Corbett, 'Self-regulation, CLERP and Financial Markets: A Missed Opportunity for Innovative Regulatory Reform' (1999) 22(2) *University of New South Wales Law Journal* 506; Joanna Bird and Jennifer Hill, 'Regulatory Rooms in Australian Corporate Law' (1999) 25(3) *Brooklyn Journal of International Law* 555. For impacts of deregulatory and regulatory oscillations, see Frank Clarke, Graeme Dean and Matthew Egan, *The Unaccountable & Ungovernable Corporation: Companies' Use-By-Dates Close in* (Routledge, 2014).

[76] See Commonwealth of Australia, above n 73.

[77] See Tomasic, above n 14, 8; S Ellis, 'Costello's Corporate Law Reform: Deeds (and Words)', *Australian Financial Review* 4 March 1997, 4; The Hon Peter Costello, 'Corporate Law Economic Reform Program — Legislation Released for Public Comment' (Press Release, 9 April 1998) <http://www.treasurer.gov.au/tsr/content/pressreleases/1998/035.asp?pf=1>.

orders, even in the case where the complained conduct has ceased or had yet to occur.[78] With these changes, oppression sections became fully developed. This was the outcome of the shift towards a legal reform approach that favoured clarity over simplification and comprehensiveness over generality to reduce the unnecessary costs caused by convoluted provisions.[79]

Corporate legal evolution reached another important milestone. All states applied the Constitution s 51 (xxxvii) to refer their corporate legislative powers to the Commonwealth in 2001. This referral was aimed at further enhancing the uniformity and predictability of corporate law reforms to facilitate market interests.[80] On the centenary of Federation, the *Corporations Act 2001* (Cth) applied nationally for the first time. As a result, oppression sections were relocated to Part 2F.1 of this Act and remained unchanged since then.

3.5 Major Factors Informing the Evolution of Oppression Sections

Changes in political, economic and social contexts have informed the evolution of the Australian oppression sections within the corporate law trajectory. Part I has demonstrated these results in which the 1983 transformation of oppression sections is a significant change (see also Chapter 2 Section 4.3 and Chapter 5 Section 5.5.1). On this basis, 10 main lessons can be drawn from such evolution:

1. The common law recognition of the need to protect minority shareholders from oppression was accepted into corporate legislation.

2. The business community and public became aware of the need for oppression sections.

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[78] Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) s 6.1.

[79] For costs caused by ambiguous legislation, see Gregory E Maggs, 'Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Court Study Committee' (1992) 29(1) *Harvard Journal on Legislation* 123, 126–30.

[80] The referrals were extended until 2016. Referrals are subject to two principal caveats, including a five-year sunset clause. See eg, *Corporations (Commonwealth Powers) Act 2001* (NSW) ss 1, 5, 6. Although referrals can be revoked, this appeared less likely because of extensive problems and costs before referral.

3. There was increased recognition that oppression sections were important to address misconduct in companies because general meetings and market exit through sale of shares had limited capacity to address calculated oppressive conduct.

4. The 1983 transformation of oppression sections was part of a much larger policy package of reforming corporate law and establishing complementary institutions to facilitate business freedom.

5. The establishment of dedicated institutions (such as CAMAC, OBPR, OPC, ASIC and Productivity Commission) was important to create an effective framework for the operation of legislation.

6. The creation of the Federal Court of Australia and changes in judicial interpretation informed the implementation of oppression sections, adding to overall effectiveness.

7. The privatisation of SOEs, which opened them up to oppression sections, was important in the sections having wide influence.

8. A unified legal reform approach following the inclusive legislative process, with a renewal in legal drafting techniques, was important to deliver transparent legislation.

9. The enactment of *Freedom of Information Act 1982* (Cth) fostered the public oversight and participation in this process, which contributed to accountability.

10. Public support for redressing corporate misconduct was important for increasing the effectiveness of the oppression sections.

In summary, many important factors have informed the evolution of oppression sections within corporate law trajectories. These factors included bipartisan attempts to improve business freedom in light of the rapid increase of minority shareholders and their vulnerability

to 'unscrupulous nouveau capitalists'.[81] Moreover, the need to address legal deficiencies in providing remedies for growing corporate misconduct led to the substantial reform of corporate law schemes, the legislative process, and the federal institutions participating in this process. In particular, market problems forced the government to overcome the regulatory capture by interest groups to transform the oppression sections in 1983 and reword them in 1998 that facilitated the judicial implementation of these sections.[82]

While these factors did not operate separately, the crucial factors in sustaining good policy practices were the collective efforts under effective political leadership of PMs, such as Bob Hawke, Paul Keating and John Howard. Central to this success under their leadership was the strengthening of processes to enable the effective scrutiny of policy proposals within Cabinet and the ministries, which was supported by research-based reviews and extensive public consultation, where desirable.[83] This approach was so effective that the OECD called it the 'Australian Model of reform'.[84]

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[81] See eg, Indyk, above n 15; Sykes, above n 15; Clarke, Dean and Oliver, above n 15. The term economic liberalism was used by Max Weber. See generally Max Weber, *The Protestant Ethic and the 'Spirit' of Capitalism and Other Writings* (Peter Baehr and Gordon C Wells trans, Penguin Books, 2002).

[82] However, Australia still faces an ongoing problem of regulatory capture by interest groups. See Nicholas Gruen, 'Economic Reform — Renovating the Agenda: With an Example from the Market for Information' (2002) 61(2) *Australian Journal of Public Administration* 90; Banks, above n 59, 405.

[83] Banks, above n 59, 405, 415.

[84] Ibid. See also OECD, *OECD Reviews of Regulatory Reform: Government Capacity to Assure High-Quality Regulation in Australia* (2010).

Part II: Evolution of Vietnamese Enterprise Law Concerning Changing Societal Contexts, Western Legal Transfers and Minority Shareholder Protection via Litigation Provisions

While the Communist Party of Vietnam has controlled the entire country since 1975, a review of the evolution of Vietnamese enterprise laws governing the private business sector and minority shareholder protection demonstrates that these laws were derived from Western ideas via French colonialism, the period of United States involvement, and ongoing enterprise legal transfer.

Part II identifies the major factors that have informed these laws. It focuses on the state business sector, private business sector and state practice in reforming these laws, all of which influence the evolution of litigation provisions for the protection of minority shareholders.

3.6 Institutional and Corporate Legal Transfers under French Colonialism (1858–1954) and United States Involvement (1954–1975)

The period of French colonialisation of Vietnam began in September 1858. It concluded in 1954 with the military victory of the Viet Minh and the Geneva Conference. The subsequent period of United States (US) involvement ended in 1975, and Vietnam was formally reunited under a communist regime. These power struggles generated a hybrid political economic system in which capitalism was superimposed on an agrarian economy prior to the communist regime.[85] This section maps the major influences of these chequered trajectories in the political, social, economic and legal evolution of Vietnam.

[85] See M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975) 203–16, 223–229, 241–7; K W Taylor, 'Surface Orientations in Vietnam: Beyond Histories of Nation and Region' (1998) 57(4) *Journal of Asian Studies* 949; Long S Le, '"Colonial" and "Postcolonial" Views of Vietnam's Pre-history' (2011) 26(1) *Sojourn: Journal of Social Issues in Southeast Asia* 128, 135. French colonialism coexisted with the nominal Nguyen dynasty until 1945 when Vietnamese communists pressured the last Nguyen King to abdicate in 1945, declared independence, and continued fighting colonialism: William J Duiker, *Ho Chi Minh: A Life* (Hachette Books, 2012) 320, 338.

3.6.1 Fragmentation of Legal Transfers and Law Implementation in a Hybrid Colonial Political Economic System

Initial corporate legal rules in Vietnam consisted primarily of the wholesale transfer of French legislation for nearly a century, until 1954.[86] The French colonial rulers established a capitalist business legal order in Vietnam, where they developed a modern export sector to exploit local resources.[87] They introduced commercial laws containing corporate rules, commercial courts and the legal profession.[88] Nevertheless, these transfers were not universal in time and degree because of the slow colonial encroachment.[89] While French commercial legislation was fully applied in Southern Vietnam from early 1864, the colonial rulers only composed codes for Northern and Central Vietnam in 1931 and 1942, respectively.[90] These codes contained the rough translation of French corporate models, such as 'a personal company' and 'a capital company'.[91]

The judicial implementation of transferred legislation was complicated and dependent on the citizenship of applicants. From the early 1860s, colonial commercial courts in Saigon, Hanoi and Hai Phong applied French laws to solve disputes between French or French-privileged foreigners, including Vietnamese people born in colonial territories.[92] Vietnamese people in

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[86] See eg, Vu Van Mau, *Vietnamese Civil Law in Brief: Volume II — Contracts and Responsibilities* (Ministry of Education, 1963) 10–11; Le Tai Trien, *Vietnamese Commercial Legal Commentaries: Volume 1* (Kim Lai, 1972).

[87] David G Marr, *Vietnamese Tradition on Trial, 1920–1945* (University of California Press, 1981) 5.

[88] Pham Duy Nghia, *Economic Law Textbook* (People's Public Security Press, 3rd ed, 2011) 24–5, 56.

[89] The French colonised Southern Vietnam from the early 1860s, made Northern and Central Vietnam into protectorates from the 1880s with the nominal governance of the Nguyen dynasty until 1945, and turned Ha Noi, Hai Phong and Da Nang into their colonies from the late 1890s: Hooker, above n 85, 226, 229; K W Taylor, 'Surface Orientations in Vietnam: Beyond Histories of Nation and Region' (1998) 57(4) *Journal of Asian Studies* 949.

[90] Eg, the Northern Civil Code 1931 and the Central Commercial Code 1942. These codes were modelled on the French Commercial Code 1807: Le Minh Tam and Vu Thi Nga (eds), *State and Law History Textbook* (People's Public Security Press, 2007) 393–396; Ha Noi Law University, *Commercial Law Textbook* (People's Public Security Press, 2004) 9; Le Tai Trien, *Vietnamese Commercial Legal Commentaries: Volume 1* (Kim Lai, 1972) ix-x.

[91] Le Tai Trien, *Summary Commercial Law* (Bach Dang Press, 1959) vol 2, 18; Nguyen Am Hieu, *Vietnamese Economic Law Textbook* (Hanoi National University Press, 1997) ch 8.

[92] This occurred in 1862. See Pham Diem, 'Vietnamese Court System Under the French Rule' (1994) 4(54) *Vietnam Law & Legal Forum* 27.

the South and North could articulate their disputes into the French system, yet those in Central Vietnam could not.[93] Moreover, lawyers were allowed in French courts, but not in Central Vietnam courts.[94] These variations suggested that colonialists used legal transfers to mainly serve their own interests and their supporters, rather than building a corporate legal system for the colony. More specifically, protection of local minority shareholders was not considered.

3.6.2 Socioeconomic Changes as a Result of Colonialism

French capitalism's liberal economic, legal and institutional transfers promoted the emergence of private commercial practices in the pre-colonial period.[95] The colonisers granted large land concessions to French companies and Vietnamese collaborators, while also introducing the concepts of legal fairness, private property and individual responsibility conducive to private business.[96] The ultimate result was that commodity capitalism emerged in large urban areas within a largely agrarian economy.[97]

The French rulers used educational policies to further promote these changes and capitalist values. Especially from 1920 to 1950, they increased legal education to popularise transferred French laws via the Indochina Law School in Hanoi, which also had a campus in Saigon.[98]

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93 See Nguyen Ngoc Huy and Ta Van Tai, *The Lê Code: Law in Traditional Vietnam — A Comparative Sino-Vietnamese Legal Study with Historical-Juridical Analysis and Annotations* (Ohio University Press, 1987); Pham Duy Nghia, *Vietnamese Business Law in Transition* (The Gioi Publishers, 2002) 31–2.

94 Nghia, above n 88, 421; Nguyen Hung Quang, 'Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007) 162, 164.

95 See Ta Van Tai, 'Vietnam's Code of the Lê Dynasty (1428–1788)' (1982) 30(3) *American Journal of Comparative Law* 523, 525; Huy and Tai, above n 93, 54–8; John K Whitmore, 'Chung-hsing and Cheng-t'ung in Texts of and on Sixteenth Century Vietnam' in K W Taylor and John K Whitmore (eds), *Essays Into Vietnamese Pasts* (Southeast Asia Program, Cornell University, 1995) 116–36.

96 Mau, above n 86, 6, 10; Marr, above n 87, 4.

97 Marr, above n 87; Bui Xuan Hai and Gordon Walker, 'Transitional Adjustment Problems in Contemporary Vietnamese Company Law' (2005) 20(11) *Journal of International Banking Law and Regulation* 567, 569; Nghia, above n 93, 34–5.

98 See Mark Sidel, 'Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training' (1993) 11(2) *UCLA Pacific Basin Law Journal* 221; Mark Sidel, 'The Re-Emergence of Legal Discourse in Vietnam' (1994) 43(1) *International and Comparative Law Quarterly* 163, 166; Richard Powell, 'English in Southeast Asia Law' in Ee Ling Low and Azirah Hashim (eds), *English in Southeast Asia: Features, Policy and Language in Use* (John Benjamins Publishing Company, 2012) 241, 259.

The courts that were established applied French rules of evidence and procedural fairness, giving newly trained lawyers an active role.[99] Through education, the French rulers gradually introduced fairer capitalist laws to the local population. People became more aware of the concept of legal fairness, thereby supporting it further. This was also vital to the interests of foreign importers. In effect, colonial laws and private capitalism gained significant momentum, especially in Saigon, where the French positioned their headquarters for Indochina.[100]

3.6.3 Partial Reception of Colonial Legal Transfers

The advantages of receiving a legal education on the fair and functional transferred legislation attracted mainly urban Vietnamese students or those who were aligned with the French. These individuals gradually acquired transferred legal knowledge to practice law and advance the business interests of those dealing with colonial officials, plantation owners, foreign merchants and shipping companies.[101] Socioeconomic and educational influences eventually created a new urban class of Vietnamese petit bourgeois who understood capitalist business practices and transferred legislation.[102]

Accordingly, the reception of French legal transfers increased in legal practice, especially among Vietnamese petit bourgeois. French officials at times complained about the rising legal disputes initiated by the Vietnamese.[103] An important lesson is that the Vietnamese people were responsive to the legal transfer of fair legislation. Hence, fair legislation and legal

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Current Romanised Vietnamese language was developed by French lexicographer Alexander de Rhodes and first taught in the colonial period: David H Kelly (ed), *French Colonial Education: Essays on Vietnam and West Africa by Gail Paradise Kelly* (AMS Press, 2000).

99 John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 52.

100 Milton E Osborne, *The French Presence in Cochinchina and Cambodia: Rule and Response (1859–1905)* (Cornell University Press, 1969) 276; Marr, above n 87, 122–3; K W Taylor, 'Surface Orientations in Vietnam: Beyond Histories of Nation and Region' (1998) 57(4) *Journal of Asian Studies* 949, 969.

101 Marr, above n 87, 23–32; John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30(2) *Stanford Journal of International Law* 325, 330; Gillespie, above n 99, 53.

102 Marr, above n 87, 2–4, 26–7.

103 Marr, above n 87, 96; John Gillespie, 'Importing Law Reform: Vietnamese Company Law as a Case Study' in Fiona Macmillan (ed), *International Corporate Law Annual* (Hart Oxford, 2002) 190.

education are important to the reception of transferred law. For nearly 100 years, the French capitalist legal transfers, which included the concept of fairness, have left a bold imprint on Vietnam by informing new legal awareness and thinking. With power and modernity, the French changed the traditional perceptions and outlook of many Vietnamese people on business, law and legal compliance.[104]

3.6.4 Demise of Colonial Institutional and Legal Transfers because of North–South Partition (1954–1975)

After the French were defeated in 1954, Vietnam was partitioned into two regions with contrasting political, economic and legal regimes.[105] In Soviet-backed North Vietnam, the communists ran a Stalinist command economy with the monopoly of SOEs operating following political directives.[106] They concurrently nationalised private economic entities, abolished colonial laws and dismantled commercial courts.[107]

In the US-supported South Vietnam, the government shifted the economic and legal system closer to US capitalism. A presidential system with separation of powers was adopted after American legal advisers arrived in the early 1960s.[108] US influences also increased through legal education, both by American academics working in Vietnam and by Vietnamese students travelling to the US to study law.[109] However, the war between the socialist North and capitalist South impeded commercial legal transfers. Although South Vietnam slowly

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[104] Bruce M Lockhart and William J Duiker, *The A to Z of Vietnam* (Scarecrow Press, 3rd ed, 2010) 15–6.

[105] See Alan Watt, 'The Geneva Agreements 1954 in Relation to Vietnam' (1967) 39(2) *Australian Quarterly* 7.

[106] This began in 1957: Adam Fforde and Stefan De Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Westview Press, 1996) 56–63.

[107] Fforde and De Vylder, above n 106. A Circular issued by the Ministry of Justice on 10 July 1959 officially abrogated all French laws: George Ginsburgs, 'The Genesis of the Peoples' Procuracy in the Democratic Republic of Vietnam' (1979) 5(1) *Review of Socialist Law* 187, 192. See also Huy Duc, *Winning Side: I. Liberation* (Osinbook, 2012) ch III.

[108] Carol V Rose, 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32(1) *Law and Society Review* 93, 97. After 1954, American common law was more influential in the south: Powell, above n 98, 241, 259. For US involvement in VN, see Bruce Palmer, *Studies in Intelligence — Special Issue: US Intelligence and Vietnam* (1984).

[109] Rose, above n 108. See also Jessica Elkind, *Aid Under Fire: Nation Building and the Vietnam War* (University Press of Kentucky, 2016).

replaced French laws with American principles, leading to Commercial Code 1972,[110] this code was short lived following the 1975 national unification.

As a single political party, the Communist Party of Vietnam (CPV) terminated capitalist legal transfers and independent commercial courts nationwide, without enacting new rules. These decisions undid all the progress of enterprise law and the judiciary that had occurred in the earlier century, as Vietnam began to re-transfer French and Western rules some 25 years later. However, these decisions could not halt the socioeconomic changes that had accumulated over a century, such as the emergence of the bourgeoisie and a social preference for private businesses. The absence of enterprise law, commercial courts and market regulators signalled a chaotic period ahead.

3.7 Post-1975 Command Economy Policies and the Resultant Renovation 1986

3.7.1 Command Economic Period (1975–1986)

Enterprise law did not exist in the post-1975 period because of command economy policies. However, the adverse consequences of a command economy forced the CPV to initiate economic reforms and post-colonial legal transfers. This necessitates a close review of the state-centred policies, particularly the mass nationalisation of private businesses, misuse of SOEs and relegation of legality.

Following the national unification, the CPV forcefully nationalised private businesses and converted them into SOEs to rush Vietnam towards idealistic socialism.[111] The Party General Secretary Le Duan stated in 1976 that, 'we must remove private property to construct

[110] Tai Trien Le, 'Republic of Vietnam' in Viktor Knapp (ed), *International Encyclopedia of Comparative Law* (Mohr, 1973) vol 1 National Reports, R-1; Nghia, above n 93, 39–40; Gillespie, above 99, 53; Andrew L Odell and Marlene F Castillo, 'Vietnam in a Nutshell: A Historical, Political and Commercial Overview' (Autumn 2008) 21(2) *International Law Practicum* 82, 83.

[111] For the nationalisation of private enterprises and collectivisation of farming land, see Dang T Tran, *Vietnam: Socialist Economic Development 1955–1992* (ICS Press, 1994); Tran Nguyen Tuyen (ed), *Party Members Doing Private Business: Realities and Solutions* (National Political Publishing House, 2009) 40; Nghia, above n 88, 150–1.

socialism'.[112] This mandate was constitutionalised in 1980, associated with the nationalisation of land, and implemented with the criminalisation of private commercial activities.[113] Two years later, the CPV reiterated that Vietnam would 'completely eliminate private businesses'.[114] This policy terminated numerous private businesses and concurrently inflated the informal economy because the social preference for private business was established, and state officials 'broke the command economy fence' to run or collude with private business.[115] Given that the economy had very low productivity, this behaviour was a by-product of poverty.[116]

Another problem was misinvestments and mismanagement of SOEs. The CPV poured substantial resources of its post-war economy into inefficient heavy industrial SOEs, while using central commands to determine the outputs of the state sector.[117] As Hoang The Lien succinctly stated, 'everything was prearranged by the state, while personal interests had to submit entirely to the interests of the state'.[118] This state-centric policy showed how the CPV privileged SOEs, regardless of cost and loss. It compromised economic incentives, productivity and dynamism. Enterprise law was viewed as unnecessary and subsequently not enacted.

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[112] Communist Party of Vietnam, *The Complete Collection of Party Documents* (National Political Publishing House, 2004) 512.

[113] See *Constitution 1980* (Vietnam) ss 24, 26; *Criminal Code 1985* (Vietnam) s 168; Robert Templer, *Shadows and Wind: A View of Modern Vietnam* (Abacus, 1999) 57–59.

[114] Tuyen (ed), above n 111, 42. Le Duan was party General Secretary until 1986.

[115] See Dang Phong, *'Breaking Fence' in the Economy in the Nights Before Renovation* (Knowledge Press, 2009); Dang Phong, *Vietnam's Economic Thinking: Tough and Spectacular Milestones, 1975–1989* (Knowledge Press, 2008); Stoyan Tenev et al, *Informality and the Playing Field in Vietnam's Business Sector* (International Finance Corporation, Washington, 2003).

[116] For the consequences of an informal economy, see Rafael LaPorta and Andrei Shleifer, 'Informality and Development' (Summer 2014) 28(3) *Journal of Economic Perspectives* 109, 110; James E Rauch, 'Modelling the Informal Sector Formally' (1991) 35(1) *Journal of Development Economics* 33, 33–47; John R Harris and Michael P Todaro, 'Migration, Unemployment and Development: A Two-Sector Analysis' (1970) 60(1) *The American Economic Review* 126. Diana Farrell, 'The Hidden Dangers of the Informal Economy' (2004) (3) *McKinsey Quarterly* 26, 27–37.

[117] Vu Quoc Ngu and Institute of Southeast Asian Studies, 'The State-Owned Enterprise Reform in Vietnam: Process and Achievements' (Visiting Researchers Series No 4, Institute of Southeast Asian Studies, 2002).

[118] Hoang The Lien, 'On the Legal System of Vietnam' 1 (September 1994) *Vietnam Law and Legal Forum* 33, 35. See also Duong Phu Hiep, *Philosophy and Renovation* (National Political Publishing House, 2008) 95.

A more serious matter arose when Vietnam embraced an anti-legal attitude.[119] This matter can be illustrated in different instances. Legality was despised as resolutions and directives of the CPV overtook the law, while the Ministry of Justice was abolished for two decades until 1981.[120] In such a context, 'even a semblance of legality became superfluous or just a formality'.[121] Moreover, in 1978, Vietnam unlawfully intervened in Democratic Kampuchea, triggering the Sino-Vietnamese War in 1979.[122] Consequently, international aid was halted, despite Vietnam's urgent need to finance the post-war reconstruction.[123]

All these problematic policies had severe consequences. Vietnam was one of the poorest countries in the world, with a yearly gross national output per capita of around USD150 in the early 1980s, and with the inflation rate skyrocketing over 775% in 1985.[124] The devastated economy collapsed because of private investment prohibition, a halt to aid, mounting foreign debts and the US comprehensive embargo from 1975.[125] Furthermore, public trust in the CPV was eroded because of myriad problems, such as deficient laws, poor institutions, recruitment of incompetent people, red tape in public governance, economic mismanagement and defects in law enforcement. The CPV were aware of these widespread problems, as they were

[119] Odell and Castillo, above 110, 82.

[120] Mark Sidel, *Law and Society in Vietnam* (Cambridge University Press, 2008) 6–8; Nghia, above n 93, 38; Rose, above n 107, 93, 99.

[121] Lien, above n 118, 33, 34.

[122] See Stephen J Morris, *Why Vietnam Invaded Cambodia: Political Culture and the Causes of War* (Stanford University Press, 1999); Robert F Turner, 'Why Vietnam Invaded Cambodia: Political Culture and the Causes of War' (2001) 3(3) *Journal of Cold War Studies* 117.

[123] Chinese Vice President Teng Hsiao-Ping described Vietnam as 'the hooligan of Southeast Asia' in his visit to Bangkok in November 1978. Aid from FAO, WHO and ADB was only resumed after Pham Van Dong visited ASEAN countries and promised that Vietnam would not give material aid to insurgent socialist movements: Melanie Beresford, Bob Catley and Francis Pilkington, 'America's New Pacific Rim Strategy' (1979) 9(1) *Journal of Contemporary Asia* 67, 70.

[124] See respectively, Fforde and De Vylder, above n 106, 10; Tran Phong, 'Vietnam's Economic Liberalization and Outreach: Legal Reform' (2003) 9 *Law and Business Review of the Americas* 139, 142. See also Hoang Duc Than and Dinh Quang Ty, *Economic Growth and Progress, Social Equality in Vietnam* (National Political Publishing House, 2010) 123.

[125] Pham Minh Chinh and Vuong Quan Hoang, *Vietnam's Economy: Fluctuation and Breakthrough* (National Political Press, 2009); Vuong Quan Hoang et al, 'The Entrepreneurial Facets as Precursor to Vietnam's Economic Renovation in 1986' (2011) 8(4) *Journal of Entrepreneurship Development* 6.

described in Lieutenant-General Tran Do's classified letter to Party leaders with a plea for reforms.[126] As a consequence, Vietnam suffered a long socioeconomic crisis.

This comprehensive crisis confirmed the statements by Ludwig von Mises, who submitted that, 'the nationalisation of the production means and the resulting abolition of market competition under socialism would lead to socioeconomic chaos rather than prosperity'.[127] Rather than enriching Vietnam, the socialist hegemony achieved the opposite. The chaos, informal economy and SOE problems placed the CPV under immense pressure to address the crisis and reform the economy.

3.7.2 Renovation 1986 as a Foundation for Enterprise Law Transfers

The 'renewal or death' circumstances, together with the reform movements occurring in China and the Soviet Union, compelled Vietnam to implement an extensive economic reform program, called *Doi Moi*, or Renovation.[128] These reforms were outlined in the landmark 1986 resolution to address the economic crisis and commence the economic transition to a socialist-oriented market economy.[129] In this sense, Renovation is an open-ended process that is adjusted contextually, and was reviewed for a 30-year period in 2015.[130]

The Renovation was specifically aimed at liberalising the market, delivering jobs and improving law, together with legal compliance.[131] The Renovation accordingly promoted the

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[126] See Letter of Lieutenant-General Tran Do published in *Remembering Writer Tran Do* (Literature Publishing House, 2013).

[127] Richard M Ebeling, 'Introduction' in Ludwig von Mises (ed), *The Free Market and Its Enemies: PseudoScience, Socialism, and Inflation* (Foundation for Economic Education, 2004) xii. See also L. Von Mises, *The Free Market and Its Enemies: Pseudo-Science, Socialism, and Inflation — Scholar's Choice Edition* (BiblioLife, 2015).

[128] *Doi Moi* in Vietnamese means 'new change' but it is commonly translated as renovation: James G McGann, *Democratization and Market Reform in Developing and Transitional Countries: Think Tanks as Catalysts* (Routledge, 2010) 193. Tyrone Carlin, Lien Thi Pham and Ha Viet Hoang, *Carlin, Tyrone and Pham, Lien Thi and Hoang, Ha Viet, Determinants of Technical Efficiency in Vietnamese Enterprises During Transition: 2001–2005* (18 October 2008) <http://dx.doi.org/10.2139/ssrn.1286685>.

[129] See generally Resolution of the National Congress of the Communist Party of Vietnam VI Dated 18 December 1986; Directions and Primary Objectives of Social Economic Developments in Five Years 1986–1990: Report of the Central Committee of the Communist Party of Vietnam at the National Congress VI.

[130] See Communist Party of Vietnam, *Comprehensive Review of Some Issues in Theory — Practice After 30 Years of Renovation (1986–2016)* (National Politics — Truth Press, 2015).

[131] Resolution of the National Congress of the Communist Party of Vietnam VI Dated 18 December 1986 s 5.

foreign sector, recognised the private sector, strengthened the state sector, and green-lighted laws governing these sectors.[132] This was significant because it officially allowed civilians to undertake private business. These changes demonstrated that the Renovation was actually a gradual process of reviving and advancing select economic, institutional and legal transfers that existed under colonialism. This began a new chapter in the evolution of Vietnamese law.

However, the 1986 resolution entailed two major problems. One was that the Renovation did not alter the state-centred policies of SOEs, although these policies were among the major causes of the economic crisis. The market was gradually opened to foreign and domestic investors, while the leading role of the SOE sector was maintained.[133] Through the SOE sector, the state remained enmeshed with its own conflicts of interest in the market liberalisation process, as it was the largest investor, while also being the market regulator.[134] These realities revealed the contradictory approaches to market reforms, whereby the state wished to attract investments, while still wanting to maintain economic control. The policies of the leading SOEs ran counter to the objectives of economic reforms and legal fairness under the Renovation.[135]

The second problem was that the 1986 resolution overlooked the need for political and institutional reforms, which were the primary causes for many of the problems. In reality, 'there was no political renovation on the part of the leadership. Policy changes were more of a tactical retreat than a real turn towards a market economy'.[136] Likewise, the resolution did not prioritise reform of the institutions that were fundamental to the enactment and implementation of new laws, such as independent regulatory reviewers, drafting bodies, the

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[132] Ibid.

[133] Ibid, ss 1–2. See *Constitution 1992* (Vietnam) 1992 and *Constitution 2013* (Vietnam).

[134] Martin Painter, 'The Politics of State Sector Reforms in Vietnam: Contested Agendas and Uncertain Trajectories' (2005) 41(2) *Journal of Development Studies* 261, 278–9; Fforde and De Vylder, above n 106, 143.

[135] Resolution of the National Congress of the Communist Party of Vietnam, above n 131.

[136] See James Riedel and William S. Turley, 'The Politics and Economics of Transition to an Open Market Economy in Viet Nam' (Working Paper No 152, OECD Development Centre, 1999). See also Keith B Griffin, *Economic Reform in Vietnam* (Palgrave Macmillan, 1998); Templer, above n 113; Peter Wolff, *Vietnam — The Incomplete Transformation* (Frank Cass, 1999).

legislature and the judiciary. There were only occasional institutional changes, such as a new court level, and binding case law effective from 1 June 2016.[137] From the outset, the Renovation failed to include the institutional preconditions for enterprise law evolution and operation.

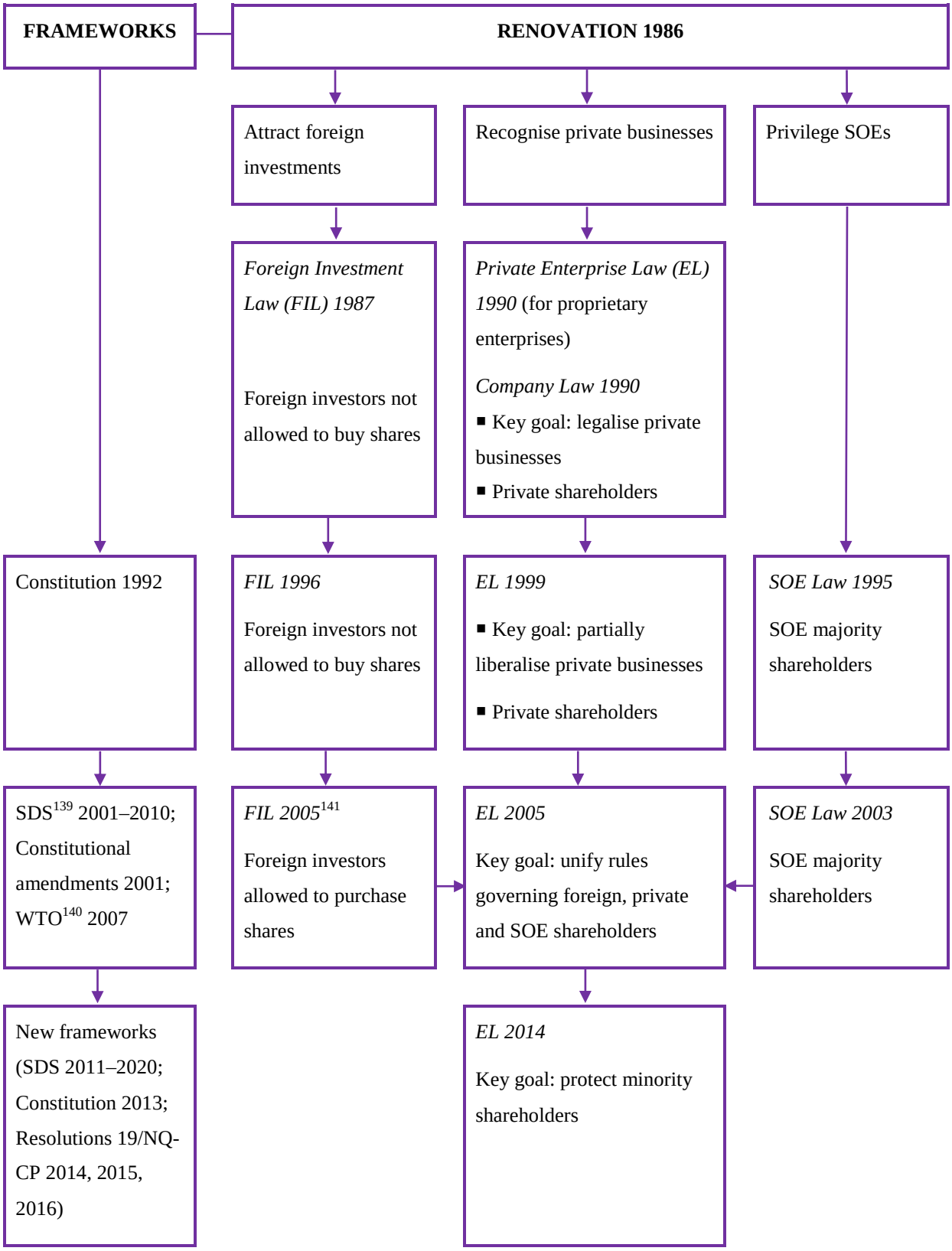
These problems posed lasting challenges to the objectives of Renovation 1986. The Party infiltrated and controlled everything because Party members took charge of the state apparatus, SOEs and all reforms. It is impossible to separate the Party from the state and from SOEs — hence the terms 'party-state' and the party-state-SOE nexus existed. These inextricable connections were a significant influence on reform initiatives, the evolution of enterprise law, effective legal transfers and the implementation of laws regarding minority shareholder protection, as discussed in the following sections and chapters.

Moreover, these problems revealed the true nature of the Renovation. Underlying the plan was a political economic agenda, in which the interests of state businesses, rather than the entire market, were the first priority of the economic reforms. This agenda determined the evolution of laws regulating foreign, private and SOE investors (Figure 3.1).[138]

[137] For a detailed discussion on the new regional high courts and a binding case law system, see Chapter 5, Sections 5.8.1, 5.9.

[138] Paul J Davidson, *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Times Academic Press, 2002) vii; Barry Metzger, 'Redefining Asia's legal framework' (October 1995) 14(10) *International Financial Law Review* 12, 13; Bahrin Kamarul, 'Reforming Economic Law in the Asia Pacific Region' (1996) 6(1) *Australian Journal of Corporate Law* 93, 98.

Figure 3.1: Renovation 1986, Subsequent Reform Frameworks and Different Laws



[139] SDS is Socioeconomic Development Strategies.

[140] WTO is World Trade Organisation.

[141] This right was maintained in FIL 2014.

As demonstrated in Figure 3.1 above, Vietnam introduced the laws with explicit discrimination based on ownership that lasted for 20 years (1986–2005). The *Foreign Investment Law 1987* was enacted shortly after the launch of the Renovation 1986, and was renewed every 10 years with the intention of attracting foreign investors.[142] The party-state later recognised that the informal private business sector was essential to provide jobs, pay taxes and assist in the economic growth of the country, after disappointing foreign investments and moribund SOEs could not solve the economic difficulties and severe unemployment.[143] As a result, enterprise law legalised the informal private business sector in 1990 and further liberalised this sector in 1999.

In contrast to foreign and private investors, SOEs were not subject to revised legislation until the introduction of *SOE Law 1995* eight years later. This legal exemption and separation reduced the protection of state businesses until the unified *Enterprise Law 2005* regulated all types of shareholders, so as to meet the preconditions for accession to the World Trade Organization (WTO). However, this law allowed pre-existing state businesses to operate under the old legislation for a further five years.[144]

WTO membership prevented Vietnam from maintaining or creating explicit protection for state businesses in subsequent legislation. Accordingly, the present *Enterprise Law 2014* ended the overt exceptions for SOEs, while insisting on differential rights for majority shareholders and regulating director duties in unclear and insufficient manners that are not easy to enforce.[145] This meant that SOE investors could still enjoy special legal advantages

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[142] For FDI from 2007–2015, see Official Letter No 2583/BKHĐT-QLKKTW Dated 5 May 2015 of the Ministry of Planning and Investment about the Report sent to the Monitoring Group of the National Assembly Standing Committee, 8–9. In 2013, FDI was USD8.9 billion while GPD was just above USD171 billion (FDI equivalent to 5% GDP), http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD.

[143] Resolution No 16-NQ/TW Dated 15 July 1988 of the Politburo on Renewing Policies and Management Mechanisms towards Manufacturers in Non-State Economic Sectors, s I. Company legislation was enacted 'to create more jobs': *Company Law 1990* (Vietnam) Preamble; Pham Van Thuyet, 'Legal Framework and Private Sector Development in Transitional Economies: The Case of Viet-Nam' (1996) 27(3) *Law and Policy in International Business* 541, 561.

[144] *Enterprise Law 2005* (Vietnam) s 171(2).

[145] Ibid, ss 114 (2) (3) (4), 160.

because they were mainly majority shareholders and often held or controlled directorships.[146] This was a subtle way to maintain preference for SOEs because both development policies and the Constitution granted them a privileged role.[147] Vietnam would have not maintained such legal discrimination for majority shareholders if SOEs were minority shareholders.

It can be concluded that the implicit preference for these state-owned businesses underpinned discriminatory enterprise legislation. Given that minority shareholders are usually private investors, their protection through enterprise law would involve reforming many policies and practices that affect SOEs and the private sector. While the Renovation process resulted in many new statutes, protection issues can be found in the *Company Law 1990* and *Enterprise Laws 1999*, *2005* and *2014*. The following sections examine the formation of these statutes with the aim of exploring the common factors that may help inform the legal transfer and adaptation of Australian oppression sections.

3.8 Contextual Changes and Multiple Enterprise Laws (1990–2005)

3.8.1 French Legal Transfers and Company Law 1990

After decades of quashing the private sector, Vietnam enacted the *Company Law 1990* to regulate shareholding companies and shareholders.[148] While this action signalled some changes in the thinking of Vietnam's political leaders, this first statute had the following three issues.

First, there was a wide gap between political statements and actions. The CPV stated that it 'would not limit national bourgeois businesses, would eradicate unfair prejudice and unfair treatment toward the private sector, and would require party-state officials to change their old

[146] For a detailed discussion, see Chapter 1, Section 1.2.

[147] *Constitution 1992* (Vietnam) ss 19, 24; *Constitution 2013* (Vietnam) s 51.

[148] See Adam Fforde, *Vietnamese State Industry and the Political Economy of Commercial Renaissance: Dragon's Tooth or Curate's Egg?* (Elsevier Science, 2007). For reasons not to liberalise the private sector, see Melanie Beresford and Dang Phong, *Economic Transition in Vietnam: Trade and Aid in the Demise of a Centrally Planned Economy* (Edward Elgar, 2000) 52.

thinking and actions against this sector'.[149] Nevertheless, it commissioned a research group to study whether enterprise law would resurrect a private capitalist class strong enough to challenge the Party legitimacy.[150] This political suspicion informed the objectives and quality of the *Company Law 1990*.[151]

Second, this enactment was primarily aimed at reducing socioeconomic problems, rather than facilitating private businesses. The CPV mainly wanted to 'exploit' the capacities of private businesses to address economic difficulties and solve the problem of high unemployment.[152] For example, the law imposed obligations to prioritise the recruitment of domestic employees.[153] However, shareholding companies encountered restrictions. These companies were required to seek the Ministerial Council Chief's approval for investments in imports, exports, tourism and telecommunications, while these areas were open to SOEs.[154]

Third, the urgent need to legalise private businesses caused lawmaking dilemmas. Although Vietnam had never created its own enterprise law, proposals to recycle colonial corporate rules were rejected because of regime hostility.[155] The Soviet Union had not yet embarked on market reforms, while the Chinese national company law was not enacted until 1993.[156] Thus,

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[149] Resolution No 16-NQ/TW Dated 15 July 1988 of the Politbuto on Renewing Policies and Management Mechanisms towards Manufacturers in Non-State Economic Sectors, s II.

[150] See Gillespie, above n 103, vol 2.

[151] See Phong, above n 124, 139, 163–4.

[152] Resolution No 16-NQ/TW Dated 15 July 1988 of the Politbuto on Renewing Policies and Management Mechanisms towards Manufacturers in Non-State Economic Sectors, s I; Tran Dinh Thien, 'Foreign Direct Investment in Vietnam' (1995) 4 *Vietnam's Socio-Economic Development Bulletin* 29.

[153] *Company Law 1990* (Vietnam) s 13(2). See also *Enterprise Law 1999* (Vietnam) s 8(6).

[154] *Company Law 1990* (Vietnam) s 11; *State-Owned Enterprise Law 1995* (Vietnam) s 7.

[155] John Gillespie, 'Understanding Legality in Vietnam' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007) 137, 147. A Circular issued by the Ministry of Justice on 10 July 1959 officially abrogated all French laws: Ginsburgs, above n 107.

[156] Roman Tomasic and Jian Fu, 'Company Law in China' in Roman Tomasic (ed), *Company law in East Asia* (Ashgate, 1999) 137–8; 143–4; Gillespie, above n 155. Vietnam transferred law and institutions from the capitalist West mainly when China lacked appropriate experience. See Jörn Dosch and Alexander L Vuving, 'The Impact of China on Governance Structures in Vietnam' (Discussion Paper 14/2008, DIE Research Project, German Development Institute, 2008).

the party-state accepted legal transfers from France, despite antipathy towards its former colonial ruler.[157]

There are intriguing reasons for the legal transfer from France, given the United Nations Development Programme (UNDP) assisted with seminars on both civil and Anglo-American corporate laws.[158] The Vietnamese legal system still retained vestiges from the French. In addition to French funding and legal advice, there were influential French-trained drafters who were already familiar with the language and legal style.[159]

French legal transfers were not necessarily easy for Vietnam because of many constraints. For example, most drafters lacked the linguistic knowledge to converse with foreign advisers effectively.[160] Moreover, as most drafters were committed socialists, they favoured state businesses and worried that liberal rules would create a new capitalist class.[161] Above all, the drafting was conducted under strict political instructions to control private rights.[162]

As a result, Vietnam wrote only 46 sections from over 500 French provisions.[163] These sections contained some elements of modern corporate law underpinned by Lockean liberal

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[157] See Valerie Senghor, 'France Lends a Hand for Legal Overhaul', *Vietnam Investment Review* 10 October 1993, 1. Given economic development needs, the Vietnamese party-state could not wait decades to distil rules from the informal market that did not reflect optimal business principles.

[158] John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2007–2008) 40(3) *New York University Journal of International Law and Politics* 657, 698.

[159] See John Gillespie, 'Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam' (2002) 51(3) *International and Comparative Law Quarterly* 641; Gillespie, above n 103, 193; Le Dang Doanh, 'The Enterprise Law and the Development of the Domestic Private Business Sector in Vietnam' (2004) 38 *Vietnam's Socio-Economic Development* 5, 6–7.

[160] Most drafters are socialist-ingrained but influential French-trained drafters of the 1990 corporate laws were Professors Luu Van Dat and Pham Huu Chi. See Claude Rohwer, 'Progress and Problems in Vietnam's Development of Commercial Law' (1997) 15(2) *Berkeley Journal of International Law* 275, 278.

[161] See generally Duong Dang Hue, 'Law on Issuing Permits to Establish Enterprises and Register Business in Vietnam: Practices and Some Recommendations' (1994) 4 *State and Law* 20. The participation of French-trained Professors Luu Van Dat and Pham Huu Chi in drafting corporate legislation 1990 remained inadequate to produce effective law: Rohwer, above n 160.

[162] Gillespie, above n 158.

[163] *Company Law 1990* was transferred from French Law 66-537 on Commercial Companies 1966, which had 509 sections.

principles,[164] such as limited liability for corporate debts, fundraising by issuing shares, mergers and liquidations.[165] This outcome indicated that Vietnam was prepared to accept Western liberal law when necessary. However, the transfers overlooked minority shareholder interests. Shareholders were given four rights, one of which allowed a group of them holding at least 25% of capital to request the board to convene a general meeting.[166] This was clearly unhelpful for minority shareholders because they needed litigation measures to seek judicial remedies (see Chapter 5, Section 5.6). Minority shareholder protection was not part of political and legal discussions of the time.

3.8.2 Contexts Informing the Creation of Enterprise Law 1999

The first simplistic company law quickly failed to meet increasing business demands in a transitional economy. This became obvious after the 1992 Constitution formally recognised business freedom and legal fairness among businesses.[167] Private investors complained that the law was not keeping pace with the fast-growing economy.[168] Despite this, unhelpful attitudes from bureaucrats towards these investors continued throughout the 1990s.[169]

Greater regional economic integration, demands from aid donors and the resultant adaptive politics led to the introduction of *Enterprise Law 1999*. These three interrelated contextual changes led to reform rivalries between non-state and state stakeholders; political response to demands for deregulatory market entry, legal fairness and legal harmonisation reforms; and

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[164] See eg, Mary Stokes, 'Company Law and Legal Theory' in William L Twining (ed), *Legal Theory and Common Law* (B. Blackwell, 1986) 156, 156–160; David Sugarman (ed), *Legality, Ideology and the State* (Academic Press, 1983).

[165] *Company Law 1990* (Vietnam) ss 2, 12, 35.

[166] The four shareholder rights included ownership, dividend, participation in general meetings and collective request for an general meeting: *Company Law 1990* (Vietnam) s 8.

[167] *Constitution 1992* (Vietnam) ss 16, 21, 22.

[168] Gillespie, above n 158, 657, 688; John Gillespie, 'Developing a Decentred Analysis of Legal Transfers' in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff Publishers, 2008) 25, 50; Ministry of Justice, *General Report: Law of Enterprises of Different Forms in Vietnam* (UNDP VIE/94/003, 1997) 20–1; Dang Duc Dam, 'Administrative Reform-Changes to Meet the Requirements of the Market-Orientated Economy' in John Gillespie (ed), *Commercial Legal Development in Vietnam: Vietnamese and Foreign Commentaries* (Butterworths, 1997) 477, 489–91.

[169] Liesbet Steer and Kunal Sen, 'Formal and Informal Institutions in a Transition Economy: The Case of Vietnam' (2010) 38(11) *World Development* 1603, 1612.

Western transfers of corporate governance rules and shareholder rights in this law. These issues are now discussed.

3.8.2.1 Three Interrelated Major Changes in Reform Contexts

The first change was the implementation of greater regional economic integration. Vietnam opened the market door to more countries to find measures to address its ongoing economic difficulties. This process began earlier with trade agreements with Australia in 1974 and the European Communities in the early 1990s.[170] These continued with the accession to Association of Southeast Asian Nations (ASEAN) and Asia-Pacific Economic Cooperation in the late 1990s after the US lifted the embargo.[171] These developments, alongside cutbacks in foreign direct investment,[172] the largely untapped domestic investments that were restricted because of legal bottlenecks[173] and concerns over the precipitous effects of the 1997 Asian financial crisis, justified reforms to enterprise law to attract more investments.[174]

The second change was the increase of pressure and assistance from donors and experts for the legal transfer of enterprise legislation. After Vietnam joined regional agreements, external stakeholders increasingly urged and assisted Vietnam to improve the legal fairness for all investors by accelerating market liberalisation and legal harmonisation. Vietnam initially (though unsuccessfully) tried to avoid the ASEAN Free Trade Area's mandatory reforms that

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[170] *Trade Agreement between Australia and the Democratic Republic of Vietnam*, signed 26 November 1974, ATS 1974 No 29 (entered into force 26 November 1974). It was replaced by the *Agreement on Trade and Economic Co-operation between Australia and the Socialist Republic of Vietnam*, signed 14 June 1990, ATS 1990 No 18 (entered into force 14 June 1990). Council Decision of 14 May 1996 Concerning the Conclusion of the Cooperation Agreement between the European Community and the Socialist Republic of Vietnam (96/351/EC).

[171] W Gary Vause, 'Doing Business with Vietnam — Prospects and Concerns for the 1990s' (1989) 4(2) *Florida International Law Journal* 231, 287; Nick J Freeman, 'Understanding the Decline in Foreign Investor Sentiment Towards Vietnam during the 1990s' (2001) 8(1) *Asia Pacific Business Review* 1, 2–3.

[172] See Schaumburg-Müller Henrik, 'Rise and Fall of Foreign Direct Investment in Vietnam and its Impact on Local Manufacturing Upgrading' (2003) 15(2) *European Journal of Development Research* 44, 44–66. For recent difficulties regarding FDI in Vietnam, see Nguyen Mai, 'In order for FDI to Be More Effective in 2014' (2014) 2 *Economy and Forecast Review* 52, 52–55.

[173] See Leila Webster, 'SMEs in Vietnam: On the Road to Prosperity' (Private Sector Discussion No 10, November 1999), 55; Henrik Schaumburg-Müller, 'Private-Sector Development in a Transition Economy: The Case of Vietnam' (2005) 15(3/4) *Development in Practice* 349, 356–8; Raymond Mallon, *Business Regulation Reform: A Toolbox for Vietnamese Policymakers* (CIEM, VNCI and USAID, October 2004) 54.

[174] Raymond Mallon, *Managing Investment Climate Reforms: Viet Nam Case Study* (No 31361, 17 January 2004) 19. See also Adam Fforde, 'Light Within the Asean Gloom? Vietnam's Economy Since the Asian Financial Crisis' (2002) *Southeast Asian Affairs* 357.

would have adversely affected its state businesses.[175] In addition, its unduly discriminatory legal regime had quarantined foreign investors from the market, had complicated business activities, and was inconsistent with the Constitution regarding legal fairness irrespective of ownership origins.[176]

Sweeping demands came from influential like-minded donors, such as the Asian Development Bank (ADB), International Monetary Fund and World Bank (WB). These donors used policy-based lending programs to request particular legal harmonisation reforms from Vietnam. For example, a release condition for the first tranche of the USD100 million loan from the ADB required extensive changes, many of which were useful for minority shareholders.[177] These included:

- improving rules regulating company affairs, such as rules for corporate governance (especially director duties), share register, corporate reporting, mergers, winding-up shareholder rights and dividend payments
- streamlining excessive market entry barriers, including allowing foreign investors to purchase shares and follow incorporation procedures applicable to domestic investors.

At the same time, donors increased onsite technical assistance via long-term project offices in Vietnam. The preparation for *Enterprise Law 1999* received extensive Western aid. For example, funding came from different donors, such as the WB, UNDP and AusAID,[178] while

[175] See Emiko Fukase and L Alan Winters, 'Possible Dynamic Effects of AFTA for the New Member Countries' (2003) 26(6) *World Economy* 853, 854–5; Lawrence Grinter, 'Vietnam's Thrust into Globalization: Doi Moi's Long Road' (2006) 33(3) *Asian Affairs: An American Review* 151; Carlyle A Thayer, 'Vietnam's Regional Integration: Domestic and External Challenges to State Sovereignty' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007) 31, 43. Vietnam delay AFTA implementation to 2006: Martin Rama, 'Making Difficult Choices: Vietnam in Transition' (Working Paper No 40, Commission on Growth and Development, 2008) 21.

[176] See *Constitution 1992* (Vietnam) ss 15, 21. See also Gillespie, above n 103, 195; Gillespie, above n 99, 158.

[177] See David Goddard, *Enterprise Reform: Legal and Regulatory Issues* (Consultant Report to MPI/ADB Enterprise Reform Project, 1998) 41–5; Chapman Tripp Sheffield Young (law firm, chief legal adviser appointed by ADB), *Enterprise Law Reform — Some Issues and Some Suggestions* (1995); *Improving Macroeconomic Policy and Reforming Administrative Procedures to Promote Development of Small and Medium Enterprises in Vietnam* (Research Report, MPI-UNIDO Project, US/VIE/95/004, 1999) 99–101.

[178] Donors for *Enterprise Law 2009* included WB, UNDP, AusAID, ADB, Germany, Japan, France and Sweden: Gillespie, above n 158, 657, 701.

consultants largely came from common law countries, including the US and New Zealand.[179] Australian lawyers and academics, including Cally Jordan and Raymond Mallon, were well represented in Vietnam and introduced the complex concepts and principles of Australian corporate law.[180]

In the same manner, Western donors regularly invoked Hayekian propositions that fair, predictable and transparent legal rules provide the optimal regulatory environment for investors to pursue interests.[181] Such advice replicated Australian experience in using Hayekian propositions to reform corporate legislation, including the liberalisation of restrictive oppression sections to better reflect the concept of fairness, as noted above. In this manner, the donors promoted liberal corporate law to discourage the state from excessive regulatory interference in the market. The party-state of Vietnam paid attention to the combined influences of foreign investors and donors,[182] leading to the emergence of 'adaptive politics'.

The third change was the emergence of 'adaptive politics'. The Politburo is the most powerful body of the single CPV, which leads and operates the state apparatus. Similar to Australia, Vietnam has factional politics in that 'conservatives, modernizers, and rentseekers are all present, both within and outside the ruling party and the government, and represented in every echelon of policymaking'.[183] Reform direction and implementation depend significantly on

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[179] Advisers from Australia, New Zealand, Canada, Hong Kong, Germany and the US invited to comment on the *Enterprise Bill 2009* included Chapman Tripp Sheffield Young (NZ law firm), David Goddard QC, Reinier Kraakman and Raymond Mallon. See Mallon, above n 174, 25; *Reinier Kraakman, Comments on the Draft General Report: Law of Enterprises of Different Forms in Vietnam* (UNDP Program VIE/94/003) (1997).

[180] See Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33 *Melbourne University Law Review* 626, 627; Mallon, above n 179. Visitors to Vietnam included Professor Malcolm Smith (Director of the Asian Law Centre at Melbourne University) and Ms Veronica Taylor at this Centre (now Professor at ANU): Sidel, above n 98, 221, 240–1.

[181] John Bentley, 'Completion of Vietnam's Legal Framework for Economic Development' (UNDP Discussion Paper 2, March 1999) 1–8; John Gillespie, 'Testing the Limits to the "Rule of Law": Commercial Regulation in Vietnam' (2009) 8(2) *Journal of Comparative Asian Development* 245, 247–8. Friedrich A von Hayek, *The Road to Serfdom* (University of Chicago Press, 1944) 54.

[182] Melanie Beresford, 'The Development of Commercial Regulation in Vietnam's Market Economy' in John Gillespie and Alber H Y Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010) 254, 256.

[183] Alexander L Vuving, 'Vietnam: A Tale of Four Players' [2010] (1) *Southeast Asian Affairs* 366.

the faction to which the PM belongs because the PM is one of the most senior members in the Politburo.

For nearly 15 years, two reformist PMs, Vo Van Kiet (1992–1997) and Phan Van Khai (1997–2006), embraced an outward-looking perspective to address investor concerns over economic ideological tensions and systemic policy mistakes.[184] PM Vo Van Kiet's visions for the Party, socialism and the law differed sharply from those of the more conservative CPV General Secretaries.[185] The leaking of his classified letter to the Politburo in 1995 revealed that he wanted the Party to define socialism as 'a just, democratic and civilised society with a rich people and a strong nation'.[186] Patriotism for him did not necessarily insulate Vietnam from Western liberal influences, rather than adhering just to a Marxism-Leninism ideology.[187] PM Vo Van Kiet especially stressed the need to pursue legal and institutional renovation that prioritised economic laws, a secure market and a complete change of bureaucratic management to the rule of law.[188] He established the first ever Reform Advisory Unit in 1993 to achieve these objectives.[189]

These public interest ideas were conducive to Western legal transfers. These views also contributed to the US–Vietnam normalisation on 11 July 1995, which facilitated further economic integration and legal transfers. Open-minded thinking and the reputation of PM Vo Van Kiet have left a lasting impression on economic policies, market laws and civil society.

PM Phan Van Khai put many of these foundations into practice. Building on his predecessor, the prescient PM steered the economy from recovery to rapid growth with new attitudes towards private business.[190] He often stressed that the government was ready to actively

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[184] Fforde, above n 174, 357, 372.

[185] Examples of conservative CPV General Secretaries included Do Muoi, Le Kha Phieu and Nong Duc Manh.

[186] Vuving, above n 183, 366, 368. Letter to the Politburo by PM Vo Van Kien on 9 August 1995 available at http://nguyentandung.org/thu-thu-tuong-vo-van-kiet-gui-bo-chinh-tri-20-nam-truoc.html. Much was written about Kiet and other party leaders. See, eg, Duc, above n 107.

[187] Vuving, above n 183, 366, 368.

[188] Rose, above n 107, 93, 99, 105

[189] See Decision No 494-TTg Dated 5 October 1993 of the Prime Minister on the Establishment of the Expert Team Advising Economic and Administrative Reforms.

[190] Jonathan London, 'Viet Nam and the Making of Market-Leninism' (2009) 22(3) *Pacific review* 375, 387.

cooperate with and listen to business, rather than just formal recognition.[191] His postgraduate training in economics may have helped build an internal consensus on important links between business development and economic growth. As leadership changes resulted from internal consensus about future directions, this provided a turning point for liberalising economic policies and subsequent enterprise transfers.

3.8.2.2 Reform Rivalries between Non-State and State Stakeholders

Donor influences and renewed leadership viewpoints provided private stakeholders with momentum to contribute to legal changes. PM Phan Van Khai upgraded his predecessor's Reform Advisory Unit to the PM Research Commission.[192] This was the first think-tank to advise the PM about comprehensive policies and corresponding reforms. PM Phan Van Khai directly invited about 30 experts to join this Commission. It advised strong reforms in the lead-up to WTO accession in 2007.[193] Some experts were leaders of the Central Institute of Economic Management (CIEM) and Vietnam Chamber of Commerce and Industry (VCCI), which played key roles in drafting *Enterprise Law 1999* and subsequent corporate laws. Under their leadership, these bodies conducted studies and cooperated with Western consultants to invoke investor support for more liberal laws.[194]

These encouraging changes motivated more civil society actors to join the wave of reform. Business and lawyer associations provided written submissions to the government and participated in discussions on draft legislation.[195] Likewise, the government and donors jointly established the Vietnam Business Forum in 1997 (including the Australian Chamber of

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[191] Jonathan R Stromseth, 'Business Associations and Policy-Making in Vietnam' in Ben J Tria Kerkvliet, Russell H K Heng and David W H Koh (eds), *Getting Organized in Vietnam: Moving in and Around the Socialist State* (Institute of Southeast Asian Studies, 2003) 62, 63–109.

[192] Decision No 473/QĐ-TTg Dated 30 May 1998 of the Prime Minister on the Establishment of the Prime Minister Research Commission; Decision No 133/1999/QĐ-TTg Dated 31 May 1999 of the Prime Minister on the Establishment of a Research Team of Policy Mechanisms Developing Small and Medium Enterprises.

[193] See, eg, The Prime Minister Research Commission and the United Nations Development Program, *Report on the Review of Legal Documents on the Establishment, Management and Operation of Enterprises with the Guiding Concepts of the Unified Enterprise Law and the Common Investment Law* (Hanoi, February 2005). For operation of PMRC see, Decision No 210/2003/QĐ-TTg Dated 13 October 2003 of the Prime Minister on Functions, Obligations, Organisations and Operations of the Prime Minister Research Commission.

[194] See UNIDO Evaluation Group, *Independent Evaluation: Technical Assistance to Business Registration Reform in Viet Nam 2008–2013* (UNIDO Projects, 2013) 17; John Gillespie, 'Localizing Global Rules: Public Participation in Lawmaking in Vietnam' (2008) 33(3) *Law & Social Inquiry* 673, 693–4.

[195] Mallon, above n 174, 28. The Vietnam Business Forum.

Commerce in Vietnam) to nurture public–private dialogue as another vehicle for supporting private sector development. These broad changes generated 'a resurgence of legal discourse', leading to 'a dramatic development of civil society', including the mainstream elite.[196] These emerging movements have continued to grow through the successive evolution in enterprise law.

However, the enterprise law reforms did not receive universal support. Vested interests, such as line ministries controlling SOEs, were less enthusiastic about the fairer market reforms that impaired rent-seeking opportunities.[197] This contrasted with the arguments of scholars and the general business community that discriminatory laws violated legal fairness, contradicted the requirement for business freedom under the Constitution, affected business efficiency and harboured corruption.[198] The solution for reconciling this discord lay with the party-state leadership.

3.8.2.3 Political Response to Demands for Deregulatory Market Entry, Legal Fairness and Legal Harmonisation Reforms

The tensions between protecting SOEs and facilitating non-state businesses challenged the party-state leadership in addressing domestic and external demands. The difficulty was that, although the PM embraced liberal thinking, the Politburo comprised fewer reformists than conservatives, especially the General Secretary.[199] Even so, the conservatives were unable to bypass mounting widespread pressures for reform, and the Politburo eventually endorsed the key changes requested by aid donors.

Three main reasons can be advanced to explain this concession. First, the political concern that liberal laws could revive a domestic bourgeois class to threaten the supremacy of the

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[196] Vuving, above n 183, 366, 375–382; Sidel, above n 98, 163. 'Civil society was developed promisingly in the south Vietnam during the mid-1960s to the mid-1970s': Ngô Vĩnh Long, 'Military Victory and the Difficult Tasks of Reconciliation in Vietnam: A Cautionary Tale' (2013) 38(4) *Peace & Change* 474, 484.

[197] See UNIDO Evaluation Group, above n 194; Gillespie, above n 194; Mallon, above n 174, 43.

[198] Central Institute of Economic Management, *Review of the Company Law and Recommendations for Primary Amendment Directions* (Hanoi, April 1998) 103.

[199] The PM was Phan Van Khai, while the General Secretary was Le Kha Phieu with a military background. For comments about Phieu, see London, above n 190, 375; Martin Gainsborough, *Vietnam: Rethinking the State* (Zed Books, London, 2010) 137–43; Cao Lan, 'Reflections on Market Reform in Post-War, Post-Embargo Vietnam' (2001) 22(4) *Whittier Law Review* 1029, 1041, 1048.

Party was seen as exaggerated by the Central Internal Affairs Committee members who were monitoring the enterprise law project.[200] Second, compared with foreign businesses and SOEs,[201] the private sector created most of the new jobs needed to absorb the growing population.[202] The political antipathy towards this sector has continued to decline since then. Third, the endorsement of broad reforms was intended to please donors. Having incurred aid cuts and a halt to loans before the Renovation, the party-state had learnt the importance of satisfying their demands in exchange for ongoing assistance.

However, as a successful hegemonic party, the CPV learnt how to survive being buffeted by rapidly changing domestic and external circumstances.[203] The interdependent political economic powers that linked the party-state with bureaucrats and their SOEs would encourage it to protect the interests of this nexus from the effects of fairness-based legal reforms.[204] As a compromise, the party-state prioritised market entry deregulation and partially conceded corporate affairs, while preserving differentiated laws. Thus, the Central Internal Affairs Committee rejected the unification of laws governing state, foreign and domestic investors, with the argument that a uniform law undermined the granted leading role of SOEs.[205] This decision continued to undermine progress towards legal fairness and legal harmonisation.

3.8.2.4 Western Transfers of Corporate Governance Rules and Shareholder Rights

There were many factors conducive to Western transfers in *Enterprise Law 1999*. Vietnam took five years to create this law by combining the *Company Law 1990* and *Private Enterprise Law 1990*. This lengthy project enabled frequent dialogues between Anglo-American consultants with the PM's Research Commission experts, including the officials

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[200] See Gillespie, above n 103.

[201] See Le Dang Doanh, 'Foreign Investment and the Macro-Economy in Vietnam' in Van Hoa Tran (ed), *Economic Development and Prospects in the ASEAN: Foreign Investment and Growth in Vietnam, Thailand, Indonesia and Malaysia* (Macmillan, 1997) 44.

[202] Dang Duc Dam, *Vietnam's Macro-Economy and Types of Enterprises: The Current Position and Future Prospects* (World Publishers, 1997) 49–82; Katariina Hakkala and Ari Kokko, 'The State and the Private Sector in Vietnam' (Working Paper 236, June 2007) 31.

[203] London, above n 190, 375, 395; Beresford, above n 182.

[204] See Martin Painter, 'The Politics of Economic Restructuring in Vietnam: The Case of State-Owned Enterprise "Reform"' (2003) 25(1) *Contemporary Southeast Asia* 20; Beresford and Phong, above n 148, 16–7.

[205] See Ministry of Justice, above n 168, 14–8; Dam, above n 168, 477, 483–91.

leading CIEM and VCCI. These close exchanges provided insightful understanding of Western corporate legal doctrines and law–society ties in the donor countries.[206] Another important factor was that less self-protective drafting instructions from the CPV reflected an increased openness and willingness to engage with Western regulatory ideas.[207]

As a result, this law incorporated many Anglo-American corporate governance principles.[208] It regulated disclosure, dividend payments, internal governance structures, duties of directors, rights of shareholders, conversion among corporate entities, merger, liquidation and dissolution, as well as streamlined market restrictions.[209] However, the quality of these rules was low. For example, directors were required to act in the company's interests, yet shareholders were not allowed to bring lawsuits to hold directors accountable.[210] Thus, director duties were merely superficial. Moreover, shareholders could take legal actions against resolutions of general meetings only within an unreasonable time limit of 90 days.[211] These restrictions appeared biased against minority shareholders.

The aforementioned politics of law reform appeared responsible for these incomplete results. As Vietnam used a compromised approach to mediate conflicting interests, it trimmed Western rules, pinned restrictions to the rules or overlooked complementary rules, as exemplified in the above director duties. This customised method was substandard because it equated vested interests with market interests, without sound doctrinal and empirical considerations. Likewise, the rejection of the ADB's conditions on fair treatment allowed the

[206] David Goddard and Reinier Kraakman were among influential foreign advisers to CIEM in drafting the Enterprise Bill 1999: Gillespie, above n 99, 157.

[207] The Central Party Committee's Economic Commission directed CIEM to draft the Enterprise Bill 1999: Le Dang Doanh, 'Enterprise Law — A Must for Further Development of a Multi-Sectorial Economy' (1999) 56 *Vietnam Law and Legal Forum* 11, 11–13; Gillespie, above n 159, 641, 699.

[208] See Quang Truong, 'Vietnam: An Emerging Economy at a Crossroads' (Working Paper No 09/2013, Maastricht School of Management School, 2013) 10. Cally E Jordan, 'Comparative Law and International Organisations: Cooperation, Competition and Connections — Lessons from Hong Kong, China and Viet Nam' (Working Paper, 20 February 2010), s 2.3 At the Cutting Edge: Viet Nam; Gillespie, above n, 641.

[209] See *Enterprise Law 1999* (Vietnam), Chapter V about shareholding companies. See also Nguyen Phuong Quynh Trang, 'Doing Business under the New Enterprise Law: A Survey of Newly Registered Companies' (Private Sector Discussion 12, Mekong Project Development Facility, 2001), 13.

[210] *Enterprise Law 1999* (Vietnam) s 86(1).

[211] Ibid, s 79.

state to give advantage to SOE majority shareholders using differential rights.[212] In other words, minority shareholder protection remained aspirational.

3.8.3 International Economic Integration and the Unified Enterprise Law 2005

The *Enterprise Law 1999* fuelled private investments from 2000. Within a few years, the formal investment rate per capita rose eight times, which was an indicator of people's preference for private business.[213] The private sector became more dynamic and grew faster than the foreign and state-owned counterparts, while also providing the greatest employment growth.[214] As in any economy, minority shareholders were important contributors to these developments. However, ongoing legal discriminations in the enterprise law inhibited the growth of the private sector.[215] Vietnam needed to attract more investment to increase jobs when half of the population was under 40 years of age and approximately 1.5 million were unemployed.[216] Externally, it faced tougher competition from regional rivals for foreign direct investments, such as Thailand, Malaysia and China.[217] Weaknesses in policies and reforms in Vietnam were the main causes for a slowdown in inward investments.[218]

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[212] See Ibid, s 53(2).

[213] The investment rate rose from USD3 to USD25 per capita. There were 54,000 new incorporated firms with USD4.7 billion of registered capital within these two years: David O Dapice, *Vietnam's Economy: Success Story or Weird Dualism? A SWOT Analysis* (A Special Report Prepared for United Nations Development Programme and Prime Minister's Research Commission, June 2003) 9; Le Duy Binh, *Quick Assessment of the Quality of the Vietnamese Private Economic Sector After Ten Years of Implementing Enterprise Law* (Task Force on Implementation of Enterprise Law and Investment Law, and the United Nations Development Programme, 2010) 9. For a recent survey about Vietnamese preference for a free market, see Pew Research Centre, *Emerging and Developing Economies Much More Optimistic than Rich Countries about the Future* (October 2014) 15–16.

[214] Dwight H Perkins and Vu Thanh Tu Anh, *Vietnam's Industrial Policy: Designing Policies for Sustainable Development* (United Nations Development Programme, Vietnam Centre for Business and Government, 2010), 6; Binh, above n 213, 16; Poverty Reduction and Economic Management Unit, East Asia and Pacific Region, *Vietnam, Delivering on its Promise: Development Report 2003* (Report No 25050-VN, World Bank, 21 November 2002), 36. In particular, the private sector generated the highest returns regarding poverty reduction with 1.75 million new jobs (2000–2002).

[215] Mallon, above n 173, 32. The private sector repeatedly called for a transparent, predictable, stable business environment with clear laws and without legal discrimination: Jean Michel Lobet, 'Protecting Minority Shareholders to Boost Investment' in Penelope J Brook et al (eds), *Celebrating Reform 2008 — Doing Business Case Studies* (World Bank, 2008) 61, 62.

[216] Lobet, above n 215.

[217] Phillipe Auffret, 'Trade Reform in Vietnam: Opportunities with Emerging Challenges' (World Bank Policy Research Working Paper 3076, World Bank, June 2003) 11, 14.

[218] Fforde, above n 274, 357, 262–3. Nick J Freeman, 'Foreign Direct Investment in Vietnam: An Overview' (Paper presented at the DfID Workshop on Globalisation and Poverty in Vietnam, Hanoi, 23–24 September 2002); Prema-Chandra Athukorala and Tran Quang Tien, 'Foreign Direct Investment in Industrial Transition: the Experience of Vietnam' (2012) 17(3) *Journal of the Asia Pacific Economy* 446.

Recognising these challenges, the CPV issued the 2001 to 2010 Socio-Economic Development Strategy, aimed at creating a level playing field for all enterprises and opening the market to the world. This strategy launched complementary initiatives, including entering into trade agreements with the US, followed by the WTO, and conducting a legal need assessment for reform to harmonise market laws to meet OECD standards.[219] These initiatives introduced new economic opportunities, competition challenges and stronger commitments, in contrast to the limited responsiveness to reform by bureaucrats, with their own vested interests. These initiatives are examined further because they inform enterprise law transfers, minority shareholder protection and long-term institutional changes.

3.8.4 Amending the Constitution in 2001 and Conducting a Legal Need Assessment to Lay the Foundations for Legal Reforms

The Socio-Economic Development Strategy (2001–2010) confirmed greater market liberalisation and legal fairness for all investors to increase the momentum towards legal reforms. By implementing this strategy, constitutional amendments in 2001 guaranteed business freedom in fields not banned by law, reiterated fairness before the law, and recognised non-state businesses as integral elements of the economy to further inspire investors.[220]

To reinforce these commitments, Vietnam constitutionalised law-based state principles.[221] These principles emphasised certainty of law and impartial judicial resolution of disputes.[222] The constitutionalised enlightened concepts — such as business freedom, legal equality and

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[219] See generally 'Socioeconomic Development Strategies 2001–2010' (Report of the Central Party Committee Session VIII at the National Party Congress IX, 2001). Legal harmonisation towards OECD standards is pragmatic because of growing quality investments from OECD members in Vietnam: Athukorala and Tien, above n 218, 446, 452.

[220] *Constitution 1992* (Vietnam) amended in 2001 s 16.

[221] See Carlyle A Thayer, 'Recent Political Development: Constitutional Change and the 1992 Elections' in Carlyle A Thayer and David G Marr (eds), *Vietnam and the Rule of Law* (Department of Political and Social Change, Research School of Pacific Studies, Australian National University, 1993) 50, 52.

[222] See Do Muoi, *Amending the Constitution, Building the Vietnamese Law-Based State and Strenthening Renovation* (Truth Publishing House, 1992) 30, 32–33, 37.

impartial adjudication — were also influenced by Western notions of fairness and justice.[223] Many Vietnamese constitutional values effectively originated from the fundamental values of France and the US.[224] These new constitutional principles opened more ideological space for adopting Western legal and judicial rules.[225]

Authorities in Vietnam also realised that proactive international economic integration required legal reforms in all fields reflecting these constitutional principles. Thus, they commnaded a legal need assessment for the 2001–2010 period. They then examined earlier efforts and identified problems in four important areas: economic law, development policies, legislative making and legal implementation.[226] Although late, these reviews were necessary to further the legal transfer reforms required for prospective trade agreements.

3.8.5 Signing the United States–Vietnam Bilateral Trade Agreement 2001

Signing the Bilateral Trade Agreement (BTA) was integral to Vietnam's global economic integration objectives, giving it access to the US market. An improved trade relationship with this superpower was a necessary step for joining the WTO. This agreement assisted Vietnam to reduce the potent political economic influence of China.[227]

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[223] Gillespie, above n 168, 25, 46. Western influences also informed the assorted eclectic writings of Ho Chi Minh, the party founder. See Tran Dinh Huynh, 'Relationship between Intelligence–Morality–Law in Managing the Country of the President Ho Chi Minh' (1995) 5 *State Organisation Journal* 3, 3–5.

[224] The Declaration of Independence of the United States of America in 1776 and the Declaration of the French Revolution in 1791 recognised democratic values. Ho Chi Minh invoked them to write the 1945 Declaration of Independence, which informed the Vietnamese constitutions 1946, 1959, 1980, 1992 and 2013. See K W Taylor and J K Whitmore, *Essays Into Vietnamese Pasts* (Southeast Asia Program, Cornell University, 1995) 221–231; Edward Miller, *The Vietnam War: A Documentary Reader* (Wiley Blackwell, 2016) 11–14.

[225] See Truong Hoa Binh, 'Reforming Courts' (2009) *Vietnam Law and Legal Forum* 4; Gillespie, above n 159, 641, 646. See also Stephen B Young, 'Vietnamese Marxism: Transition in Elite Ideology' (1979) 19(8) *Asian Survey* 770.

[226] See Luu Tien Dung, *Legal Needs Assessment: Building Ownership and Partnership for Legal Reforms in Viet Nam* (Case Studies on Access to Justice by the Poor and Disadvantaged, Asia-Pacific Rights and Justice Initiative, United Nations Development Programme, July 2003); Mallon, above n 173; *Evaluation of Assistance to the Implementation of Vietnam's Legal System Development Strategy to 2010*, Final Report, UNDP VIE 02/015 (November 2008) 17; United Nations Development Programme, *Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region* (February 2012) 67–8.

[227] Thayer, above n 175, 31, 38, 40. See also Carlyle A Thayer, 'Vietnam in 2001 Toward the Ninth Party Congress' (2002) 41(1) *Asian Survey* 181. Thayer also stated that the Soviet Union collapse and 1997 Asian financial crisis also resulted in economic integration reforms.

The US–Vietnam BTA went beyond a simple BTA. It was modelled on WTO standards, with some stricter clauses.[228] It required full market liberalisation, with a separate chapter demanding specific requirements for extensive reforms towards the rule of law.[229] For instance, consultation in lawmaking, regular disclosure of laws, uniform and impartial legal governance, and unbiased judicial reviews were all mandatory, while legal service had to be open to US investors.[230] These conditions were stepping stones for long-term reforms, including enterprise laws. In essence, this separate chapter was designed to promote openness, transparency, predictability and impartiality for the transition towards a market economy.

The US took Vietnam's commitments seriously. The US–Vietnam Trade Council and American Chamber of Commerce monitored issues concerning this agreement and linked them with WTO accession.[231] For example, this chamber publicly criticised Vietnam for its narrow interpretation of its international commitments, and for delaying their implementation.[232] About 43% of non-US multinationals considered these concerns before making investment decisions in Vietnam, and many countries did the same in their WTO negotiations.[233] As the actions of Vietnam informed its reputation and competitiveness, the pressure kept increasing for its leadership to duly honour its commitments.

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[228] See Lisa Toohey, 'Stepping Stones and Stumbling Blocks: Vietnam's Regional Trade Arrangements and WTO Accession' in Ross Buckley, Vai Io Lo and Laurence Boulle (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer Law International, 2008) 65. See also Jonathan Stromseth and Chadwick Bolick, 'U.S.–Vietnam Relations: An Overview' in J Stromseth (ed), *Dialogue on U.S.–Vietnam Relations: Domestic Dimensions* (Asia Foundation, 2003).

[229] This was exchanged for normal trade relations with the US and a tariff reduction to 4%: Tim Büthe and Helen V Milner, 'The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?' (2008) 52(4) *American Journal of Political Science* 741, 746.

[230] Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, signed 13 July 2000 (entered into force 10 December 2001) ch IV ss 1–8.

[231] See U.S.–Vietnam Trade Council Education Forum, *The U.S.–Vietnam Bilateral Trade Agreement: A Survey of U.S. Companies on Implementation Issues* (2004); Steve Parker and Phan Vinh Quang, *Support for Trade Acceleration (Star) in Vietnam* (Final Report Produced for Review by the U.S. Agency for International Development, February 2007). For documents (2004–2012) of AmCham relating to Vietnam, see http://www.amchamvietnam.com/summary-of-policy-and-economic-development-issues/.

[232] Lisa Toohey, 'Accession as Dialogue: Epistemic Communities and the World Trade Organization' (2014) 27(2) *Leiden Journal of International Law* 397, 414. For documents (2004–2012) of AmCham relating to Vietnam, see http://www.amchamvietnam.com/summary-of-policy-and-economic-development-issues/.

[233] Foreign Investment Agency, Ministry of Planning and Investment, *The Impact of the U.S.–Vietnam Bilateral Trade Agreement on Overall and U.S. Foreign Direct Investment in Vietnam* (National Political Publisher, 2005) 4. See also Steve Parker, Phan Vinh Quang and Nguyen Ngoc Anh, 'Has the U.S.–Vietnam Bilateral Trade Agreement Led to Higher FDI into Vietnam?' (2002) 2(2) *International Journal of Applied Economics* 199.

3.8.6 World Trade Organization Negotiations as Drivers for Widespread Reforms

Vietnam applied for the WTO from its inception in 1995. Negotiations for accession were delayed because Vietnam was not ready to make reform commitments to the world.[234] However, the outcomes of the US–Vietnam BTA and earlier trade agreements (including with Australia and the European Union), together with the Chinese WTO accession in 2001, motivated Vietnam to accelerate the WTO process.[235] Vietnam must negotiate with 43 other economies (negotiators), including Australia, the European Union and the US, as the toughest gatekeeper.[236] To facilitate negotiations, Vietnam had to upgrade its legal system to reflect WTO principles. These included guarantees of freedom, non-discrimination and the rule of law to protect business rights across national borders.[237]

These daunting tasks caused a huge legislative backlog in the National Assembly, given that it only sat for about three months per annum.[238] Failure to update legislation could stall the process; thus, legal changes were processed at a frenetic pace. For example, in just 12 months of sitting between 2002 and 2006, this part-time legislature passed over 100 laws.[239] It became a legislative factory that 'produced' laws, often in rudimentary forms.[240]

The desire to join the global trade organisation left behind the political antipathy towards private business. This can be seen in the CPV's changing policies, encouraging private

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[234] See Thayer, above n 175.

[235] Philip Abbott, Jeanet Bentzen and Finn Tarp, 'Trade and Development: Lessons from Vietnam's Past Trade Agreements' (2009) 37(2) *World Development* 341, 351. Vietnam's Ministry of Planning and Investment's Central Institute of Economic Management and Foreign Investment Agency and the U.S. Agency for International Development-Funded Support for Trade Acceleration (STAR) Project, *Assessment of the Five-Year Impact of the U.S.–Vietnam Bilateral Trade Agreement on Vietnam's Trade, Investment, and Economic Structure* (National Political Publishing House, July 2007).

[236] *Working Party on the Accession of Vietnam*, WTO Doc WT/ACC/VNM/1/Rev.23 (25 October 2005) (Chairman: H E Mr Eirik Glenne, Norway).

[237] See Ernst-Ulrich Petersmann, 'Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law' in Daniel L M Kennedy and James D Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002) 32, 33; Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3(1) *Journal of International Economic Law* 19.

[238] Australian Agency for International Development 2003–2007, *Vietnam–Australia Development Cooperation Strategy, 2003–2007* (AusAID, 2003) 29–30.

[239] Brian J M Quinn and Anh T T Vu, 'Farmers, Middlemen, and the New Rule of Law Movement' (2010) 30(2) *Boston College Third World Law Journal* 273, 289. Vietnam made only 27 laws between 1954 and 1986. Vietnamese legal instruments are made available at http://vbqppl.moj.gov.vn/Pages/vbpq.aspx.

[240] Jonathan L Golin, 'Tiger by the Tail' (1995) 81 *ABA Journal* 62, 64.

business and allowing Party members to own private business since 2002.[241] However, the Party remained faithful to SOE preference by enacting *SOE Law 2003* during the intense negotiation process. These contradictory actions, alongside the direct political control of the Vietnamese negotiation team and the sabotage (capture) from line ministries who resisted any changes that affected their SOEs, compounded Vietnam's already inconsistent behaviours.[242]

These persistent problems prompted WTO negotiators to scrutinise market structures, the quality of lawmaking and the impartiality of judicial reviews.[243] For example, state-owned and state-controlled enterprises were central issues to the US, the European Union, Australia and other negotiators.[244] As many ministries controlled SOEs, the negotiators were concerned about ongoing preferential treatments for their enterprises, including legal differentiation, financial subsidy and political intervention.[245] Vietnam was also expected to bring laws into line with Western democratic principles to reduce the broad discretion of ministerial bureaucrats.[246] Questions were also raised regarding impartial trials in disputes between private companies and state-owned or state-controlled businesses.[247]

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[241] Resolution 14-NQ/TW Dated 18 March 2003 of the Fifth Plenum of the Ninth Part Central Committee on Continuing Renewing Mechanisms, Policies, Encouragement and Enabling to Develop Private Economy; Conclusion No 64-KL/TW Dated 9 February 2010 of the Secretariat of the Central Party Committee on the Results of Reviewing the Implementation of Resolution 14-NQ/TW (Session IX) Dated 18 March 2002 on Continuing Renewing Mechanisms, Policies, Encouragement and Enabling to Develop Private Economy; Decision No 15/QD-TW Dated 28 August 2006 of Central Party Committee on Party Members Engaging in Private Economy; Dam Kien Lap, 'Some Thoughts on Party Members Engaging in Private Economy' (2006) 6 *Communist Journal* 60.

[242] See generally Uwe Schmidt, 'Vietnam's Accession to the WTO: A Roadmap for a Rational Approach in Trade Liberalization' (Duisburg Working Paper on East Asian Economic Studies No 66/2003, University Duisburg-Essen, Asia-Pacific Economic Research Institute, 2003); Dapice, above n 213. See also Dawn Brancati, 'Democratic Authoritarianism: Origins and Effects' (2014) 17(1) *Annual Review of Political Science* 313.

[243] *Accession of Viet Nam,* WTO Doc WT/ACC/VNM/48 (27 October 2006) (Report of the Working Party on the Accession of Viet Nam) [110]–[314] , [443]–[449].

[244] See World Trade Organization, 'Working Party Examines First Revision of Membership Report' (Press Release, Viet Nam Membership Negotiations 15 September 2005, 20 September 2005).

[245] Other concerns included legal mechanisms to protect private enterprise against anti-competitive behaviours of SOEs. See *Accession of Viet Nam,* WTO Doc WT/ACC/VNM/48, above n 243. For Vietnam's claimed natural monopoly of SOEs, see Table 8(c): List of Goods Subject to State Trading Enterprises at pages 162–163 in this report.

[246] See Star-Vietnam Support for Trade Acceleration Project, *Report on the Issues That Need to Be Amended and Supplemented in the Law on Promulgation of Legal Normative Documents* (Report to Ministry of Justice, Hanoi, 2006) 56–7; Abbott, Bentzen and Tarp, above n 235, 341, 344.

[247] *Accession of Viet Nam,* WTO Doc WT/ACC/VNM/48, above n 243, [123].

As a result of widespread problems, Vietnam needed to make greater legal changes and stronger commitments before negotiations could be finalised. One of the prerequisites for WTO accession was the termination of laws that regulated businesses differently because of their ownership origins. While the unification of divergent enterprise laws was uneasy because of bureaucratic resistance, it was achieved with broad public support and the leadership's determination for Vietnam to join the WTO. Vietnam finally enacted the unified *Enterprise Law 2005*. The party-state also accepted a request from negotiators to allow foreign investors to become strategic investors in equitised SOEs.[248] Thus, the common *Investment Law 2005* allowed foreign investors to buy shares in Vietnamese companies.

In an attempt to indicate its readiness for legal harmonisation, Vietnam voluntarily requested the WB to assess the *Enterprise Law 2005* against six OECD Corporate Governance Principles.[249] The overall findings were that this law did reflect these principles, but with modest quality and various deficiencies. Fair treatment of shareholders, the board's compliance to this issue, protection of minority shareholders, redress for internal corporate misconduct, insider trading rules and disclosure requirements were weak, while related party transactions were prevalent.[250] These issues demonstrated that minority interests were not the primary goal of this law.

In addition, Vietnam had to make commitments to disclosure, consultation, transparency in lawmaking and impartial judicial reviews in the future to address growing concerns about the legal quality.[251] This was intended to reassure all investors that Vietnam would respect the

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[248] Ibid [83], [87], [90].

[249] World Bank, *Corporate Governance Country Assessment: Vietnam* (June 2006). Six OECD Principles included ensuring the basis for an effective corporate governance framework, the rights of shareholders and key ownership functions, fair treatment of shareholders, role of stakeholders in corporate governance, disclosure and transparency, and responsibilities of the board.

[250] See World Bank, above n 249, 9, 17–20; World Bank, *Corporate Governance Country Assessment: Vietnam* (2013)

[251] See *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48, above n 243 [45], [135], [509]–[519], [527]. The US particularly targeted these commitments to transparency in government processes, economic freedoms and rule of law: Office of the United States Trade Representative, *Vietnam's Accession to the World Trade Organization (WTO*) (May 2006) 2. World Trade Organisation, 'Viet Nam Starts its 'Quantum Jump' But still Some Way to Go' (Press Release, Viet Nam Membership Negotiations 10–11 December 2003, 12 December 2003).

rule of law in practice and would avoid a repeat of the earlier episode of lawmaking conducted at a frenetic pace. Another Law on Law was enacted in 2008, with legal transfers largely assisted by Canada, as it had done previously.[252]

Despite the increasing Western transfers of substantive and procedural laws, these outcomes appeared inadequate to convince the US that Vietnamese leadership was ready to effectively implement its commitments. As Vietnam was led by a single communist party, inconsistencies between actions and promises were common, as the US noted above. Moreover, Vietnam's extensive state business sector slowed the full implementation of its WTO commitments to become a market-based economy. With many remaining problems, the US strategically imposed a non-market economy status on Vietnam in its WTO accession from 2007 to 2018.[253] It was hoped that this move would create pressure for more liberal processes and institutions in Vietnam beyond this deadline.

3.8.7 Collective Efforts Contributing to World Trade Organization Accession and Enterprise Law 2005

Vietnam's aspiration for WTO accession received its greatest collective support from the donor and domestic community, except among vested interests, of course. Multilateral and bilateral donor activities increased sharply as the prospect of market liberalisation became clearer. For example, the number of technical assistance projects reached 475.[254] Many of these were linked to negotiations with Western donors, including 19 multilateral donors, 25 bilateral donors and over 500 non-government organisations active in the country.[255] Vietnam

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[252] For detailed discussions on how this Law was used to make the *Enterprise Law 2014*, see Chapter 4, Part II.

[253] This was translated into Paragraphs 254 and 255 of the WTO Working Party Report: *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48, above n 243, [254], [255]. Non-market economy status would result in adverse rulings against Vietnamese companies, in the case of antidumping and countervailing duty disputes. Preferences for SOEs were the main reasons for such status. See Michael F Martin, *U.S.–Vietnam Economic and Trade Relations: Issues for the 113th Congress* (Congressional Research Service Report Prepared for Members and Committees of Congress, 13 August 2014) 8–10.

[254] See World Trade Organisation, Trade Capacity Database, http://tcbdb.wto.org/.

[255] Irene Nørlund, Tran Ngoc Ca and Nguyen Dinh Tuyen, 'Dealing with the Donors: The Politics of Vietnam's Comprehensive Poverty Reduction and Growth Strategy' (Policy Paper 4/2003, Institute of Development Studies, University of Helsinki, 2003) 61. See also Ann Bartholomew and Stephen Lister, 'Vietnam: The Benefits of a Strong Consultative Framework' (2005) 25(5) *Public Administration and Development* 425.

was the 'darling of the donor community which used carrots and sticks to bring this WTO applicant into the mainstream of the global development agenda'.[256]

Donors and their consultants also worked closely with domestic stakeholders. The Socio-Economic Development Strategy, legal need assessment, and *Enterprise Law 2005* were exemplars of close cooperation between Vietnamese experts and the UNDP, alongside its partners, including AusAID.[257] The preparations for this law showcased the collective efforts of many like-minded stakeholders. For example, the PM Research Commission advised the PM on directions for this law, based on a review of 800 legal instruments that the VCCI developed from theoretical and empirical studies, assisted by donors for several years.[258] Early Bills received important inputs from international law firms and foreign business chambers via the Vietnam Business Forum, while donors provided legal advisers and funding.[259] Moreover, Australian consultant Raymond Mallon provided suggestions for drafting the enterprise law to reflect OECD principles.[260] Foreign and domestic experts jointly assessed this law for the WB.[261]

Importantly, strong cooperation benefited both donors and domestic civil society. It enabled donors to observe from the inside and to present their viewpoints. It also strengthened the roles of civil society actors in shaping policies and reforms, and provided a model for future law reform.

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[256] Nørlund, Ca and Dinh Tuyen, above n 255, 22.

[257] For donors in these cases, see Raymond Mallon, *Approaches to Support the Development of an Enabling Environment for Small Enterprises — Country Report: Vietnam* (German Agency for Technical Cooperation, August 2002) 50–53. UNDP coordinated donors in assisting the legal need assessment (2001–2010): United Nations Development Programme, *Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region* (February 2012), 67–8, 120.

[258] See The Prime Minister Research Commission and the United Nations Development Programme, above n 193. Donors, such as UNDP, ADB and WB sponsored theoretical and empirical studies from 2001 to 2005.

[259] Lobet, above n 215, 61, 63–4. Lobet stated that the International Finance Corporation alone funded $100 000 for the reform process.

[260] See Mallon, above n 173.

[261] Contributors to the assessment included Khalid Mirza, James Seward, Viet Quoc Trieu, and Son Thanh Tran, Pham Duy Nghia, MCG Management Consulting, Olivier P Fremond, Alexander S Berg, Tadashi Endo, Peter Taylor, Thomas A Rose and Noritaka Akamatsu: World Bank, above n 249, Acknowledgements.

Despite massive efforts, the creation of *Enterprise Law 2005* still took 20 months with 20 drafts.[262] The Ministry of Planning and Investment directed the drafting, while the final decisions rested with the single-party legislature. The hegemonic politics explained why Western transfers of this law only modestly addressed OECD principles, as the WB assessed above. This experience demonstrated that the 'in-house' lawmaking process and legislative drafting are just as important as foreign knowledge and the actions of state and non-state stakeholders in legal transfer.

3.9 Widespread Economic Problems, a Comprehensive Reform Framework and Enterprise Law 2014

The *Enterprise Law 2014* addressed deficiencies regarding minority shareholder protection. The WB recommended strengthening this protection as a priority in 2005 and again in 2013 to address widespread oppressive conduct through increasing litigation rights to seek fairness.[263] This law accordingly focused on minority shareholder protection, litigation provisions and SOE issues. In effect, the party-state avoided tackling these problems when formulating the initial laws 25 years earlier.

This section explores the main reasons behind these changes. It examines poor minority shareholder protection, widespread market problems, public debts involving SOE preference, widespread pressures for legal fairness, and the resultant framework for comprehensive law reform.

[262] Lobet, above n 215, 61, 64.

[263] See World Bank, above n 249; World Bank, above n 250.

3.9.1 Assessments of Legal Protection for Minority Shareholders in Doing Business Reports

The WB annually conducts *Doing Business* reports to inform global investors about the business regulation in 189 economies.[264] These reports review the progress of business-related regulations, in which minority shareholder protection is a key indicator.

Although this indicator includes nine variables, it particularly highlights shareholder rights and the ease of shareholder litigation.[265] Between 2006 and 2015, Vietnam performed poorly on the ease of shareholder litigation against directors, compared with its ASEAN competitors.[266] On a measuring scale of 1 to 10, Vietnam attained 1, Thailand attained 6, Malaysia attained 7 and the Philippines attained 8.[267] Vietnam was also left far behind in the regional trend in East Asia and the Pacific, with a ranking of 6.4 out of 10 in 2015.[268] Investors often consider these rankings before making decisions regarding investment or divestment in Vietnam.[269] This means that these *Doing Business* reports are influential for attracting investment because they reveal how committed the Vietnamese leaders are to achieving OECD standards.[270]

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[264] Doing Business measures business regulation affecting 11 areas of the life of a business, including protecting minority investors: World Bank, *Doing Business 2015: Going Beyond Efficiency* (2014) 16–23. There were 190 countries assessed in World Bank, *Doing Business 2017: Equal Opportunity for All* (2017).

[265] For explanations on nine variables of minority investor protection indicator, see World Bank, *Doing Business 2015: Going Beyond Efficiency* (2014) 128–132. Methods of these reports are systemic, practice-based, and updated annually by experts using data from business respondents, governments, the WB Group regional staff and relevant regulations, thereby informing practical values of the findings. For updates of methodology, see http://www.doingbusiness.org/methodology. Some smaller studies measure shareholder protection with 10 variables. See, eg, Dionysia Katelouzou and Mathias Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013' (2015) 15(1) *Journal of Corporate Law Studies* 127, 3–5.

[266] Rankings of all economies are available at http://www.doingbusiness.org/data. Vietnam has decided to run after average rankings of ASEAN-4 (Malaysia, Thailand, Philippines and Singapore). See Resolution No 19-2016/NQ-CP Dated 28 April 2016 of the Government on Primary Missions and Solutions to Improve the Business Environment and Increase the National Competitiveness Capacity for two years 2016–2017, with orientation towards 2020.

[267] Rankings can be extracted automatically from http://www.doingbusiness.org/data. Also in this database, the extent of director liability in Vietnam was 2 (2006–2011) and 3 (2012–2015).

[268] Rankings can be extracted automatically from http://www.doingbusiness.org/data.

[269] Bui Xuan Hai, *Enterprise Law: Shareholder Protection–Law and Practice* (National Politics Press, 2011) 169.

[270] See also Mathias M Siems and Oscar Alvarez-Macotela, 'The OECD Principle of Corporate Governance in Emerging Markets: A Successful Example of Networked Governance?' in Mark Fenwick, Steven Van Uytsel and Stefan Wrbka (eds), *Networked Governance, Transnational Business and the Law* (Springer, 2013) 257. Emerging markets include Vietnam's market.

The opaqueness of the existing enterprise law and the unpredictable judicial implementation were main reasons for Vietnam's disappointing rankings.[271] These reasons also compounded minority shareholder protection problems because, as stated by Walker, Reid, Low and La Porta et al, law implementation is as important as the law itself.[272] These factors were important drivers for expansions on litigation provisions in the new *Enterprise Law 2014*, followed by judicial reforms (see Chapter 5).

3.9.2 Unfair Treatment of Minority Shareholders in Corporate Governance Practices

Investors often think that top-listed companies embrace corporate practices.[273] A main reason for this belief is that these companies are subject to stronger disclosure requirements, public attention, press scrutiny and state oversight. However, reality shows that the limited legislative protection for minority shareholders has translated into poor corporate governance practices, including oppressive conduct against them. From 2009 to 2011, the International Financial Corporation conducted annual empirical research using five OECD Corporate Governance Principles to score the practices of Vietnam's top-100 listed companies, which collectively represented over 80% of market capital.[274] For this period, the average scores on shareholder rights, disclosure and transparency — like the overall performance — were all well below 50%, while the score for board responsibilities was just 36%.[275]

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[271] See Lobet, above n 215, 61. For detailed discussion on these two aspects, see Part II of Chapter 5.

[272] Gordon R Walker and Terry Reid, 'Upgrading Corporate Governance in East Asia' (2002) 17(3) *Journal of International Banking Law* 59, 64–5; Chee Keong Low, *Corporate Governance: An Asia-Pacific Critique* (Sweet & Maxwell Asia, 2002) 7; Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58(1–2) *Journal of Financial Economics* 3.

[273] World Bank, *Doing Business 2015: Going Beyond Efficiency* (2014) 81. The larger the company, the better CG scores overall: International Finance Corporation, Global Corporate Governance Forum and State Securities Commission of Vietnam, *Corporate Governance Scorecard Report* (2011) 37–8.

[274] The five principles were (1) rights of shareholders, (2) equitable treatment of shareholders, (3) role of stakeholders, (4) disclosure and transparency, (5) responsibilities of the board: International Finance Corporation, Global Corporate Governance Forum and State Securities Commission of Vietnam, *Vietnam Corporate Governance Scorecard 2012* (2012); International Finance Corporation, *Corporate Governance Scorecard Report* (2011), above n 273; International Finance Corporation, Global Corporate Governance Forum and State Securities Commission of Vietnam, *Corporate Governance Scorecard 2009* (2010).

[275] International Finance Corporation, *Vietnam Corporate Governance Scorecard 2012* (2012), above n 274, 31. Methods and percentage scores were explained in pages 26–30 of this report.

These scores revealed problems about the fair treatment of shareholders in practice. Although this indicator was assessed slightly above the average percentage, the treatment was worsening, with a minimum score of 14% (2011).[276] More extensive studies on both listed and non-listed companies indicated similarly weak compliance with the fair treatment principle.[277]

These results also confirmed the correlation of ownership types with corporate governance practices. The practices in companies with foreign investors usually improved because they tended to demand better practices or introduced better practices from their own countries.[278] In contrast, state ownership negatively affected both SOEs and enterprises with SOE shareholders.[279] The state often held a majority stake in these enterprises, which enabled bureaucrats to influence the board selection.[280] The UNDP also noted that, 'state representatives often vetoed company's resolutions that could affect their own shares or their relatives'.[281] Likewise, with political ties, SOE shareholders exerted substantial influence over directors, thereby rendering minority expropriation more severe in politically linked firms.[282] The increased connection between SOEs, their controlling bureaucrats and the party-state increased the unfair treatment of minority shareholders.

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[276] International Finance Corporation, *Corporate Governance Scorecard 2009* (2010), above n 274, 12; International Finance Corporation, *Corporate Governance Scorecard Report* (2011), above n 273, 35; International Finance Corporation, *Vietnam Corporate Governance Scorecard 2012* (2012), above n 274, 32.

[277] This study examined 400 companies conducted by Nguyen Truong Son. See Nguyen Truong Son, 'Corporate Governance in Vietnamese Enterprises' (2010) 5(40) *Science and Technology Journal, Danang University* 234, 236–7. See also a survey of 1023 people: World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, *Changing Attitudes to the Market and the State (CAMS) 2011* (Hanoi, 2012) 34–5.

[278] International Finance Corporation, *Vietnam Corporate Governance Scorecard 2012* (2012), above n 274, 38–9. Foreign investors may also look for companies that have already demonstrated better corporate governance.

[279] International Finance Corporation, *Vietnam Corporate Governance Scorecard* 2012 (2012), above n 274, 19–20.

[280] See Vu Thi Thuy Nga, 'Owners of Shareholding Companies: For "New Bottles, New Wine"' (2009) 3 *Finance* 5, 25–26; Bui Xuan Hai and Chihiro Nunoi, 'Corporate Governance in Vietnam: A System in Transition' (2008) 42(1) *Hitotsubashi Journal of Commerce and Management* 45. See also a survey of 1023 people: World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, above n 277, 27–38.

[281] The Task Force on Implementation of Enterprise Law and Investment Law and UNDP, *Assessment Report on 2-Years Implementation of the 2005 Enterprise Law and Investment Law* (December 2008) 34–5.

[282] See respectively, Cao Ba Khoat, *Review Report on Enterprise Law 2005* (2012) section A(2.2); Lihong Wang and Philip T Lin, 'Who Benefits from Political Connections? Minority Investors or Controlling Shareholders' (2016) *Asia-Pacific Journal of Accounting & Economics* 1.

In this environment, corporate governance practices continued to worsen. In 2012 and 2013, the ADB released two peer-reviewed studies on Vietnam and five other ASEAN countries.[283] The findings indicated that the overall performance in Vietnam was the lowest, and was even lower than in the International Financial Corporation's earlier studies. In particular, problems regarding the unfair treatment of shareholders had become more negative as the board responsibilities remained weakest.[284] For example, the ADB found that directors and the board could easily conduct transactions to advance their own interests.[285] One of the reasons for this behaviour was that *Enterprise Law 2005* only required shareholder approval for related-party transactions valued with at least 50% of total corporate assets.[286] Furthermore, companies generally lacked a whistle-blower mechanism to enable minority shareholder employees to complain about illegal and oppressive conduct.[287]

These ongoing poor outcomes were reaffirmed in the annual *Doing Business* reports and stemmed from the fact that corporate power was mainly held by majority shareholders, directors and the board.[288] Moreover, although *Enterprise Law 2005* mirrored OECD principles, it left loopholes for abuse through unclear rules, lax liabilities and absent oppression remedies.[289] These defects enabled majority shareholders to oppress minority counterparts. Vietnamese majority investors attempted to exploit the company and minority

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[283] See Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014* (2014) 5; Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2012–2013* (2013).

[284] Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014* (2014) 74, 77.

[285] Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014* (2014) 76, 77. See also International Finance Corporation, *Vietnam Corporate Governance Scorecard 2012* (2012), above n 274, 56–1. International Finance Corporation, *Corporate Governance Scorecard Report* (2011), above n 273, 15.

[286] *Enterprise Law 2005* (Vietnam) s 104 (2).

[287] Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014* (2014) 78.

[288] An empirical study showed that 95% of directors were concurrently members of the BOD and majority shareholders: Son, above n 277, 234, 238–9. Institutional majority shareholders were increasing and starting to balance controlling shareholders: Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014* (2014) 76.

[289] International Finance Corporation, *Vietnam Corporate Governance Scorecard 2012* (2012), above n 274, 55; Phan Duc Hieu et al, *Protecting Minority Shareholders: Theory, International Experiences and Recommendations for Enterprise Law Amendment* (Report of Ministerial Research 2013, Central Institution of Economic Management, Ministry of Planning and Investment, Hanoi, July 2014), 2–3. Son, above n 277, 234, 238.

shareholders as much as possible.[290] Thus, oppression sections are needed to provide remedies for unscrupulous conduct.

3.9.3 State-Owned Enterprise Preference, Rent-Seeking and Public Debts

In the WTO negotiation process, negotiators queried an extensive nexus and preference for state-owned and state-controlled enterprises, such as monopolies, privileges and the influence of senior bureaucrats on these businesses.[291] In response, Vietnam committed to substantially reducing the state's stakes in SOEs via equitisation and reorganisation, while subjecting SOEs to legal fairness under the enterprise law. As discussed, Vietnam has yet to effectively perform such commitments, despite being a WTO member since 2007.

The state sector was downsized from 12 000 SOEs in 1990 to 949 SOEs with sole state ownership and 4068 equitised SOEs in 2014, with the state being the controlling or majority shareholder.[292] SOEs include 11 giant conglomerates that are the parent companies, with hundreds of smaller SOEs.[293] The entanglement between government and business leads to substantial conflicts of interest. For example, the two stock exchanges — Hanoi Stock Exchange and Ho Chi Minh City Stock Exchange — are SOEs controlled and regulated by the Ministry of Finance. Four issues are worth consideration, as follows.

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[290] The Task Force on Implementation of Enterprise Law and Investment Law and UNDP, above n 281.

[291] See *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48, above n 243, [52]–[79], [80]–[95].

[292] Vietnam Competition Authority, Ministry of Industry and Trade et al, *Report on Economic Concentration in Vietnam 2014* (April 2015) 12, 30–1; Ministry of Planning and Investment, *70 Years of Planning and Investment Field — Renovation, Integration and Development* (2015) 3, 7. For the number of equitised SOEs 2002–2014, see Asian Development Bank, *Asian Development Outlook 2015: Financing Asia's Future Growth* (2015) 245.

[293] Eg, Vinashin had slightly over 200 subsidiaries. The Prime Minister combined corporations to establish 13 conglomerates but downgraded VNIC and HUD to general corporations from 2 October 2012. Moreover, there were 97 single corporations. See Nguyen Huu Dat, 'Practice of State-Owned Conglomerate Operations — Success, Limitations and Solutions' in Ho Chi Minh National Academic of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 2014) 179, 179–86.

(1) The representative owners of most SOEs are government bodies led by senior bureaucrats

SOE ownership arrangements are complex, with Party organs holding numerous SOEs. The government and its bodies control massive SOEs, conglomerates and corporations, while local committees and department agencies govern thousands of smaller SOEs.

The governance of SOEs is more convoluted. The State Bank of Vietnam and Ministry of Finance also act as business owners in the financial sector. The Ministry of Finance reviews the financial performance of SOEs and makes decisions on the use of their profits. The Ministry of Planning and Investment approves SOE investment projects and prepares the business policies, enterprise Bills and regulations for all investors. Similarly, line ministries approve SOE business lines, business plans, development strategies, and human resources. Thus, in many central and local state bodies, SOEs are both regulated and directed by senior bureaucrats.

Each SOE also carries a Party cell to approve and oversee specific business strategies. Chief executive officers in conglomerates have a rank equivalent to Deputy Ministers. Incumbent SOE boards remain dominated by civil servants and political appointments, with regular interference by the various ministries and parent conglomerates.

These arrangements form an inextricable nexus of interests among the party-state, senior bureaucrats and SOEs. SOEs are structured as political, bureaucratic and commercial bodies in which authorities revolve between the State Capital Investment Corporation and other SOEs.[294] These practices provide central bureaucrats with a concentration of political, regulatory and economic power to influence enterprise policy and law making (see Chapter 4).

[294] For a full list of these authorities, see http://www.scic.vn/index.php/intro/53-introduction/organization-3.html.

Under such conditions, the governance, ownership and control of SOEs are opaque. The leading bureaucrats in relevant state bodies also direct the boards of SOEs and receive their reports, but are not held accountable for their performance. Bureaucrats act as owners, representing the state control of SOEs. They often act as shadow managers of SOEs, bypassing the incumbent boards of SOEs when needed. All party-state members, including bureaucrats, are allowed to both run private businesses and invest in SOEs. Consequently, the corporate governance performance of many SOEs is poor, with weaknesses in transparency, accountability, board professionalism, legal compliance and legal fairness for minority shareholders.[295] Overall, SOEs, SOEs' managing bureaucrats and the party-state together act in their own interests in the market.

(2) Multiple forms of SOE preference continue

SOE preference became less explicit and more focused following WTO accession. Regarding business, WTO concessions were directed at the state sector.[296] SOEs dominated 16 (previously 43) business fields, including shipbuilding, mining, telecommunication, electricity, petrol, cement, rice export, finance and insurance.[297] Concerning financial subsidy, SOEs were given free land use; differential access to state-owned banks; and external capital resources, with over half of all foreign loans guaranteed by the government.[298] For example,

[295] This is consistently seen in many reports and surveys of WB, IFC, ADB, discussed above.

[296] See Edmund Malesky and Jonathan London, 'The Political Economy of Development in China and Vietnam' (2014) 17 *Annual Review of Political Science* 395; *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48, above n 243, 162–163.

[297] See Decision No 58/2002/QĐ-TTg Dated 26 April 2002 of the Prime Minister Issuing Criteria and Categories to Classify State-Owned Enterprises and General Companies (43 business fields); Decision No 37/2014/QĐ-TTg Dated 18 July 2014 of the Prime Minister Issuing Criteria and Categories to Classify State-Owned Enterprises (16 business fields). For example, 99% in coal, 94% in electricity, 91% in telecommunications. For specific statistics, Ministry of Planning and Investment, *70 Years of Planning and Investment Field*, above n 292, section Renewing the Management of SOEs, 3; Le Xuan Thanh, 'Recognising Obstacles to the Effective Operation of State-Owned Enterprises' in Ho Chi Minh National Academic of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 2014) 76.

[298] Eg, foreign debts of conglomerates and general corporations were already VND315,815 billion, in which loans from Vietnam's ODA were VND54,574 billion and guarantee of the government was VND150,681 billion: Report No 490/BC-CP Dated 25 November 2013 of the Government on Financial Status and Performance of Enterprises Which the State Holds 100% Capital and Enterprises Which the State Holds Shares and Contributes Capital in 2012, and Directions for the 2014–2015 Period (Report Reserved for the National Assembly) 7. See also Hakkala and Kokko, above n 202, 13, 16.

the government on-lent nearly USD2 billion from official development assistance and an international bond issuance to SOEs in 2010.[299] In regard to law, the state sector was free from legislation until 1995, subject to differential SOE laws (1995–2005), partly exempted from unified enterprise law (2005–2015) and implicitly protected via differential rules for majority shareholders (2015–present). The government and ministries often use by-laws to advantage SOE investors.[300]

(3) SOEs have the largest capital, yet the least efficiency, and declining roles

The state sector accounted for 40% of total national investments.[301] However, it shared around 32% of gross domestic product (GDP), compared with 48% and 20% from the private and foreign sectors, respectively.[302] Central SOEs — particularly 11 conglomerates under government control — received approximately 90% of state investments.[303] These central SOEs consequently caused massive debts to the state sector (about 50% GDP, and increasing because of interest rates).[304] For example, two conglomerates — Vinashin and Vinalines —

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[299] World Bank and Donor Working Group, *Vietnam Development Report 2012: Market Economy for a Middle-Income Vietnam* (Joint Donor Report to the Vietnam Consultative Group Meeting, 6 December 2011, 2012) 41.

[300] Vo Dai Luoc, *Vietnamese Economy: Renovation and Development* (World Publishers, 2007) 175; World Bank, above n 250, 15. Examples are Decree No 03/2000/NĐ-CP Dated 3 February 2000 of the Government Instructing the Implementation of Some Sections in Enterprise Law (including voting preferred shares in equitised SOEs); Decree No 73/2012/NĐ-CP Dated 12 September 2012 of the Government Regulating Foreign Cooperation and Investment in the Field of Education and Training, s 24 (not allowing foreign educational institutions enrolling over 20% of Vietnamese learners.

[301] The specific percentage was 37% in 2011, 40.2% in 2012, and 40.4% in 2013: Report No 428/BC-CP Dated 17 October 2014 of the Government on Implementing Economic Restructuring in the Domains of Public Investment, State-Owned Enterprises and the Banking System Following the Resolution No 110/2011/QH13 of the National Assembly, 18 (unpublished, on file with author).

[302] Ministry of Planning and Investment, *70 Years of Planning and Investment Field*, above n 292, 3.

[303] See Bui Van Cuong, 'Restructuring State-Owned Enterprises in the Central Enterprise Section: Requirements, Difficulties and Solutions' in Ho Chi Minh National Academy of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 25 June 2014) 29, 29–36.

[304] Eg, as of 31 December 2012, a total debt of all SOEs was slightly above VND1.68 million billion in which 80% or 1.3 million billion came from just 105 SOEs (conglomerates and general corporations). See Report No 490/BC-CP Dated 25 November 2013 of the Government on Financial Status and Performance of Enterprises Which the State Holds 100% Capital and Enterprises Which the State Holds Shares and Contributes Capital in 2012, and Directions for the 2014–2015 Period (Report Reserved for the National Assembly) Part I(A); Chu Van Cap, 'A Cadre of Leading Officials Managing State-Owned Enterprises: Issues, Success and Failures; Reasons and Lessons' in Ho Chi Minh National Academic of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 2014) 165, 165–6.

collapsed because of misinvestments, mismanagement and corruption, with debts of over USD6 billion (just above 5% of the 2010 GDP).[305] Leaders of conglomerates report directly to the government and, in practice, the PM Nguyen Tan Dung (2006–2016) and Cabinet.

The average ratio of turnover to capital for the SOE sector was 1:1, or lower if considering all debts and extravagant use of capital. In contrast, for the other sectors, the ratio increased to 20:1.[306] Moreover, the employment rate in the state sector continued dropping to 14% and this rate in the foreign sector remained at 23%, while the private sector provided 63% of jobs with gradual increase.[307] Economic experts Bui Trinh and Nguyen Tri Dung asked, 'if state investments have not translated into production or surplus value, where did the money go?'.[308] Although many SOEs were profitable, they could not compensate for the considerable losses and negative productivity of the entire sector.

(4) Cause and effect of the preference for SOEs

These facts reveal the Vietnamese leaders' actions regarding state businesses in post-WTO accession. Although they trimmed the SOE sector, as promised, the substance of this sector changed little, as the party-state has remained a dominant player seeking market profits. Its interwoven commercial and regulatory roles result in inevitable conflicts of interest and present a challenge to guaranteeing legal fairness between state and non-state investors.

Instead of learning the lessons from the collapse of the Soviet Union, the party-state has remained faithful to the vision of the constitution for SOEs to 'lead the way' towards an idealised socialist state. Nghia, Malesky and London submitted that this idealised socialism or

[305] Vietnam's GDP of in 2010 was just UD115.983 billion (World Bank), whereas Vinashin cost about US4.1 billion (Quang Truong) and Vina lines cost about US2 billion (Vuving): Truong, above n 208, 8; Alexander L Vuving, 'Vietnam in 2012: A Rent-Seeking State on the Verge of a Crisis' [2013] (1) *Southeast Asian Affairs* 323, 328. See also Cap, above n 304, 165, 174.

[306] World Bank and Donor Working Group, above n 299, 32.

[307] Drafting Committee of Enterprise Law (Amendment) Project, Ministry of Planning and Investment, 'Review Report of the Implementation of Enterprise Law 2005' (August 2013) 11–2. See also Dwight H Perkins, *East Asian Development: Foundations and Strategies* (Harvard University Press, 2013) 122–152.

[308] Bui Trinh and Nguyen Tri Dung, 'Selection of Policies in the Current Contexts' in National Assembly Economic Committee (ed), *Proceedings of the Spring Economic Forum* (2014) 32, 33–4.

state-directed capitalism is suboptimal because it has not promoted socioeconomic fairness, as promised.[309] With minus productivity together with declining job provision and debts above capital, the SOE sector is struggling to survive, instead of leading the economy. Rather, private investors, together with foreign businesses, are driving much of Vietnam's socioeconomic development.

These realities suggest that there are personal benefits to maintaining the ineffective state sector. While SOEs are present in almost all economies (including Australia), the roles of state businesses in public value creation are questionable because of the issues of political interference, corruption and limited efficiency.[310] Observing corporate law reforms in emerging economies, Claessens, Yurtoglu, Black and Kraakman noted that policy goals were abused to consolidate the ties of officials with SOEs to advance rent-seeking.[311] Vietnam is no exception.

Vietnamese SOEs receive preferential treatment mainly from their ties with high-ranking bureaucrats and politicians.[312] National resources are channelled into their central SOEs, especially the 11 conglomerates. Vuving even considered "Prime Minister Nguyen Tan Dung a leading rent-seeker […] with a largely free hand to appoint the members of the government and the bosses of the state-owned conglomerates" because political, economic and regulatory powers made the PM more influential than the party General Secretary.[313] This situation

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[309] Malesky and London, above n 296; Nghia, above n 88.

[310] See PWC, *State-Owned Enterprises: Catalysts for Public Value Creation?*, (2015); OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, 2015). See also David Robinett, 'Held by the Visible Hand: The Challenge of State-Owned Enterprise Corporate Governance for Emerging Markets' (World Bank, 2006); Przemyslaw Kowalski et al, *State-Owned Enterprises: Trade Effects and Policy Implications* (OECD Publishing, 2013).

[311] Stijn Claessens and B Burcin Yurtoglu, 'Corporate Governance in Emerging Markets: A Survey' (2013) 15 *Emerging Markets Review* 1; Bernard Black and Reinier Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109(8) *Harvard Law Review* 1911, 1970–1.

[312] Vuving, 'Vietnam in 2012', above n 305; Adam Fforde, 'Vietnam in 2012: The End of the Party' (2013) 53(1) *Asian Survey* 101, 103–5.

[313] Vuving, 'Vietnam in 2012' above n 305, 323, 326. Vuving, 'Vietnam: A Tale of Four Players' above n 183. Vuving argued that the PM represented "a clear break from old-style communism" with his family having relations with the United States: Alexander L Vuving, 'Vietnam: Arriving in the World — and at a Crossroads' [2008] Southeast Asian Affairs 375, 382. See also Adam Fforde, 'Economics, History, and the Origins of Vietnam's Post-War Economic Success' (2009) 49(3) Asian Survey 484, 494.

turned Vietnam into "a rent-seeking state" in which the party-state elite usually gained the greatest benefits, and bureaucrats controlling SOEs became a vested interest group who benefited from the status quo of the unfair enterprise legal regime.[314]

The SOE preference caused vast legal, social and economic problems. This led to piecemeal legal transfers and inertia in enterprise legislative reform, in case such transfers affected state businesses.[315] Consequently, enterprise legislation had limited scope and insufficiently regulated practice and misconduct in this largest business sector. The SOE preference was also often exploited to retain rents for senior bureaucrats, who were closely linked with SOEs and other majority shareholders.[316]

Moreover, the SOE preference created unfair competition against private small-scale investors. This problem increased their annual ended rate to about 50% because privileges assisted SOEs to crowd out private business and oppress minority shareholders more easily.[317] This demonstrated that the party-state did not facilitate or protect private businesses, even though they were the main providers of jobs and government tax revenue. This affected market stability and socioeconomic welfare.

The SOE preference was the major cause for the 50% GDP debt created by this sector.[318] Although national financial and non-financial resources were poured into SOEs, the party-

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[314] See Vuving, 'Vietnam in 2012' above n 305, 323; London, above n 190, 375, 395–6; Nguyen Tien Dung and Le Hong Nhat, 'Restructuring State-Owned Enterprises: Institutional Economics Perspectives' in the National Assembly Economic Committee (ed), *Proceedings of the Autumn Economic Forum* (2014) 109, 115.

[315] This approach is considered the gradualist paradigm. It originated from the Renovation 1986, was intended to control the pace of reform and reduce disruptions, but was also misused. See Rama, above n 175, 20–1; Riedel and Turley, above n 136; David Dollar, 'Transformation of Vietnam's Economy: Sustaining Growth in the 21st Century' in Jennie I Litvack and Dennis A Rondinelli (eds), *Market Reform in Vietnam: Building Institutions for Development* (Quorum, 1999) 31.

[316] See also Claessens and Yurtoglu, above n 311, 1, 24.

[317] See Nguyen Van Thang and Nick J. Freeman, 'State-Owned Enterprises in Vietnam: Are They "Crowding Out" the Private Sector?' (2009) 21(2) *Post-Communist Economies* 227; Dang Duc Thanh, 'In Order for the Vietnamese Economy to Integrate and Develop Sustainably' in the National Assembly Economic Committee (ed), *Proceedings of the Autumn Economic Forum* (2015) 48, 59.

[318] As discussed in Section 8.3.1 above. Debts of central SOEs were four times higher than their capital while debts of local SOEs were slightly above their total capital, both with an annual debt increase of sixteen percent: Dang Duc Thanh, 'In Order for the Vietnamese Economy to Integrate and Develop Sustainably' in

state unreasonably excluded this debt from other public debt, which was another 60% of GDP.[319] With a total debt exceeding its annual GDP, Vietnam teetered on the brink of a debt crisis, given that the maximum safe debt threshold for Vietnam is 45%.[320] The Ministry of Planning and Investment reported that the upsurge in public debt had impaired the business environment and led to a greater need for loans to SOEs, which had limited private investments to improve economic difficulties.[321]

Accordingly, the party-state began taking massive loans to pay-down mature debts, including the bad debts of SOEs, and obtained more loans from the ADB to 'restructure' SOEs.[322] Combined with budget over-expenditure, this compounded the gloomy economic prospects.[323] The aggregate consequence was macroeconomic turbulence from 2008 until 2013, with its ongoing repercussions.[324] Moreover, Vietnam could face a debt crisis when

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the National Assembly Economic Committee (ed), *Proceedings of the Autumn Economic Forum* (2015) 48, 50–1.

[319] International Monetary Fund, *Vietnam: Staff Report for the 2014 Article IV Consultation* (IMF Country Report No 14/311, International Monetary Fund, 15 July 2014); Tran Dinh Thien and Associates in Vietnam Economic Institute, 'The Vietnamese Economy 2014: An Overview' in The National Assembly Economic Committee (ed), *Proceedings of the Spring Economic Forum* (2015) 1, 23, 28.

[320] A safe debt threshold for Vietnam ranged from 40 to 45% of GDP, whereas a debt distress threshold ranges from 65 to 70% of GDP: International Monetary Fund, Vietnam: *Staff Report for the 2014 Article IV Consultation*, above n 319, 14. 'The real public debt of Vietnam has been already above 100% of GDP': Thien and Associates in Vietnam Economic Institute, above n 319, 1, 28.

[321] Report No 7020/BC-BKHĐT Dated 30 September 2015 of the Ministry of Planning and Investment on Results of 3 Years (2013–2015) Implementing the Overall Project of Economic Restructuring together with Growth Model Renewal towards Increasing Quality, Effectiveness and Competitive Capacity, 28.

[322] Eg, Vietnam was taking a USD630 million loan from ADB to reform SOEs from 2009 and another USD335 million (2014–2019): For updates, see https://www.adb.org/projects/39538-035/main#project-documents.

[323] The overexpenditure rate has averaged 6% since 2009, above the 5% cap under law on budget, with an increase stemming from routine expenditure: Vu Quang Viet, 'Overexpenditure of the Budget in Vietnam' (September 2017) 36 *New Age Journal* 217, 218, 223. See also Vu Sy Cuong, 'Discussing Sustainability and Discipline in Financial Policies' in the National Assembly Economic Committee (ed), *Proceedings of the Spring Economic Forum* (2013) 129.

[324] Truong Dinh Tuyen, 'Vietnam's Economy in 2014 and Prospect in 2015' in the National Assembly Economic Committee (ed), *Proceedings of the Spring Economic Forum* (2014) 4, 5. Wrong investment and corruption of conglomerates and other SOEs precipitated economic turbulence: Perkins and Anh, above n 214, 35. See also Vuong Quan Hoang, *Vietnam's Political Economy: A Discussion on the 1986–2016 Period* (Universite Libre de Bruxelles, 2014).

three more blocks of international bonds of several billons of US dollars become mature between 2016 and 2024.[325]

Apart from SOE preference, former Deputy PM Vu Khoan and Nguyen stated that macroeconomic turbulence also lay in the subjective mistakes arising from state-led advisers.[326] PM Nguyen Tan Dung (2006–2016) abolished the PM Research Commission in 2006, which had effectively advised his two predecessors. Moreover, the PM received the informal education (Years 10–12, medical practice and Bachelor of Law).[327] Policy formulation and implementation based on bureaucratic advice since became more problematic.[328] These problems increased dissent inside the party-state and widespread public calls for change because the growing public debt would create a huge burden on taxpayers in many years to come.

3.9.4 Public Attitudes and Calls for Reforms on Legal Fairness

Pandemic problems eroded public trust in state economic policies. Such displeasure was translated into unprecedented attempts to hold PM Nguyen Tan Dung accountable for problematic decisions, lax conglomerate oversight and poor Cabinet performance. He faced a lawsuit from a civil society activist, a proposal for a no-confidence vote by a parliamentarian, and a dethroning request from the party leader, although none of these affected his second

[325] International bonds and their interests, due after 10 years, include USD750 million (2005), USD1 billion (2010) and USD1 billion (2014): Thien and Associates in Vietnam Economic Institute, above n 319, 1, 30. Vietnam has been warned about fiscal shocks or economic crisis: World Bank and Ministry of Planning and Investment of Vietnam, *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy* (2016) 33; Viet, above n 323, 217, 223.

[326] Former Deputy PM Vu Khoan and Professor Nguyen Quang Thai quoted in Le Chau, 'Why Still Blame Subjective Circumstances', *VnEconomy* (24 September 2013) http://vneconomy.vn/thoi-su/sao-lai-cu-do-toi-cho-tinh-hinh-khach-quan-20130923092657350.htm.

[327] Http://www.chinhphu.vn/portal/page/portal/chinhphu/tieusulanhdao?personProfileId=960&govOrgId=2856.

[328] The credibility of the government's commitment to policies was low and decreasing. World Bank and Donor Working Group, above n 299, 19.

term in office until April 2016.[329] The then State President acknowledged that 'the population is tremendously indignant' about SOE privileges and market direction.[330]

People expected substantial reforms to reflect socioeconomic changes. This was demonstrated in the *Changing Attitudes toward Market and State Survey* of 1023 people representing broad interests. Respondents included private businesses and SOEs, associations and the press, central and local party-state officials, and a small portion of foreign investors and international bodies. The survey's overall finding was that economic policies and associated problems displeased most respondents, especially businesses.[331] This section examines three findings influential in enterprise law evolution via legal transfers and SOE reforms.

First, there was overwhelming support for a liberal private capital economy. In particular, 70% of respondents preferred private ownership to state ownership, while 87% favoured a market-driven economy over the SOE-privileged socialist-oriented market economy. This was reaffirmed in an international survey of 1000 Vietnamese people, in which 95% supported private capitalism — the highest rate among the 44 countries studied.[332] These results demonstrated that a healthy and competitive private market is a public expectation.

These results are explicable from historical, constitutional, research and especially practical perspectives. Private capitalism arising from French colonialism and the period of US involvement existed for over a century, and again became common following WTO

[329] Vuving, above n 183. For detailed discussion on these unprecedented actions towards PM Nguyen Tan Dung, see Chapter 4, Sections 4.8.2, 4.9.1.

[330] Statements of the State President Truong Tan Sang in a meeting with voters on October 2012, quoted in Vuving, 'Vietnam in 2012' above n 305, 323, 335.

[331] World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, above n 277, 46–7. Respondents were state actors (37%), businesses (41%), civil society (associations, the press and others, 11%), foreign investors and international bodies (11%): CAMS, 8–10.

[332] Pew Research Center, above n 213, 16. This study interviewed 1000 people in each of 44 advanced, emerging and developing countries.

accession.[333] Even communist party members and authorities can run private businesses, and the Constitution has recognised both private and state capitalism since 1992.[334]

Studies on political, economic and legal evolution further explain the presence of mixed capitalism in Vietnam. Economic experts, Bui and Nguyen, uncovered that Vietnam partially adopted Hayekian economic liberal viewpoints (fed by Western experts advising the *Enterprise Law 1999* and reforms for the Western-led WTO accession) and later shifted to more restrictive Keynesian economics to increase regulatory intervention.[335] This remained the case, although the party-state avoided acknowledging these facts. Likewise, Vietnamese and foreign scholars, including Nguyen and Fforde, described the vast SOE sector as neo-capitalism, authoritarian capitalism and state capitalism, while Truong stated that Vietnamese state capitalism is ripe for change.[336]

The SOE preference, discussed above, provides evidence that further explains why people prefer private capitalism. For instance, the contributions of private and foreign businesses to GDP and job growth doubled those of the SOE sector. The SOE preference also reveals that SOEs largely aim to seek profits for the party-state and favour elite interests over the public good, by dominating numerous lucrative fields (including banking, telecommunication and petrol). It is the significant roles of private capitalism in supporting socioeconomic welfare that appears more important to people.

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[333] See detailed discussion in Section 7.3.4 above.

[334] *Constitution 1992* (Vietnam)1992 s 16 (amended in 2001); *Constitution 2013* (Vietnam) s 51.

[335] Trinh and Dung, above n 308, 32, 32–39. See also detailed discussion on the contexts and contents of Enterprise Law 1999 in Section 3.8.2 above.

[336] Pietro Masina, 'Vietnam Between Developmental State and Neoliberalism: The Case of the Industrial Sector' in Chang Kyung-Sup, Ben Fine and Linda Weiss (eds), *Developmental Politics in Transition: The Neoliberal Era and Beyond* (Palgrave Macmillan, 2012) 188; Fforde, above n 274, 357, 371; Ruchir Sharma, *Breakout Nations: In Pursuit of the Next Economic Miracles* (Penguin, 2013) (Vietnam as authoritarian capitalism); Truong, above n 208, 22. See also Lan Nguyen, *Guerrilla Capitalism: The State in the Market in Vietnam* (Chandos, 2009); Quang Truong and Chris Rowley, 'Vietnam: Post-State Capitalism' in Michael A Witt and Gordon Redding (eds), *The Oxford Handbook of Asian Business Systems* (Oxford University Press, 2014) 283.

These realities demonstrated an inherent capitalist economy, despite the 'socialist-oriented' label attached to 'the market economy' in development policies and the Constitution. In essence, this label connotes socialist politics to maintain a single party-state's preference for SOEs (usually majority shareholders) under state capitalism. This label is designed to compete with private investors (largely minority shareholders) under private capitalism in the market. Above all, the preference for SOEs continues because party-state leadership and senior bureaucrats benefit from them.

Second, the pace of reform was not sufficiently rapid to meet its trade commitments, public expectations and business needs. Despite Renovation over decades, 75% of Vietnamese people believed that the state had not established a fair and full market economy, as promised.[337] To convince this majority, faster, deeper and broader market reforms were necessary to address economic institutional defects, interest group proliferation and reform fragmentations. Any delay would further cause coordination costs, conflicting rules, state investment inefficiency and public dismay.

Third, an absolute majority of the survey respondents supported Western effective measures, including ending all concessions for SOEs and strengthening law, enforcement and transparency.[338] Likewise, academia held a national conference scrutinising the success and failure of SOEs to advise an end to their privileges.[339] Even the late Party leader's son, Le Kien Thanh, often criticised SOE privileges in the media to push for real change.[340] Such concordance is understandable, given that SOE preference has distorted the market and

[337] World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, above n 277, 16–17, 48.

[338] Ibid 34–8.

[339] See, eg, Ho Chi Minh National Academic of Politics and Vietnam Energy Association, *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 2014).

[340] The writing of Dr Le Kien Thanh was often published in various mainstream newspapers, including the *World Security and People's Intellect*. See, eg, Le Kien Thanh, 'Have We Really Trusted the People?', *World Security Online*, 2 January 2016 <http://antgct.cand.com.vn/So-tay/Chung-ta-da-thuc-su-tin-nhan-dan-377799/>; Le Kien Thanh, 'After 30 Years, Thinking of the Second Renovation', *Word Security Online*, 19 February 2017 http://antgct.cand.com.vn/So-tay/Sau-30-nam-nghi-ve-cuoc-doi-moi-lan-thu-hai-428419/.

undermined legal fairness, private business opportunities and minority investor protection.[341] People generally expected more rapid, complete and effective SOE reforms[342] because the SOE preference undermined legal and economic reforms. The survey indicated a broad consensus for subjecting the SOE sector to legal fairness to protect minority shareholders as part of market liberalisation.

It is also noted that legal transfers in *Enterprise Law 2005* and WTO accession informed new positive thinking among individuals, especially private investors.[343] This suggests that people expected changes closer to common international standards, rather than ineffective home-grown solutions. It could be argued that people would support legal transfers that could improve legal fairness for all investors, such as oppression sections.

3.9.5 Framework for Comprehensive Reforms, Enterprise Law 2014 and Minority Shareholder Protection

Widespread socioeconomic problems, including mounting public debts, market instability and social criticism, have compelled the party-state leadership to seek measures to improve socioeconomic welfare. International practices have demonstrated that a thriving economy need an efficient business community, led by private businesses, with their total number equivalent to at least 2% of the population .[344] This means that Vietnam needs to increase from about 373 000 operating enterprises (2013) to 2 million effective enterprises (2020).[345]

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[341] See eg, Nguyen Dinh Cung et al, *State-Owned Enterprises and Market Distortion* (Central Institute for Economic Management, 2015).

[342] World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, above n 277; World Bank and Donor Working Group, above n 299, 3.

[343] See World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, above n 277, 15–6; Pew Research Center, above n 213, 6.

[344] World Bank and Donor Working Group, above n 299, 41. Thanh, above n 318, 48, 59.

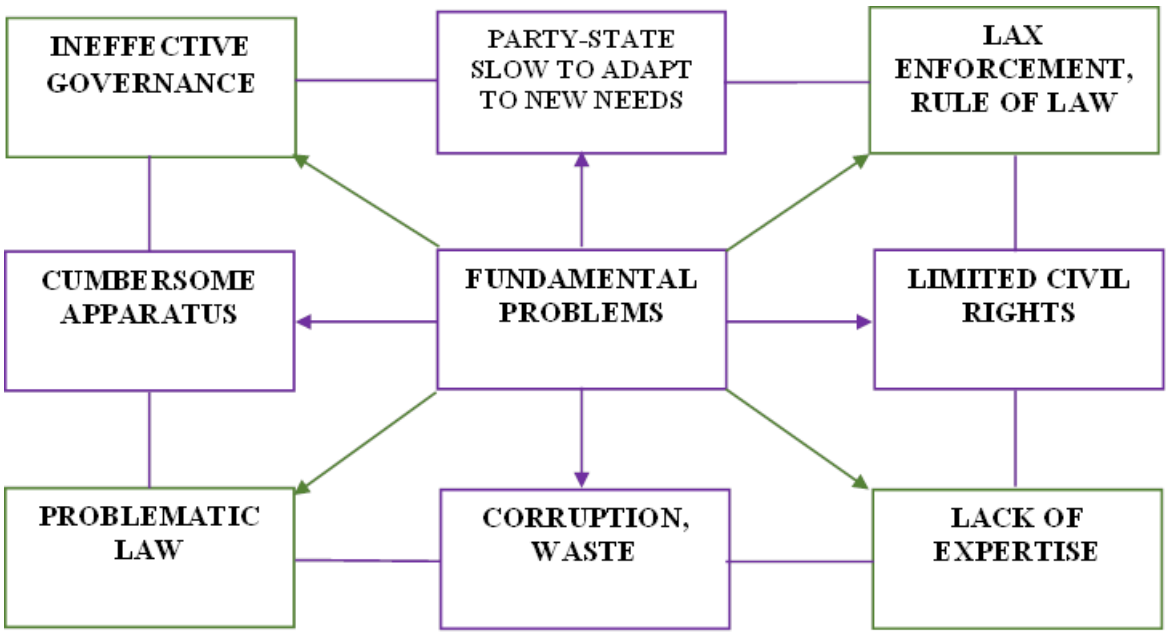
[345] The population would be nearly 100 million people in 2020. For the number of operating enterprises 2009–2013, see General Statistical Office, *Statistical Handbook of Vietnam* (Statistical Publishing House, 2014) 75. For the number of new registered enterprises from 1990 to 2014, see Ministry of Planning and Investment, *70 Years of Planning and Investment Field*, above n 292, section Support for Small and Medium Enterprises, 3.

Although the government's goal until 2020 is only 1 million functioning enterprises that account for 49% total investments in the market, this still remains a huge task.[346]

These goals are served by protecting fairness for minority shareholders. Effective fair protection underpins a healthy economy because, together, they are the backbone of the Vietnamese market. Vietnam has arrived at a turning point that needs substantial changes.

An extensive reform framework was created in the 2011 to 2020 Socio-Economic Development Strategy, which informed the 2013 Constitution, *Enterprise Law 2014* and government resolutions for improving the business environment and national competitiveness towards 2020. As part of the reform framework, eight fundamental problems were acknowledged, which are summarised in Figure 3.2 and explained further in Table 3.1. Recognising the problem is the first step to finding a solution. Thus, these eight interrelated problems (obstacles to progress) can become the pathways to future solutions (as discussed in Chapters 6 and 7).

Figure 3.2: Eight Interrelated Fundamental Problems in the Vietnamese Party-State



[346] See Resolution No 35/NQ-CP Dated 16 May 2016 of the Government on Supporting and Developing Enterprises until 2020.

The reform framework is summarised in Table 3.1 below.

Table 3.1: Framework for Comprehensive Reforms and *Enterprise Law 2014*

Socio-Economic Development Strategy 2011–2020	Recognising eight interrelated fundamental problems (obstacles to progress) as the primary cause of socioeconomic problems and poor performance outcomes: 1. Party-state slow to adapt its thinking to new development needs, 2. Limited facilitation of civil rights, 3. Problematic law, 4. Lax enforcement and rule of law, 5. Ineffective state governance because of inconsistencies between statements and actions, 6. Cumbersome apparatus, 7. Problems concerning lack of expertise and personalities of public officials, and 8. Endemic corruption alongside serious waste of financial resources, particularly by SOEs.
	Reiterating reform goals: Complementary political and economic changes to pursue five objectives of democracy, fairness, civil society, a strong nation and a rich people. The strategies confirmed that these were the highest criteria to assess upcoming reform outcomes.
	Laying down generic solutions: ▪ *Reforming the legislative process and judicial enforcement of law to create a business environment that ensures business freedom, with fair and transparent competition among all investors.* These were identified as strategic goals. ▪ Transforming institutions to remove obstacles to promote the private sector strongly, especially shareholding companies. ▪ Transforming the state apparatus and public governance, and administering the economy based on market principles. ▪ Unleashing domestic resources as decisive factors to sustain economic transition, while attracting foreign resources to support it, and increasing the number, expertise and ethics of business people. ▪ *Strengthening the leading role of the SOE sector*, and recreating stronger conglomerates with dominant state stakes, despite constantly admitting the ineffectiveness of SOEs.[347]

[347] Communist Party of Vietnam, above n 130, 74.

The Constitution 2013[348]	▪ Reaffirming the five reform objectives of the strategies. ▪ Requiring the party and state to operate following and within constitutional and legal limits. ▪ Prohibiting discriminatory treatment, stressing the equality before the law of all economic sectors, yet retaining the leading role of the state sector. ▪ Confirming freedoms of information, association, business, speech, press and protest based on law.
Government Resolutions 19/NQ-CP 2014, 2015, 2016	▪ Recognising limited responsiveness to changes from many ministries and state bodies (bureaucratic sabotage of reforms). ▪ Acknowledging poor investor protection rankings as a main reason causing overall rankings of national competitiveness and business environment to be much lower than those in most ASEAN economies. Considering improving these elements is urgent. ▪ Targeting reforms to increase these rankings to the average ASEAN–4, including Singapore, Malaysia, Thailand and the Philippines,[349] following criteria and annual assessments of the WB and World Economic Forum. ▪ *Prioritising an upgrade of minority shareholder protection in enterprise law following international standards (eg, OECD principles, assessed by the WB). Increasing the protection ranking to top-30 in 2020 (rankings of 117 in 2014, 121 in 2015 and 122 in 2016).*[350] *Improving judicial litigation regulations to simplify procedures and fast-track the trial of small disputes and those between small and medium businesses. Requesting the Supreme People's Court to initiate online case management for local courts.* ▪ Preparing for full implementation of WTO commitments from 2018 and operating SOEs following market mechanisms. ▪ More consulting investors in formulating business policies and publicly disclosing their comments for transparency. ▪ Requiring VCCI, Vietnam Lawyers Association, Vietnam Bar Federation, business associations and professional associations to conduct independent studies to make policy recommendations to the government. ▪ Increasing information distribution, encourage businesses and people to actively provide policy criticism and suggestions, and open forums to receive these on the government webpage.

[348] *Constitution 2013* (Vietnam) ss 3, 4, 8, 16, 25, 33, 51.

[349] See Resolution No 19/NQ-CP Dated 12 March 2015 of the Government on Primary Missions and Solutions to Continue Improving Business Environment and Increasing the National Competitiveness Capacity 2015–2016; Report No 7011/BC-BKHĐT Dated 29 September 2015 of the Ministry of Planning and Investment on the Results Following Six Months Implementing Resolution No 19/NQ-CP Dated 12 March 2015 of the Government on Primary Missions and Solutions to Continue Improving Business Environment and Increasing the National Competitiveness Capacity 2015–2016 (Document for the Meeting Session of the Government 9/2015); Resolution No 19-2016/NQ-CP Dated 28 April 2016 of the Government on Primary Missions and Solutions to Improve the Business Environment and Increase the National Competitiveness Capacity for two years 2016–2017, with orientation towards 2020.

[350] Annual rankings available at http://www.doingbusiness.org/data/exploreeconomies/vietnam/.

This framework consolidated and expanded earlier statements in the 1986 Renovation, the Socio-Economic Development Strategy (2001–2010) and previous Constitutions. It includes many positive signals, as seen in Table 3.1. By recognising these eight fundamental problems, the party-state understood that the resultant solutions had to come from internal changes. Its commitments were substantial, including improving political leadership, economic policies, laws, institutions, legislative process, public consultation, civil society encouragement, litigation rules and judicial implementation. Another bold promise was the pronouncement of the constitutional fairness principle as the highest criterion to assess these reforms.

The new policies in the Socio-Economic Development Strategies to improve the minority shareholder protection law ranking to reach the global top-30 were highly ambitious. As noted above, the WB's annual *Doing Business* reports demonstrated that judicial redress is very limited while oppression sections are absent, despite rather easy and affordable court access and the presence of various common law principles in the enterprise laws. Legal transfers of litigation provisions and corporate governance from common law jurisdictions would be appropriate to materialise these policies and congruent with the public preference for Western effective rules.[351]

This framework is reiterated and detailed in the *Master Plan on Economic Restructuring 2013–2020*.[352] This blueprint prioritised the reorganisation of the securities market, measures to tackle the misconduct of shareholders, and reform of the corporate governance of SOEs — all aimed at protecting minority shareholders.[353]

This plan also prioritised trade opportunities with strategic markets, including Australia and the US.[354] Given the mutual interests between Australia and Vietnam, Australia is providing aid and technical assistance for many elements of this plan via the Restructuring for a More Competitive Vietnam (RCV) project, with AUD3.1 million (2014–2016) and an expected

[351] Public preference for Western effective rules was discussed in Section 3.9.4 of Chapter 3. The recent legal reform and the potential legal transfer of litigation provisions will be examined in Chapters 4, 5 and 6.

[352] Decision No 339/QĐ-TTg Dated 19 February 2013 of the Prime Minister Ratifying Master Plan on Economic Restructuring Associated with Shifting Growth Model Towards Enhancing the Quality, Effectiveness and Capacity of Competition in the Period of 2013–2020.

[353] Ibid, 14–16.

[354] Ibid, Part I.4(c).

extension to 2020.[355] This project implemented the Australian revised strategies, including advocacy for rules-based global trade in Vietnam, SOE reforms and private sector development focusing on small and medium businesses.[356] These priorities would also benefit minority shareholders.

The project's flagship was support for market reforms and *Enterprise Law 2014*, advised by experienced consultants, such as Mallon and Goddard.[357] Experts of the Australian Consumer and Competition Commission, together with the Productivity Commission, were also invited to share how Australia improved 'highly regulated and anti-competitive' problems from 1970s onwards.[358] This is helpful for Vietnam, as Australia succeeded in upgrading state institutions and corporate laws to tackle market misconduct in the following decades (discussed above). Moreover, this project required Vietnam to seek contributions from non-state researchers and public comments via the press.[359] These activities would facilitate Vietnam's civil society and Australian corporate law transfers.

However, this framework entailed similar problems to its predecessors. It continued to emphasise the leading role of debt-making SOEs to maintain their privileged status (Table 3.1 above), which contradicted the new policies on minority shareholder protection and the promise to assess reforms following the principle of fairness. These conflicting policies were

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[355] RCV is the Restructuring for a more Competitive Vietnam. The counter funding of Vietnam was AUD135 000. DFAT approved the second phase corresponding with Vietnam's priorities of the Social Economic Development Plan 2016–2020: Department of Foreign Affairs and Trade, *Restructuring for a More Competitive Vietnam Project, Project Summary* (August 2014); DFAT, *Management Response to Mid-term Review Report of the Restructuring for a more Competitive Vietnam Program (RCV)* (EDRMS File: HN16/225, 2016).

[356] See Agreement No 70306 on Direct Funding Agreement between the Government of Australia and the Government of Vietnam in Relation to Restructuring for a more Competitive Vietnam Project (RCV), Signed on 30 June 2014; Department of Foreign Affairs and Trade, *Aid Investment Plan: Vietnam 2015–16 to 2019–20* (2015).

[357] See David Goddard, 'Draft Revised Law on Enterprises — Some Comments' (Paper presented at the Conference on (Amended) Enterprise Law and Sharing International Experiences in Corporate Governance, Sponsored by DFAT, Hanoi, 15 August 2014); Raymond Mallon, *Reforming Viet Nam's Economic Institutions to Accelerate the Transition to a Market Economy* (Restructuring for a more Competitive Viet Nam 2015); Raymond Mallon, *Restructuring for a More Competitive Vietnam: Project Context* (2014).

[358] See Michael Woods, 'Bottlenecks to Productivity Growth: Some Reflections on the Australian Experience' (Paper presented at the Restructuring for a more Competitive Vietnam (RCV) Project Launch workshop, Hanoi, 11 August 2014). Professor Michael Woods was then Deputy Chairman of Australia's Productivity Commission from (1998–2014). See also 'Speech by Australian Ambassador' (Paper presented at the National Assembly Economic Forum Autumn 2015, Sam Son Town, Thanh Hoa Province, 27 August 2015). Australian experts also attended this Forum.

[359] See the Operation Manual, Funding Agreement and ongoing updates at http://en.rcv.gov.vn/About-RCV.htm.

an underlying cause for abused gradualism in the reform of enterprise law, with incomplete legal transfers designed to reduce the effects on state businesses.[360] Moreover, although this framework recognised the bureaucratic sabotage (capture) of reforms and the need to transform institutions, no specific initiatives were launched. This capture problem, the SOE preference and institutional inadequacy could have influenced the creation of *Enterprise Law 2014* for minority shareholder protection goals (see Chapter 4).

3.10 Major Factors Informing the Legal Transfer of Enterprise Law

Foregoing reviews demonstrate that many major factors have been linked with the evolution of Vietnamese enterprise law over the last 25 years. This can be seen in the following observations.

(1) Enterprise laws are a hybrid of civil law and common law rules. There has been a gradual increase in the common law rules from Australia. These transfers are founded on the concepts of legal fairness and business freedom in Vietnamese Constitutions, which also have Western origins.

(2) The main drivers for enterprise law transfers were economic reforms. In particular, recent policies of protecting minority shareholders through judicial remedy are part of the existing economic restructuring package. Legal transfers in *Enterprise Law 2014* under these policies are aimed at addressing uncontrolled oppressive conduct and adding litigation rights. These issues have become priorities in this law because they were the main causes for the poor international rankings of minority investor protection, as assessed in the WB's *Doing Business* reports, despite easier judicial access and affordable court fees.

(3) Enterprise law changes were often induced from outside the party-state. Market reform demands, donors and their legal advisers, cross-national relationships and private stakeholders were the major forces counteracting the inertia of the single party.

(4) Commitments to legal fairness and impartial judicial reviews in trade agreements — especially with the US and WTO — provided impetus for reducing legal discrimination. As

[360] An example of this problem was the case of *Enterprise Law 1999*, as discussed in Section 3.8.2 above.

these commitments rank above domestic laws and serve public interests, the party-state could not ignore them, although the implementation remains tokenistic. However, commitments are important because they reinforce calls for greater changes.

(5) Enterprise laws benefited from the active participation of civil society in lawmaking. This result came from cooperation with donors, the constitutional freedom of information, and the open-minded actions of PM Vo Van Kiet. Civil society continues growing, as WTO accession has improved socioeconomic liberalisation.

(6) The business community generally takes up foreign legal transfers. Likewise, the public largely supports those transfers, which address SOE privileges to assist the economic restructuring and the disadvantaged minority shareholders.

(7) Enterprise law reforms were not accompanied with an overall commitment to a market economy, or supported by establishing supportive institutions. The reforms barely addressed the lawmaking and drafting institutions, while the legislative process was improved too slowly, followed by some judicial changes, including first binding precedents applicable from 1 June 2016. Likewise, state security regulators needed much improvement, while a workable reform advisory body (the PM Research Commission) was dismantled. Vietnam has not well prepared the institutions that are fundamental to legal transfers and market regulation.

(8) Economic and legal reforms follow contradictory policies. By equitising SOEs, the party-state still wants market control, yet also wishes to attract small investors. Minority shareholder policies coexist with legal advantages for majority shareholders to implicitly benefit SOEs.[361] This is the SOE preference hidden behind the enterprise laws.

(9) Enterprise law transfers were piecemeal and often held foreseeable deficiencies, which were then fixed bit by bit to justify the implementation of commitments.[362] These tokenistic

[361] Eg, majority shareholders hold at least 10% of total company shares for six consecutive months and have exclusive rights, for example nominating candidates for the board and accessing financial reports of the company: *Enterprise Law 2005* s 79 (2); *Enterprise Law 2014* s 114 (2).

[362] This piecemeal approach has been demonstrated in Table 3.1 Renovation 1986, subsequent reform frameworks and different laws above.

improvements were often inadequate and too late to provide workable measures for market problems. These transfers favoured the party-state interests over inclusive economic growth.

(10) Enterprise law reforms often encounter the sabotage or capture by vested interests (such as politically powerful bureaucrats controlling central SOEs). Although this regulatory capture has led to piecemeal transfers, it was suitable to the SOE preference and hence tolerated by the party-state leadership. In essence, the interrelated issues of the SOE preference, piecemeal transfers and regulatory capture arose from the interest ties of SOEs with bureaucrats and the party-state.

These 10 observations reveal that some factors are independent and may assist legal transfer, while others are interrelated and may hinder it. Therefore, these factors can be grouped as:

- foundational factors (legal origins, alongside commitments in the Constitution and trade agreements about legal fairness);
- legal transfer drivers (need and pressure to address legal deficiencies in providing remedies for oppressive conduct targeting minority shareholders);
- non-state stakeholders (such as private investors, foreign investors, civil society, donors and foreign business associations in Vietnam);
- state institutions in charge of law making, drafting and implementation (for example, the legislature, the government and the court); and
- nexus of SOEs with controlling bureaucrats and the party-state (SOE preference, the bureaucratic capture of reform, and the market interests of the party-state).

Conclusion

Australia and Vietnam have used legal transfer as an important approach to corporate law reform. This reform, especially in regard to shareholder litigation, shared a high degree of Western legal origin.

The evolution of Australian oppression sections and Vietnamese litigation provisions in this corporate law reform context was informed by eight interrelated factors (in italics). For instance, *widespread corporate misconduct* and *corporate legal deficiencies* have placed pressures on *political leadership* to adopt *broad reform policies*. The renewed *lawmaking process* allowed *state institutions* to mobilise more contributions from *civil society* to reforms of corporate law, which also informed *the judicial implementation* of it. Among these factors, the extent of corporate misconduct and the actions of state institutions had a strong influence on the pace and scale of the corporate law reforms in both countries. However, the political leadership of the PM was the key factor for the success or failure of such reforms.

Complacency in corporate law reform occurred in both Australia and Vietnam, especially after some achievements. Both countries invested great efforts to improve law and institutions, mainly after corporate misconduct injured market efficiency. While reform is the art of catching up on fixing problems, Australia is much more effective than Vietnam in this regard. This means Vietnam can learn from Australia's success and failure when conducting upcoming complex reforms.

Interest groups have often captured legal reforms in both countries. However, the transformation of the Australian oppression sections in 1983 did not encounter this problem, while the reform of the Vietnamese *Enterprise Law 2014* did. The next chapter investigates the legislative process to clarify these issues.

CHAPTER 4: LEGISLATIVE PROCESSES OF REFORMING AUSTRALIAN OPPRESSION SECTIONS AND VIETNAMESE LITIGATION PROVISIONS

Introduction

The preceding chapter demonstrated that prevalent unfair corporate practices towards minority shareholders compelled Australia to transform its oppression sections in 1983 and prompted Vietnam to strengthen its corporate litigation provisions in 2014.[1]

This chapter (Chapter 4) draws on the regulatory capture theories discussed in Chapter 2 to investigate whether such legal changes in both countries were affected by the common problem of regulatory capture by interest groups. This investigation is essential to the examination of the legal transfer from Australia to Vietnam.

This chapter is divided into two parts. Part I examines the four stages of the lawmaking process in Australia, while Part II examines the corresponding stages in Vietnam. The main focus is on articulating the most important drafting and deliberating stages to assess the roles and actions of participants. This assessment aims to elaborate how four major factors — the legislative process, lawmaking institutions, political leadership and civil society as identified in Chapter 3 — have informed the major reforms of Australian oppression sections and Vietnamese litigation provisions. The outcomes of this assessment provide the basis for applying the legal transfer framework in Chapter 6.

This chapter demonstrates that Australia has designed a legislative process to prevent regulatory capture by interest groups, whereas Vietnam has not yet done so. In Australia, the interest groups responsible for capturing the regulatory process were primarily business groups, while, in Vietnam, the ministerial interest groups controlling the state-owned enterprises (SOEs) were responsible for capturing the regulatory process. Thus, this

[1] *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth); *Law on Enterprises 2014* (Vietnam) (‘*Enterprise Law 2014*’). Australia in 1983 was more developed than Vietnam in 2014. This makes the examination meaningful because it shows how Vietnam can learn from Australia’s past to address problems that Vietnam presently faces.

bureaucratic capture could be viewed as a proxy for the systemic institutional problems in the legislative process in the Vietnamese single-party state.

While regulatory capture is not a foreign occurrence in Australia, Vietnam represents such an extreme case of internal regulatory capture by vested interests that this raises questions about the potential effectiveness of transferring Australian oppression sections. This chapter considers six main themes that demonstrate the political, social and institutional environments within which the Australian oppression sections and the Vietnamese litigation provisions were reformed. These six themes are summarised as follows.

Table 4.1: Six Themes Important to the Effective Level of Reforms of Australia's Oppression Sections in 1983 and Vietnam's Litigation Provisions in 2014

Themes	**Roles of themes**	**Main features in Australia**	**Main features in Vietnam**
Structure of state power	Influence state's ability to introduce fair legislation	Distribution of powers Multiparty legislature	Concentration of powers Single-party legislature
Features of state institutions	Affect how they perform their functions	High level of independence, expertise, transparency and accountability	Modest level of independence, expertise, transparency and accountability
Essence of lawmaking process	Inform fairness and effectiveness in operating stages of process	Inclusive	Centralist
		Distinct functions	Concurrent functions
		Well-organised components	Disorganised components
Public consultation	Increase awareness in community and obtain broad viewpoints	Active participation of domestic business associations and civil society stakeholders	Active participation of foreign business associations and civil society stakeholders
Legal drafting	Influence effectiveness of legislative design in Bill	Independent drafters	Bureaucrats captured all Bill-related tasks
Debate and voting	Enable politicians to check quality of Bill and make informed decision	Much debate Multi-partisan support	Not much debate A single party rubber-stamping Bill

Part I: Reforming Australian Oppression Sections with an Inclusive Legislative Process

The Australian Constitution recognises three arms of government, which must operate on the relative separation of power and the rule of law.[2] Functionally, the legislature is the centre of legislative power, while the executive is involved in most stages of the lawmaking process.[3] For example, in the executive, the Attorney-General's Department, and the Treasury from 1996, sponsor corporate Bills, including oppression sections. In addition, the judiciary can make legal precedents through statutory application. This judicial institution is independent from both the legislature and executive, which are intertwined in practice. This part discusses the legislative process in which both the Parliament and executive played key roles.

Oppression sections were included in the *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983* (hereafter *Bill 1983*). *Bill 1983* was drafted under the instructions of the then Attorney-General. Matters in this Bill were not independently reviewed because this was optional. All Bills were checked by the Standing Committee for the Scrutiny of Bills to ensure they conformed to the principles of fairness and civil liberties. These Bills must be submitted to the multiparty Parliament for scrutiny, often encountering political obstacles. In practice, the composition of the parties in a particular Parliament influences the debate, voting and legislative outcomes.

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[2] See, eg, Michael Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33(3) *Australian Bar Review* 195; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014); Kevin Lindgren, 'The Rule of Law: Its State of Health in Australia' (2012) <http://www.ruleoflaw.org.au/principles>.

[3] The executive can block legislative changes at the initial stage or at parliamentary voting. Stan Ross, *The Politics of Law Reform* (Penguin Books, 1982) 91. Only a minority of parliamentarians have significant influence on law reform, such as the Prime Minister, the Cabinet, the frontbench ministers and the opposition. The backbenchers' role becomes more important when a government has a narrow majority. Reform proposals are usually made by the government, frequently with the involvement of pressure groups or public concerns. See Gary N Heilbronn et al, *Introducing the Law* (CCH Australia, 7th ed, 2008) 72–3.

4.1 Main Stages and Stakeholders in the Legislative Process of Reforming Oppression Sections in 1983

The amendment of *Bill 1983* was made through a legislative process of four stages, with some concurrent and sequential steps. The first and fourth stages had procedural importance, but were fairly straightforward, while the second and third stages had greater bearing on the substance of the process. Table 4.2 summarises the four stages and various roles of the main actors, including the sponsoring ministries, legislative drafters and external participants.

Table 4.2: Australia's Legislative Process of Reforming Oppression Sections in 1983

Stages of process	**Actors and tasks**
Stage 1: Placing reform proposal in the legislation program	▪ Proposal by Attorney-General ▪ Approval by Parliamentary Business Committee of Cabinet
Stage 2: Drafting and consultation	▪ Drafting by Office of Parliamentary Counsel ▪ Policy instruction, Bill disclosure for public consultation by Attorney-General's Department ▪ No regulatory impact assessment as yet compulsory
Stage 3: Debating and voting	▪ Debate is central to lawmaking ▪ Critical debates ▪ Debates recorded in Hansard, freedom of information
	▪ Three readings in Senate: ▪ The first reading is Attorney-General's formal introduction of *Bill 1983* ▪ The second reading speech is very important and required for every Bill. Critical debates in detail began after this speech ▪ The third reading is a formality when Senate passed *Bill 1983*
	▪ Three readings in House of Representatives: ▪ Similar to procedures in the Senate ▪ Formal introduction by the Minister for Trade Lionel Bowen
Stage 4: Assent	▪ *Bill 1983* signed by Governor-General

As demonstrated in Table 4.2, the government controlled the first stage of placing the reform proposal in the legislative program.[4] While there may be challenges to such proposals from rival parties, this did not affect *Bill 1983*. This Bill was a high priority for the government to address the pressing need to revise corporate law.[5] Likewise, the final stage of assent was basically procedural. It proceeded after both Houses had passed *Bill 1983* in the same form. After the Bill was introduced and passed in the Senate, the House forwarded it to the Governor-General for assent to become an Act.[6] The Governor-General rarely uses constitutional power to disallow an approved Bill.[7]

4.2 Drafting and Consultation Stages

This stage is very important because it has major functions that inform public participation and the design of an approved legislative proposal. These tasks include legal drafting following the instructions of the sponsor ministry, and information disclosure for public consultation.

4.2.1 Roles of Skilled and Independent Drafters in Designing Oppression Sections

The Office of Parliamentary Counsel was a dedicated independent statutory body responsible for writing *Bill 1983*.[8] Effective legal drafting is a demanding task; thus, drafters of this office have to be highly professional. For example, the First Parliamentary Counsel and the two

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4 For a summary of stages prior to Parliament, see Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) 78. For the current approval process, see at 4–8. Government ministers introduce most Bills. For private member Bills from 1901, see B C Wright and P E Fowler, *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012) 568–70.

5 Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1081 (Gareth Evans, Attorney-General).

6 In the past, the executive at times abused a proclamation by delaying it for a few years, which has been now addressed. Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 340–1.

7 *Constitution* s 58 gives the Governor-General three options: assent (including withholding), reserving the law for the Queen's pleasure and amendments. The two last options have been applied many times but rarely after 1990. Wright and Fowler, above n 4, 855; Evans and Laing (eds), above n 6, 339–40. For different commencement dates of an act, see *Acts Interpretation Act 1901* (Cth) pt 3 Commencement of Acts. For the assent procedure, see Department of the Prime Minister and Cabinet, above n 4, ch 15.

8 The Office of Parliamentary Counsel was established in 1970 to write federal Bills. *Parliamentary Counsel Act 1970* (Cth).

Second Parliamentary Counsels must be barristers, solicitors or legal practitioners of the High Court or Supreme Court having standing for at least five years.[9] The Governor-General appoints them for a term not exceeding seven years, with reappointments possible. These statutory criteria were designed to maintain appropriate expertise and the working independence of legal drafters.

Independence does not mean working in isolation. Drafters effectively commenced the drafting process following policy instructions from the Attorney-General's Department. The instructions were primarily in writing, with additional exchanges via the instructing officer when necessary.[10] Although this officer ensured that *Bill 1983* reflected the government's economic liberal policies, the drafters were responsible for the language and structure to target this goal. Statutory independence assisted them in communicating effectively with the sponsoring ministry, while reducing its opportunities to capture the legislative design. Overall, the apposite independence, cooperation and expertise of the drafters were important factors informing the design of this Bill.

Despite these factors, the design outcomes of oppression sections were mixed. The contents of legal standing, litigable conduct, grounds for court orders and available remedies under these sections were vastly expanded and uniformly applicable to all company members. This demonstrated Australia's economic liberal policy objectives to promote fairness and business freedom. However, the drafting techniques were not impressive. These four components were still squeezed into a single section with the traditional convoluted structure and obscure language.

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[9] The first parliamentary counsel is head of the office. As of December 2015, the Office of Parliamentary Counsel has 55 drafters (including the first and second parliamentary counsels), 40 publications staff and 30 corporate services staff. <http://www.opc.gov.au/about/index.htm>. *Parliamentary Counsel Act 1970* (Cth) ss 4, 5.

[10] For further details about positions of instructors, written and oral forms of instruction, requirements of instructions, and collaboration between drafters and instructors, see Department of the Prime Minister and Cabinet, above n 4, 26–7.

These drafting problems derived from both the sponsoring ministry and drafters. The policy instructions did not prioritise an efficient and effective legal design with a requirement for regulatory and financial impact assessments (not conducted until 1985).[11] As the Attorney-General generally favoured a doctrinal approach with complex wording,[12] he approved *Bill 1983*.

Another issue in this Bill was that drafters had not yet adopted the plain English style to simplify convoluted legislation.[13] Drafters responded to the 'tortuous drafting' criticisms by citing the constraints under the drafting instructions from the sponsoring ministry.[14] While drafting under bureaucratic instructions may be challenging, it was not a valid excuse for passively following instructions. The drafters had the statutory powers to raise concerns with the instructor and to place them into the memorandum.[15] In essence, the task of modernising legal drafting rested with the drafters. The Office of Parliamentary Counsel slowly changed the drafting style to improve the legibility of the text. The office began using plain English, simplifying sentence structures and using notes to assist readers.[16] The Attorney-General's Department endorsed these methods.[17]

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[11] See generally OECD, 'OECD Reviews of Regulatory Reform: Government Capacity to Assure High-Quality Regulation in Australia' (2010).

[12] See Robert Eagleson, 'Plain English in the Statutes' (1985) 59 *Law Institute Journal* 673; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (September 1993) xiii–xvi. The Bill must be cleared by the Attorney-General, followed by his or her political party. Department of the Prime Minister and Cabinet, above n 4, 36, 54. For criticism of MPs on the doctrinal approach of the Attorney-General Department, see Section 3 below.

[13] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 12, xxii, 1–5; Eagleson, above n 12, 673, 674; J G Starke, 'The Problem of Drafting Styles' (1986) 60 *Australian Law Journal* 368. The plain English style was not introduced until the Simplification Program (1993–1997).

[14] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 3 April 1984, 1111 (Robert Murray Hill); Attorney-General's Department and Office of Parliamentary Counsel, *Attorney-General's Department and Office of Parliamentary Counsel Annual Reports 1984–1985* (Australian Government Publishing Service, 1986) 259–260.

[15] Department of the Prime Minister and Cabinet, above n 4, 37.

[16] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 12, 6. See also I M L Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161.

[17] Attorney-General's Department, *Annual Report 1989–90* (1990) 2.

After the Treasury took charge of corporate law reform in 1996, these revised drafting techniques were deployed to reword the oppression sections in the *Corporate Law Economic Reform Program (CLERP) Act 1998* to increase the efficiency of regulation and accountability of market players.[18] The redrafting did not add any substantial content change to these sections because the 1983 design almost maximised their scope.[19] However, it made the sections dramatically clearer and simpler by using plain English and breaking up convoluted sentence structures. The simplified oppression sections were relocated to *Corporations Act 2001* (Cth) and remain the same until today.[20]

4.2.2 Public Consultation as a Conduit for the Participation of Private Stakeholders

Public consultation is a key aspect of policy development and an inclusive legislative process. This consultation can be conducted before and after drafting, by an instructing agency through online disclosure of Bills, or by a parliamentary committee through public inquiry of controversial proposals. Effective consultation must begin early in the legislative process and engage the entire community to reflect broad interests, assist with drafting directions, and refine Bills. It is argued that this consultation can improve policies, parliamentary debates and the resultant laws.[21]

From the early 1980s, the Hawke Government shifted the legislative process from the naked use of power to cooperation and teamwork, with extensive public consultation.[22] While this

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[18] Changes of oppression sections under the *CLERP Act 1998* have not attracted as much attention as the reform of these sections in 1983 because the changes mainly involved refining the language and structure.

[19] The *CLERP Act 1998* only clarified that the court may make orders even if the act, omission or conduct complained of has yet to occur or has ceased; and made two small clarifications about finalising remedies under oppression sections: the Explanatory Memorandum and the Corporate Law Economic Reform Program Bill 1998 (Cth) 34.

[20] Part I of Chapter 5 will examine the legislative designs of oppression sections 232–235 in the *Corporations Act 2001* in detail.

[21] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 12, xiv.

[22] Ross, above n 3, 242; Edwards, 'Policy and Regulatory Responsibility for Companies and Securities: The Process of Change' (1992) 2(1) *Australian Journal of Corporate Law* 20. See detailed discussions in Chapter 3 Section 3.

gradual progress placated interest groups,[23] it also afforded all stakeholders a fair opportunity to advance their ideas. As the drafting instruction agency, the Attorney-General's Department released the draft Bill for public comments without background papers on oppression sections. It appeared that the Hawke Government regarded broad support for these proposed amendments from all state governments, the business community, the investing public and the press as sufficient to warrant change.[24] Despite retaining substandard practices, the department allowed the public 'a large number of months' to examine the Bill.[25] This was encouraging because 'too much secrecy' in lawmaking in the 1980s was a cover to maintain rent-seeking.[26] Even the Opposition agreed that the Bill was subject to 'a great deal of public consultation'.[27]

This adequate disclosure period contributed to positive responses. Following calls from the government, the public provided numerous constructive contributions via around 100 submissions, largely from legal academics, practising lawyers, professional bodies and interest groups.[28] Such active public participation could be explained via social, economic and political aspects.

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[23] David Wishart, 'Corporate Law Reform: A Note on the Process and Program' (2000) *Australian Company Secretary* 140, 145. See also Michael J Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (Ashgate, Aldershot, 2001); Angus Corbett, 'A Review of: An Economic and Jurisprudential Genealogy of Corporate Law by Michael J Whincop' (2004) 13(1) *Griffith Law Review* 124, 126–7.

[24] See Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2705 (Peter Drew Durack); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 2884 (Lionel Bowen).

[25] Explanatory Memorandum, Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 (Cth) 21; Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1084 (Gareth Evans, Attorney-General). The public exposure of the project occurred 12 months before the Bill was introduced to the Senate on 5 October 1983. Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696 (Gareth Evans, Attorney General).

[26] Ross, above n 3, 242; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 12, xxx, 14. For detailed discussions on the capture of legal reform by interest groups, see Chapter 3, Sections 3.2, 3.3. For comments of problems in legal reform in recent years, see Gary Banks, 'Return of the Rent-Seeking Society?' (2013) 32 *Economic Papers* 405, 414.

[27] Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1081 (Peter Drew Durack).

[28] Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1081 (Gareth Evans, Attorney-General). Vital stakeholders, such as the stock exchanges and accounting bodies, also supported the Bill 1983. Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2690 (Jack Evans). Active public participation has been important to law reform practice and has been gradually increasing. Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Law*

First, social attitudes had changed significantly. While Australians had not often previously thought of social problems in legal terms,[29] they appeared more critical of corporate law defects in the wake of frequent bank misconduct and dramatic corporate scandals within the last 'two centuries of panic'.[30] In particular, the *Freedom of Information Act 1982* (Cth) meant that the public was better informed. It provided them with valuable insights into legal matters and placed them in a better position to comment on government proposals.[31] While endemic market problems triggered new social consciousness, this milestone legislation promoted the liberal values that facilitated greater civil society contribution to law reform.

Second, the magnitude and economic importance of *Bill 1983* interested the public. As stated by former High Court Justice Michael Kirby, the money at stake in the commercial law field usually attracted the legal minds, not to mention those with direct interests, such as business interest groups and legal practitioners.[32] Although corporate law is one of the 'tools of trade' for investors, its success or failure influences the market's wellbeing and eventually public life.

Third, the Hawke Government embraced both domestic viewpoints and foreign resources to address market expectations. *Bill 1983* took into account public contributions on the powers of companies and duties of directors, yet also retained the winding-up remedies in oppression

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Economic Reform Program Bill 1998 (1999) [1.13]; Commonwealth, *Corporate Law Economic Reform Program: Policy Reforms* (1998) iii, iv; Commonwealth, *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment*, Corporate Law Economic Reform Program Proposals for Reform: Paper No 6 (1997) 8, 41, 107; Commonwealth, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors*, Corporate Law Economic Reform Program Proposals for Reform: Paper No 3 (1997) 5, 65.

29 Ross, above n 3, 3, 205.

30 See generally Trevor Sykes, *Two Centuries of Panic: A History of Corporate Collapses in Australia* (Allen and Unwin, 1998).

31 Ross, above n 3, 155, 253–4; Michael Kirby, 'Freedom of Expression — Some Recent Australia Developments' (1993) 19(4) *Commonwealth Law Bulletin* 1778. Criticism is a feature of Australian society. Heilbronn et al, above n 3, Foreword by Justice Michael Kirby, viii.

32 Michael Kirby, 'Ten Requirements for Successful Law Reform' (2009) 11(1) *Flinders Journal of Law Reform* 76, 83. See also Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2 *Australian Journal of Corporate Law* 1; Bernard S Black, 'Is Corporate Law Trivial?: A Political and Economic Analysis' (1990) 84(2) *Northwestern University Law Review* 542, 549–550; Dennis Woodward, Andrew Parkin and John Summers, *Government, Politics, Power and Policy in Australia* (Pearson Education Australia, 9th ed, 2010) 343–9.

sections, following consultation with corporate sectors, and expanded earlier recommendations of British Lord Jenkins on these sections.[33] By taking these actions, the government demonstrated that it was capable of legislation reflecting broad interests that advanced its social commitment, while also addressing the Opposition's vigilance.[34] While a full adoption of public comments is not possible, the government was able to incorporate effective consultation outcomes in the drafting stage.

The federal and public practices regarding *Bill 1983* need to be viewed in the context of the 1980s, when noticeable changes in lawmaking approach had only just begun. Disclosure, transparency and public participation (among businesses, academics, lawyers and the press) cannot be fairly compared with the later reforms under CLERP from 1997 onwards with the advances in the internet, society and institutions.[35] Thus, these early changes were encouraging, although there was still much more room for improvement within the state domain, as discussed next.

4.3 Multidimensional Parliamentary Debates on the Bill 1983 and Oppression Sections

Debate and voting are important functions of a democratic legislature.[36] Broadly speaking, debate is a procedure in which candid arguments for and against proposed legislative designs

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[33] Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1081 (Gareth Evans, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2691 (Robert Murray Hill). See Christine Danos, 'Oppression, Winding Up and the Continued Retention of Parallel Shareholders' Remedies' (2008) 26 *Companies and Securities Law Journal* 259.

[34] See David Edwards, above n 22, 20. Legislative changes need to ensure the mature reflection of public submissions. See Law Council of Australia, Response to CAMAC's Issues Paper 'Aspects of Market Integrity' (10 March 2009) 1.

[35] Gwynneth Singleton et al, *Australian Political Institutions* (Pearson Australia, 10th ed, 2013) 141. For internet and research, Gerard Goggin (ed), *Virtual Nation: The Internet in Australia* (UNSW Press, 2004); Gerard Goggin, 'Internet' in Bridget Griffen-Foley (ed), *A Companion to the Australian Media* (Australian Scholarly Publishing, 2014) 218–220.

[36] See Wright and Fowler, above n 4, ch 14; Singleton et al, above n 35, 141; Josef Redlich, *The Procedure of the House of Commons* (Archibald Constable, London, 1908) vol 3, 42–3.

are raised and clarified so that better informed decisions can be made.[37] In this sense, debate involves more than just simple discussions, and includes constructive enquiries, suggestions, challenges and (where necessary) attacks to expose the questionable practices of rival political parties. Debate is protected by freedom of speech and parliamentary immunity.[38] The political environment in a particular Parliament is influential in the conduct of both debate and voting.

Bill 1983 was debated in the 33rd Parliament. The Labour Party government controlled the Lower House, while the balance of power in the Senate was held by the minor parties, rather than by the Liberal Party Opposition.[39] The two Houses of Parliament help maintain the system of checks and balances in a multiparty Parliament, as discussed below. This informs the legislative debate, especially in the Senate, which is a house of critical review, because it is not controlled by the government. This has been a common political situation in Parliaments, as the government has only controlled the Upper House once between 1980 and 2016.[40]

Bill 1983 was debated and approved in the Senate, followed by the House of Representatives, before receiving the assent of the Governor-General. All these steps were completed within two months to meet the pressing need for legal changes.[41] Although this Bill was read three

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[37] See Wright and Fowler, above n 4, 493–542; Evans and Laing (eds), above n 6, ch 10. Debate will have little impact on a Bill when the government holds the majority in a house. Even so, the debate is publicised and thus still subject to public monitoring.

[38] *Constitution* s 49. See Cheryl Saunders, *It's Your Constitution: Governing Australia Today* (Federation Press, 2nd ed, 2003) ch 23 Checks and Balances; Wright and Fowler, above n 4, ch 19 Parliamentary Privilege.

[39] In the 33rd Parliament (1983–1987), the Hawke Labour Government held 75 out of 125 seats in the House of Representatives. In the Senate, this Government held 30 seats, the Liberal Party 23 seats, and minor parties 10 seats, in addition to 1 independent MP. Parliamentary Library, Department of Parliamentary Services, *The 44th Parliament: Parliamentary Handbook of the Commonwealth of Australia 2014* (33rd ed, 2014) 414–15. Minor parties, which hold the balance of power, have influence on law reform. See Joanna Bird and Jennifer Hill, 'Regulatory Rooms in Australian Corporate Law' (1999) 25(3) *Brooklyn Journal of International Law* 555.

[40] Parliamentary Library, Department of Parliamentary Services, above n 39, 414–15. The existing Government (2016–19) does not control the Senate. A primary reason is that the Senate seats are based on quota and preferential voting.

[41] The Bill was introduced to the Senate on 5 October 1983 by the Attorney-General, then passed by the House of Representatives on 30 November 1983 without change and returned to the Senate, which promptly proceeded the assent procedure.

times in each House, the debates were similar in nature and occurred mainly between the Opposition and the government.[42] The debate examined the oppression sections, the duties of directors, and the influence of majority shareholders because these major issues related to both the protection of minority shareholders and market interests. Eight key aspects in this process require emphasis.

First, Senator Durack from the Opposition was concerned about excessive influence on corporate legal reforms from interest groups, including bankers and big business.[43] This regulatory capture problem had impeded earlier reforms of oppression sections and transparency in lawmaking.[44] As this serious problem had vast economic effects, he argued that people would expect the Parliament to pay careful attention to these matters and truly represent the broad interests of the public in examining this legislation package.[45] The following debates demonstrated some responsiveness to public expectation.

Second, Senator Durack attacked the government's limited transparency for not disclosing the detailed treatment of public submissions to the Senate.[46] Senator Hill likewise requested that a Senate committee should publish future amendments for public inquiry to enable greater input from the Senate.[47] Although the Attorney-General countered these arguments as 'pure political humbug' because such disclosure and public inquiry are not always essential, he admitted that these traditional practices appeared insufficiently sensitive to the understandable demands for input from politicians.[48] He agreed to provide a full briefing if requested, and for

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[42] Debates occurred mainly in the second and third reading. Debates began immediately following the mandatory speeches in the second reading from the Attorney-General Gareth Evans in the Senate and the Minister for Trade Lionel Bowen in the House of Representatives. For detailed proceedings of the three readings, see Department of the Prime Minister and Cabinet, above n 4, 43, 57; Evans and Laing (eds), above n 6, 341; Wright and Fowler, above n 4, 351.

[43] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2683 (Peter Drew Durack).

[44] See detailed discussions in Chapter 3, Sections 3.2, 3.3.

[45] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2683 (Peter Drew Durack).

[46] Commonwealth, *Parliamentary Debates*, Senate, 5 October 1983, 1081 (Peter Drew Durack).

[47] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2691 (Robert Murray Hill).

[48] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2699 (Gareth Evans, Attorney-General).

the debate period to be extended from the practice of one week to a period of eight weeks, at the Opposition's request, to deliberate on substantial issues.[49]

Third, the Opposition also criticised the Attorney-General for the fuzzy drafting style in *Bill 1983*, including the oppression sections. Reflecting on public concerns, Senator Rae submitted that 'businesses and associated professional community have been drowned in papers and words which were too complicated to be efficient and effective' in addressing widespread oppressive conduct.[50] These costs of 'tortuous drafting' were also echoed in the Lower House.[51] Although the Bill language remained unchanged, such vigilance from the Opposition and frequent critiques from the legal academia built pressure for subsequent drafting simplification, including rewording the oppression sections in the *CLERP Act 1998*.

Fourth, the main impetus for transforming the oppression sections was widespread corporate misconduct and its costs. Mr Bowen, the Minister for Trade in the Lower House, acknowledged the failure of corporate law to address oppressive conduct, especially when majority shareholders are directors or when they act together.[52] He stated that these actors often used voting and collusion to cloak fraud and deceive others, almost without liability.[53] Likewise, Mr Jacobi and Mr Spender agreed that corporate misconduct and legal deficiencies caused huge costs that became a burden to commercial life, economic growth and future prosperity because the public ultimately incurred these costs.[54] Corporate misconduct and its

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[49] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696, 2699 (Gareth Evans, Attorney General).

[50] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696 (Peter Rae).

[51] For example, Senator Hill and Mr Jacobi criticised the 'tortuous drafting' and 'clear drafting errors in the existing legislation': Commonwealth, *Parliamentary Debates*, Senate, 3 April 1984, 1111 (Robert Murray Hill); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 3038 (Ralph Jacobi).

[52] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 3041 (Lionel Bowen).

[53] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 3041 (Lionel Bowen). He also pointed to problems of directors approving sale of property or loans to company members to advance self-interests.

[54] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 3037 (John Michael Spender); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 3038 (Ralph Jacobi).

serious consequences revealed the inherent inadequacies of protecting minority shareholders in remedies involving director duties, general meetings, market exit and winding-up procedures. This necessitated the liberalisation of restrictive oppression sections to address market problems.

Fifth, the transformation of oppression sections was underpinned by the concept of fairness aimed at counteracting these market problems and legal deficiencies. While Senator Hill supported the need for reform, he challenged the terms 'unfairly prejudicial' and 'unfairly discriminatory', arguing that these terms were dramatic expansions beyond illegality.[55] He also suggested not applying oppression sections to conduct that could cause harm to the position interests of directors because this provided them with 'an unnecessary second bite of the cherry'.[56] As Chapter 5 will explain, these dramatic expansions made the oppression sections very powerful. Such expansions determine that oppressive conduct may trigger judicial remedies to reinstate fairness. Moreover, although directors were often involved in oppressive practices, this did not justify a legal bias against them.

Senator Hill's controversial arguments were not supported in the Parliament. Senator Evans applauded the Bill and regarded the expansions of the oppression sections as considerable progress for protecting minority shareholders, including opportunities that they could commence litigation against harm to their position interests as directors, rather than to just financial interests.[57] In broader views, Senator Rae emphasised the need to reform corporate law to assist all businesses, regardless of status or ownership.[58] This indicated that he advocated for fair reforms. These critical multiparty debates demonstrated broad political support for reforms to improve the protection for minority shareholders and general interests.

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[55] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2691 (Robert Murray Hill from the opposition).

[56] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2691 (Robert Murray Hill).

[57] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2690 (Jack Evans).

[58] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696 (Peter Rae).

The Parliament finally voted for the Bill without change to the expanded oppression sections. This result affirmed the Australian Government's consistent pursuance of fairness in legal and economic policies.

Sixth, expertise of debaters, a democratic approach and double deliberation rounds were important factors informing these merit-based legislative debates. A few parliamentarians who were previously experienced in law — including solicitors, barristers and a Queen's Counsel — examined the Bill in depth.[59] This meant that the political parties rightly favoured professional expertise over the quantity of debaters. Their use of court cases, academic resources and foreign law reports demonstrated their expertise in the critical legal aspects of policy and language in the debate.[60] Professional skills, combined with the double examinations in a bicameral legislature and the freedom of dissent in a democratic system, enabled debaters from the different parties to scrutinise the multidimensional merits of transforming the oppression sections to find a balance between protecting minority shareholders and facilitating corporate operations.

Seventh, the effectiveness of the debates demonstrated that the legislature was functional. Although the government controlled the Lower House, the multiparty structure, with its checks and balances, maintained a vibrant cooperative and competitive environment within a broadly representative Parliament.[61] As minor parties held the balance of power in the Senate, combined with the vigilance of the Opposition, the government could not use a gag or guillotine[62] to restrict debate, fast-track *Bill 1983* or paralyse the legislature.[63] The

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[59] Senators Durack and Hill were barristers; Senator Evans and Mr Spender were Queen's Counsel; Mr Lionel Bowen was a solicitor; Mr Ralph Jacobi contributed to Australian Law Reform Commission.

[60] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696 (Gareth Evans, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2696 (Peter Rae); Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2691 (Robert Murray Hill).

[61] See Singleton et al, above n 35, 156.

[62] The opposition can block or amend the government legislation, particularly when it has a majority in the Senate. The 'guillotine' refers to a tactic of using motions to declare a matter urgent and set times for each stage of debate to be completed. This practice has been less popular in recent years. There is also a 'closure' or 'gag' — a tactic of using a motion 'that the question be now put' to undermine the debate. If this motion is passed, the question on the motion being debated must be put to the vote immediately. An alternative

government was also forced to increase its transparency and the debate preparation period because it had to work with the other parties to have the Bill passed.[64]

The functionality of the legislature was attributed to both the multiparty system and the independent competitive election.[65] These mechanisms, combined with parliamentary entitlements (such as high salary, allowances, professional assistance and working facilities),[66] provided opportunities and strong incentives for prominent people to stand for parliamentary election, especially for the Senate.

Eighth, it remains inconclusive whether multi-partisanship was the decisive factor for preventing regulatory capture by interest groups. Regulatory capture had previously impeded the development of oppression sections, and it was quite possible for governments to strike a deal with other parties to 'rubber stamp legislation' that served interest groups.[67] In other words, a multiparty system itself is not immune to regulatory capture. Thus, it could be said that this system was an important factor, rather than a decisive factor, for deterring interest groups from capturing the transformation of oppression sections in 1983.

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procedure, which is now more common, is to set times for debate without a declaration of urgency. See Wright and Fowler, above n 4, 274–87, 289–342, 493–542.

63 The executive at times only allowed 1 week to examine Bills, and less than 1 hour, or even only 3 minutes, for debate, as in the case of the Unlisted Property Trusts Amendment Bill. Peter Costello, 'Is the *Corporations Law* Working?' (1992) 2(1) *Australian Journal of Corporate Law* 12, 13–14. This poor practice has been rare in recent years.

64 Regarding the conscience vote about moral issues, party members in the Parliament are at times allowed to escape from party lines.

65 The independent Australian Electoral Commission, chaired by an active or retired judge of the Federal Court of Australia, conducts federal elections. *Commonwealth Electoral Act 1918* (Cth) s 6. See also, Australian Electoral Commission, 'Annual Report 2014-15' (2015) 9–15. The electoral system has become fairer, with the 'one vote, one value' principle. See Brian Opeskin and John Juriansz, 'Electoral Redistribution in Australia: Accommodating 150 Years of Demographic Change' (2012) 58 *Australian Journal of Politics and History* 557.

66 See Committee for the Review of Parliamentary Entitlements, Parliament of Australia, *Review of Parliamentary Entitlements: Committee Report* (April 2010); Cathy Madden and Deirdre McKeown, 'Parliamentary Remuneration and Entitlements' (Research Paper, Politics and Public Administration Section, Department of Parliamentary Services, Parliament of Australia, 2013); Remuneration Tribunal, 'Annual Report 2015–16' (2016).

67 See Costello, above n 63, 12; Singleton et al, above n 35, 173. Banks, above n 26, 405, 414. Gary Banks is a former chairman of the Productivity Commission from 1998 until 2013.

In conclusion, these parliamentary debates demonstrated that the multiparty system, the inclusive legislative process, and the endemic corporate misconduct as a key driver for reform together compelled the government to override any influence from interest groups and initiate the necessary legal reforms aimed at restoring confidence in the market.[68] As a result, the oppression sections were transformed and embodied the concept of fairness.

[68] Commonwealth, *Parliamentary Debates*, Senate, 16 November 1983, 2690 (Jack Evans). Senator Evans stated that the Bill 1983 also received support from vital stakeholders such as the stock exchanges and accounting bodies. In addition, minor parties such as the Australian Democrats supported the Bill 1983. See Dimity Kingsford Smith, 'Interpreting the Corporations Law: Purpose, Practical Reasoning and the Public Interest' (1999) 21(2) *Sydney Law Review* 161, 161–3.

Part II: Reforming Vietnamese Enterprise Law 2014 with a Government-centric Lawmaking Process

An important priority under the *Master Plan on Economic Restructuring 2013–2020* was the long-awaited enactment of *Enterprise Law 2014*. This law sought to institutionalise emerging policies, including fairer treatment between domestic and foreign investors, and better protection for minority shareholders and company members.[69] Accordingly, the scope of amendments was extensive, with the major priorities being: (1) easing shareholder litigation; (2) detailing the duties of corporate managers; and (3) strengthening corporate governance rules for shareholding companies, especially SOEs.[70] These priorities were significant because they had not been highlighted in previous enterprise laws over the previous 25 years.

In creating *Enterprise Law 2014*, Vietnam continued to use legal transfers to harmonise with common international practices in corporate law.[71] *Enterprise Law 2014* was driven by socio-economic needs, rather than by aid donors and trade partners, as with pre–World Trade Organization (WTO) laws[72]. Part II examines how the outcomes of this law were informed by the functional distribution in the legislative process, the quality of the institutional operation, the participation of civil society stakeholders and political leadership.

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[69] See Submission No 1335/TTr-BKHĐT of 10 March 2014 of the MPI on the Amended Enterprise Law Project, 7.

[70] They are part of 14 major amended groups of issues. Drafting Committee of the (Amended) Enterprise Law Project, MPI, *Report of Impact Assessments of the (Amended) Enterprise Law Project* (Hanoi, March 2014) pt IV.

[71] For example, issue 10 on shareholder protection and issue 11 on SOEs. Ibid 44–52. Moreover, the OECD issued investment policy reviews on Vietnam in 2009 (supported by Australia together with Japan) and in 2015 to be published in late 2017. The 2009 review reminded Vietnam about ensuring full implementation of WTO commitments, including legal and financial areas. OECD, *OECD Investment Policy Reviews: Viet Nam 2009 — Policy Framework for Investment Assessment* (OECD Publishing, 2010). See also OECD, *OECD Survey of Corporate Governance Frameworks in Asia* (2017).

[72] For detailed discussions, see Chapter 3, Section 3.9.

4.4 Delineation of the Structure of the Enterprise Lawmaking Process

Vietnam used the standard legislative process in *Law on Law 2008* (*LOL 2008*) to create the *Enterprise Law 2014*.[73] This process has four stages. Its functional design was transferred largely from advanced common law jurisdictions, with assistance from Canada (see Table 4.3).[74]

[73] Vietnam also has a summary process to be used in case of urgency. Unlike the standard process, the summary process requires neither establishing a drafting committee and an editing group, nor consulting the public. The National Assembly considers and votes the Bill in one meeting session. See *Law on the Making of Legal Instruments 2008* (Vietnam) ss 75–7. This law is often referred to as the Law on Law (*'LOL 2008'*).

[74] For example, the Vietnam–Canada Legislation Drafting and Management Program (1994–1996), the Vietnam Drafting and Promulgation Program (1996–1998) funded by the Asia Foundation, the United Nations Development Programme and the Legal Reform Assistance Project (2002–2008) funded by Canada.

Table 4.3: Four Stages, Major Tasks and Main Actors in Vietnam's Legislative Process

Stages	Actors and tasks	Features
Stage 1: Legislative proposal	▪ Ministry of Planning and Investment (MPI) made proposal ▪ Government approved proposal and delegated MPI to submit it to lawmaking agenda ▪ National Assembly Law Committee examined it ▪ National Assembly Standing Committee shortlisted it in lawmaking agenda ▪ National Assembly formally voted on this agenda	▪ Procedural matter
Stage 2: Preparing the Bill	MPI took charge of most mandatory tasks, including: ▪ Policy instruction ▪ Regulatory impact assessment ▪ Information disclosure for public consultation ▪ Bill drafting The Ministry of Justice reviewed the Bill The National Assembly Economic Committee reviewed the Bill	▪ Conflicts of interest ▪ Capture by Ministries ▪ Civil society stakeholders' comments on regulatory impact assessment and Bill
Stage 3: Discussing and voting on the Bill	Discussion and voting are functions of National Assembly which comprised: ▪ Mostly Party members, including the Party General Secretary ▪ Largely bureaucrats (including MPI Minister) and their subordinates ▪ Chief Justice of the Supreme People's Court	▪ Active discussions ▪ Political hegemony ▪ Government's capture
Stage 4: Law proclamation	▪ State President	▪ Procedural matter

Table 4.3 itemises the institutional function arrangements in the lawmaking process. These arrangements were important because they informed the substance of the legislative process and the resultant actions of stakeholders. The legislative proposal stage was mainly procedural, even though it involved multiple institutions. This was because the legislative proposal and lawmaking agenda had to follow the economic restructuring policies.[75] Moreover, the protracted process to address the poor minority investor protection meant that reforming the enterprise law had become an imperative.[76]

The Bill preparation stage had important functions, such as online information disclosure and public consultation, which had to be upheld by the sponsoring ministry (MPI). Post-WTO Western procedural law transfers had resulted in a diversity of mandatory functions that provided all stakeholders with the opportunity to give feedback on the regulatory impact assessment and Bill.[77] This stage was the most dynamic in the lawmaking process, even though it was still controlled by the government.

The improvements of these functions were undermined by the allocation of them to only the sponsor ministry under *LOL 2008*. Such broad discretion risked providing the MPI with a convenient way to downplay legal expertise, independence, transparency and accountability in the performance of these functions. The MPI had significant conflicts of interest because it managed many SOEs, while also having extensive administrative powers over the entire

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[75] The lawmaking agendas must follow the policies, lines and directions of the CPV. *LOL 2008*. The proposal was examined by the National Assembly Law Committee. Such examination only served as a reference for the National Assembly Standing Committee (NASC), because the NASC shortlisted the proposal to prepare the lawmaking agenda for the National Assembly.

[76] Vietnam's international ranking of investor protection is continuously poor in the annual *Doing Business* reports. This ranking was 160 out of 189 economies when the *Enterprise Law 2014* was derived. For Vietnam's rankings since 2006, see <http://www.doingbusiness.org/Custom-Query/vietnam>. See also Chapter 3, Sections 3.9.1, 3.9.2.

[77] See *LOL 2008* s 27. The mandatory pre-checking of financial and human resource feasibility for future implementation by the Finance Ministry and Internal Affairs Ministry was window-dressing because of limitations of time and expertise. Hoang Ngoc Giao et al, *Assessment Report on the Process of Making Law and Ordinance: Practices and Solutions* (Labour-Society Press, 2008) 45.

investor community and all investment activities.[78] By selecting the MPI as the sponsoring ministry, the government gave the MPI a legitimate platform to capture the Bill for vested interests of ministries.

Debating and voting on the Bill is the stage that reflects the legislative functions and operational practices of the unicameral National Assembly. This is where Party members from different state bodies (largely from the government) and a tiny fraction of non-Party members collectively make decisions about proposed amendments that are prepared by the MPI. It is also the place where the single Party demonstrates its authoritarian leadership style. While the government exerts the influence of its overwhelming majority, a minority of members still attempt to be genuine legislators. In the final stage, the absence of any veto power over an approved Bill means that the proclamation of law by the State President is a formality.

Overall, institutional function arrangements in the two most important stages of the standard legislative process are suboptimal. The concentrated discretion given to the sponsoring MPI, despite its significant conflicts of interest, revealed serious legal pitfalls in *LOL 2008*. The following sections examine how the MPI used its discretion when performing Bill-related functions, how civil society stakeholders reacted, and how hegemonic politics occurred in the legislature.

4.5 Design of Drafting Bodies as a Vehicle for Regulatory Capture

The preparation of a Bill involves multiple functions, including the requirements for regulatory impact assessment, public consultation and legal drafting. This requires dedicated institutions with distinct functions to share the workload and to promote professional expertise, independence, transparency and accountability when performing these demanding

[78] The MPI's authorities are vast, including registration, licensing and issuing regulations on business activities. See Decree No 86/2017/NĐ-CP of 25 July 2017 of the Government Regulating Functions, Obligations, Powers and Organisation of the MPI.

tasks. As examined in Part I, the Australian experience demonstrated that institutional values are preconditions to reduce the risk of regulatory capture and generate fair and just legislative outcomes.

To date, Vietnam still does not have a dedicated and independent institution for preparing legislation. As a consequence, the preparation of legislation for *Enterprise Law 2014* was an ad hoc process. The MPI used statutory discretion of a sponsor ministry to establish its own drafting committee with an assistant editing group (called drafting bodies) to perform all Bill-related functions.[79] Given its vested interests in any change in enterprise law, the MPI's design of these important drafting bodies will be examined.

4.5.1 Interest Nexus, Concentrated Functions and Interwoven Relations in Drafting Bodies

The MPI appointments to the drafting bodies ensured that these bodies largely comprise senior bureaucrats from the influential government institutions which managed SOEs.[80] Such institutions included the State Bank of Vietnam; Ministry of Finance; Ministry of Health; Ministry of Education and Training; Ministry of Industry and Trade; and Ministry of Labour, War Invalids and Social Affairs. The government institutions and their senior bureaucrats had strong economic interests in the legislative outcome of *Enterprise Law 2014*. A recent study showed that Vietnam has a significant problem with senior bureaucrats (party-state authorities) having large personal investments through their families and 'unhealthy links'

[79] See *LOL 2008* s 27. The roles of these drafting bodies are significant. See Deutsche Gesellschaft für Technische Zusammenarbeit (GIZ), Prime Minister's Research Commission and UNDP Vietnam, *Improving the Quality of Business Laws: A Quickscan of Vietnam's Capacities & Introduction of International Best Practices* (2005). See Appendix 3.

[80] See Decision No 1773/QĐ-BKHĐT of 25 December 2012 of the Minister of Planning and Investment on the establishment of the Drafting Committee and the Editing Group for the Enterprise Law Project. *LOL 2008* s 31 requires that a law drafting committee must have at least nine people, including a sponsor ministry leader, experts and scientists. They must have specialised knowledge. However, the MPI's drafting committee had 18 members, who were also leaders or deputy leaders of almost all 23 senior officials in the Editing Group. Thus, the MPI gave a majority of seats to bureaucratic bodies, including itself.

with big business.[81] Such bureaucrats could be seen as another interest group with strong influence over drafting bodies.

The MPI and its Central Institute of Economic Management (CIEM) assumed the most important drafting positions. The MPI Minister presided over the drafting committee and appointed the Deputy Director of the CIEM (Dr Nguyen Dinh Cung) as the secretary. The secretary concurrently chaired the editing group with his nephew at the CIEM (Mr Phan Duc Hieu) as secretary.[82] MPI and CIEM representatives heavily outnumbered any other agency,[83] thereby giving them control over the drafting bodies.

Internal drafting records show that, while Mr Phan Duc Hieu was the key drafter working alongside Dr Nguyen Dinh Cung, both received orders from the MPI.[84] The CIEM performed all tasks and sent the results to other drafting body members for their comments on the proposed amendments.[85] By appointing fellow agencies with similar vested interests, the MPI could confidently anticipate consensus outcomes. Such number politics clearly worked in the

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[81] A recent study authorised by the Central Party found 14 unhealthy links between party-state authorities and companies. See Le Hong Lien (ed), *Study on Abnormal Relationship of a Portion of Officials and Party Members Holding Position and Power with Enterprises for Rent Seeking* (National Political Press, 2014). These links are well known. Pham Thi Tuy and Tran Dang Thinh, 'Identify and Respond to Group Benefit' (July 2013) 543 *Economy and Forecast Review* 25; Thu Hang, 'Around "Close-Knit Groups" and "Group Interests": Power Is Being Commercialised', Interview with Le Dang Doanh, *Ho Chi Minh Law* (online), 10 April 2013) <http://plo.vn/thoi-su/chinh-tri/quyen-luc-dang-bi-thuong-mai-hoa-8824.html>.

[82] Under *LOL 2008*, MPI leaders must hold the chair and deputy chair of the Drafting Committee. Mr Nguyen Dinh Cung was then deputy director of the MPI's CIEM (now director). His nephew was then acting chief of the Business Environment Department of the MPI's CIEM (now deputy director). This is an example of the widespread nepotism in Vietnam. See, Kieu-Trang Nguyen, Quoc-Anh Do and Anh Tran, 'One Mandarin Benefits the Whole Clan: Hometown Infrastructure and Nepotism in an Autocracy' (Research Paper No 2011-11-02, School of Public and Environmental Affairs, Indiana University, 2011); Quang Truong, 'The Network-Based Economy in Vietnam' (Working Paper No 2015/12, Maastricht School of Management, 2015).

[83] The MPI occupied 13 of all seats while most other agencies each had two seats.

[84] Mr Phan Duc Hieu signed drafting documents in the capacity of a single drafter rather than a secretary in the Editing Group. See Submission No 366/QLKTTW-MTKD Dated 12 May 2014 of the Central Institute for Economic Management, MPI, to the Minister of Planning and Investment on reporting, explaining and supplementing ideas on contents of enterprise law; official letter of May 2014 of the Central Institute for Economic Management, MPI, to the Minister of Planning and Investment to further explain some issues of enterprise law. All these internal documents are on file with the author. The author's meetings with members of the Editing Group on March 2013 as summarised in Appendix 1 confirmed this well-established practice.

[85] This is because other members came from vastly different fields and because of regulatory requirements. See Decree No 24/2009/NĐ-CP of 5 March 2009 of the Government regulating details and measures to implement *LOL 2008* ss 24(4), 20–5.

MPI's favour, thereby making the enterprise law project costly.[86] In general, the institutional arrangements within the drafting bodies meant that the drafters worked in a complex network of vested interests, without functional and professional independence.

4.5.2 High-Ranking Bureaucrats and the Challenge to Drafting Expertise

The preponderance of senior officials, mostly without enterprise law qualifications, raises doubts about the appropriate level of legal expertise in the drafting bodies. The appointment of representatives from ministries governing medicine, labour, invalids and social affairs reflected the political dimension of the drafting bodies.[87]

The lack of drafting expertise was also demonstrated by the allocation of core drafting positions. In particular, the CIEM key drafter had no previous legislative drafting experience, yet did have a degree that included the study of enterprise law.[88] Although the chair of the editing group had worked on enterprise law projects, he had economic degrees.[89] While they had acquired enterprise law knowledge, this is different to being corporate legal experts and skilled drafters in the real sense of these terms. They were more suited for policy analysis,

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[86] The Enterprise Law 2014 Project spent a maximum of VND495 million, not including aid from donors such as Australia, GIZ and UNIDO. Decision No 349/QĐ-BKHĐT of 25 March 2014 of the Minister of Planning and Investment on allocating a state budget in 2014 for the Amended Enterprise Law (internal document, on file with author).

[87] For this problem, see also Narul Faisal and Nguyen Dinh Cung, 'Improving the Quality of Vietnamese Regulations: Two Papers on Challenges in Implementing Broad-Based Regulation Quality Improvement Programmes in Vietnam' (Vietnam Competitiveness Initiative of the United States Agency for International Development and Central Institution of Economic Management, 25 November 2010) 9.

[88] Mr Phan Duc Hieu was a key drafter, as noted above. He graduated Bachelor of Laws from Hanoi Law University in 1995 and studied Master of Law and Economics at Maastricht University in the Netherlands in 2013. These details came from his curriculum vitae.

[89] Mr Nguyen Dinh Cung graduated from the University of Economics in Prague in 1982 with a Bachelor of Foreign Economics, obtained a Master of Development Economics from Manchester University (England) in 1996 and received a Ph.D. in Development Economics of his own CIEM (Vietnam). For roles of Mr Nguyen Dinh Cung in enterprise law projects from 1999 after he graduated from England, see Tu Giang, *Behind a Law That Changes Vietnam* (13 February 2016) The Restructuring for a More Competitive Vietnam Project <http://rcv.gov.vn/Phia-sau-mot-luat-lam-thay-doi-Viet-Nam.htm>.

given that they worked in a political economy institute and had expertise in market institutions.[90]

In practice, appropriate appointments were available, with the options of prominent corporate lawyers or well-respected academics from Vietnam's law schools, universities and research institutes.[91] The exclusion of independent professional experts may have strengthened the MPI's control over the Bill; however, without independent checks of Bill-related tasks, this negatively impacted legislative design.[92]

4.5.3 Structure of Drafting Bodies Undermining the Proper Scrutiny of the Bill

The lawmaking process requires two state agencies to check the drafting quality against the government reform goals. The enterprise Bill reviewers were the Ministry of Justice and National Assembly Economic Committee.[93] The MPI strategically appointed representatives of these reviewers to the drafting bodies, thereby introducing a conflict of interest that compromised the independence and impartiality of the gatekeepers. Consequently, the proper scrutiny of the Bill was undermined and critical reviews were limited, lacking in both quality and information.[94]

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[90] This can be seen in their publications, such as Nguyen Dinh Cung and Nguyen Tu Anh (eds), *Monitoring and Evaluating the Implementation of the Master Plan on Economic Restructuring* (2015); Nguyen Dinh Cung and Bui Van Dung (eds), *Renewing the Organisational Model of Implementing State Ownership Representative in SOEs: Theory, International Experience and Application to Vietnam (Reference Book)* (Encyclopedia Press, Hanoi, 2013).

[91] The MPI did not follow the practice of appointing distinguished legal academics and prominent corporate lawyers. Lawyers and scholars reviewed 16 laws and 200 subordinate instruments. This review recommended amending the *Enterprise Law 2005*, leading to the *Enterprise Law 2014.* See VCCI et al, 'Reviewing Business Laws' (November 2011). There are distinguished legal academics, including Associate Professor Pham Duy Nghia (Fulbright Economics Teaching Program), who advised reform projects of donors, including WB and UNDP.

[92] For detailed examination of legislative design, see Chapter 5, Section 5.6.

[93] The Ministry of Justice reviewed the Bill for the Government. The National Assembly Economic Committee reviewed the Bill for the National Assembly.

[94] See Report No 1853/BC-UBKT13 of 18 April 2014 of the Economic Committee preliminarily verifying the (Amended) Enterprise Law Project; Report No 1896/BC-UBKT13 of 23 May 2014 of the Economic Committee verifying the (Amended) Enterprise Law Project. See also Huy Anh, 'Law "Deviated" from Realities Because of … "Formality" Reviews', *Vietnam Law* (online), 17 May 2013 <http://www.baophapluat.vn>; Hoang Ngoc, 'Need for Strong Renewal of Lawmaking Thinking', Interview

4.5.4 Bureaucratic Control of Drafting Bodies and Regulatory Capture Strategies

Regulatory capture is known as the manipulation of legal reforms, largely by public and private interest groups, to favour sectional interests over general interests.[95] The consequence is that legal changes unfairly advantage some stakeholders at the expense of others. Beneath the issue of regulatory capture lie the interconnecting factors of excessive discretion, limited transparency, inadequate accountability, poor quality institutions and low political openness.[96] In other words, regulatory capture comes down to self-interest in the lawmaking process.[97]

As a result of the economic implications, any change to enterprise law threatened the vested interests of the MPI and fellow ministries. The reform objectives of tightening SOEs, easing business activity and improving minority shareholder protections would affect their rent-seeking opportunities[98] and their complex interests with majority shareholders and large private investors.[99] Thus, benefits were derived from jointly manipulating the enterprise Bill to reduce these effects. Given that ministerial bureaucrats are a powerful interest group, they were often proactive in regulatory capturer, rather than being driven by their own SOEs and the allied majority investors.[100]

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with Le Minh Thong, Deputy Chairman of Law Committee, *People's Deputies* (online), 3 July 2013 <http://daibieunhandan.vn/default.aspx?tabid=76&NewsId=285053>.

95 See, eg, George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3; Andrei Shleifer and Robert W Vishny, *The Grabbing Hand: Government Pathologies and Their Cures* (Harvard University Press, 1998); Daniel Carpenter and David A Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2014); Martin Lodge, 'Regulatory Capture Recaptured' (2014) 74 *Public Administration Review* 539.

96 See, eg, Jean-Jacques Laffont and Jean Tirole, 'The Politics of Government Decision Making: Regulatory Institutions' (1990) 6 *Journal of Law, Economics and Organization* 1; S Djankov et al, 'The Regulation of Entry' (2002) 117 *Quarterly Journal of Economics* 1, 28, 34–5; Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22 *Oxford Review of Economic Policy* 203, 207–11; William J Novak, 'A Revisionist History of Regulatory Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2014) 37–46.

97 Paul J Stahl, 'Assessing Interest Groups: A Playing Field Approach' (2008) 29 *Cardozo Law Review* 1273, 1285.

98 These problems also affected previous enterprise law reforms. Raymond Mallon, 'Managing Investment Climate Reforms: Viet Nam Case Study' (No 31361, 17 January 2004) 27.

99 For unhealthy connections between authorities and big investors, see Le Hong Lien (ed), above n 81.

100 See, eg, Thu Hang, 'Suggestions on the Amended Enterprise Bill: State-Owned Enterprise Becoming Backyards of Ministries?', *Law* (online), 30 July 2014 <http://plo.vn/kinh-te/gop-y-du-thao-luat-dn-sua-doi-

The bureaucrats were strategic in preparing this Bill. They proposed sound provisions regulating SOEs to appease the public, yet later fragmented these provisions to maintain the lucrative nexus with SOEs and the addition of new vague rules.[101] As a compromise, they extended shareholder litigation provisions to partially reflect the Party's minority shareholder protection reform policies.[102] This regulatory capture measure resulted in a partial reform equilibrium in which progressive changes accompanied regressive restorations to maintain the status quo.[103]

These capture measures were deceptive and damaging — reforming some legal aspects, while deforming many others. Although they created many changes, the net result was modest. Regulatory capture pandered to vested interests, discharged the MPI of its duties and advanced the career interests of its inferiors.[104] It brought them high private gains at huge public costs in a stifling business environment. Thus, 'Bill drafting still strongly focuses on

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dnnn-thanh-san-sau-cua-cac-bo-485827.html>; 'Regression of the Amended Enterprise Bill', *Ho Chi Minh City Law* (online), 31 July 2014 <http://plo.vn/kinh-te/buoc-lui-cua-du-thao-luat-doanh-nghiep-sua-doi-486280.html>.

[101] For example, the MPI's removal of s 172 in the fourth draft, which separated the representation of state ownership by bureaucratic bodies from their state management functions, attracted criticism from lawyers and experts. See, Thu Hang, 'Amending Enterprise Law Has to Deter Group Interests', Interview with lawyer Tran Huu Huynh (Press Interview on the Ho Chi Minh City Law, 4 August 2014); T Hang, 'Do Not Let Reform Thinking Be Eliminated From the First Round', Interview with economic expert Pham Chi Lan (Press Interview on the Ho Chi Minh Law Newspaper, 8 April 2014) <http://plo.vn/thoi-su/dung-de-nhung-tu-tuong-cai-cach-bi-loai-ngay-vong-dau-487075.html>; Thanh Lan, 'Enterprise Bill Before "G" Time: "Opaque and Retrograde"', *Vietnam Law* (online), 8 October 2014 <http://baophapluat.vn/thi-truong/du-luat-doanh-nghiep-truoc-gio-g-tit-mu-roi-lai-vong-quanh-198607.html> (Quoting ideas of lawyers Truong Thanh Duc, Vu Xuan Tien and Le Nga).

[102] For detailed discussion on shareholder litigation provisions, see Chapter 5, Section 5.6.

[103] For a partial reform equilibrium, see Edmund Malesky, 'Gerrymandering — Vietnamese Style: Escaping the Partial Reform Equilibrium in a Nondemocratic Regime' (2009) 71 *Journal of Politics* 132; Joel S Hellman, 'Winners Take All: The Politics of Partial Reform in Postcommunist Transitions' (1998) 50(2) *World Politics* 203; Kevin M Murphy, Andrej Shleifer and Robert W Vishny, 'The Transition to a Market Economy: Pitfalls of Partial Reform' (1992) 107 *Quarterly Journal of Economics* 889.

[104] Ngo Huy Cuong, 'Amending Enterprise Law 2015: Analysis, Commentary and Recommendation' (Paper presented at the Scientific Conference: Completing Laws on Enterprises and Investments in the Context of Market Institution Reform in Vietnam Today, Hanoi, 24–25 April 2014). MPI Minister Bui Quang Vinh promoted his inferiors, Mr Nguyen Dinh Cung as CIEM director and Mr Phan Duc Hieu as CIEM deputy director, who were respectively the head and secretary of the Editing Group. Decision No 686/QĐ-BKHĐT of 29 May 2014 of the Minister of Planning and Investment appointing officials and public servants; Decision No 1726/QĐ-BKHĐT of 20 November 2015 of the Minister of Planning and Investment on appointing officials and civil servants.

reinforcing the interests of ministries because state actors have yet to change institutional practices and incentives through legal reforms'.[105]

The MPI's designs and operations of drafting bodies enabled regulatory capture with multiple measures. The non-independence of drafting bodies, which had the concentrated drafting functions and also included Bill reviewers, undermined transparency and accountability. These measures, combined with the MPI's appointments of numerous ministries to drafting bodies, legitimised their opportunities to together capture this Bill.

Moreover, the MPI was politically prepared for such capture practice. It decided to push this Bill through, regardless of its content and effects, by installing powerful authorities across the Party, legislature, executive and judiciary into the drafting bodies. To increase certainty, the MPI ensured that all drafting members were Party members, including senior Party-dedicated politicians.[106] This intensive particisation also indicated that the party-state leadership had not banned regulatory capture practices. These practices are endemic and legitimised by ranking bureaucrats who hold political and economic power.

However, Vietnam's post-WTO legislative process required the conduct of regulatory impact assessment and public consultation. The following sections examine how the practices of state institutions and civil society stakeholders regarding these two tasks informed the regulatory capture of the Bill.

[105] Ideas of the deputy chairman of the Law Committee quoted in Hoang Ngoc, 'Need for Strong Renewal of Lawmaking Thinking', Interview with Le Minh Thong, Deputy Chairman of Law Committee, *People's Deputies* (online), 3 July 2013 <http://daibieunhandan.vn/default.aspx?tabid=76&NewsId=285053>.

[106] See Decision No 1773/QĐ-BKHĐT of 25 December 2012 of the Minister of Planning and Investment on the establishment of the Drafting Committee and the Editing Group for the Enterprise Law Project.

4.6 Regulatory Impact Assessment as a Regulatory Capture Strategy

4.6.1 Regulatory Impact Assessment for Economic Reform of Corporate Law in Vietnam

Regulatory impact assessment (RIA) is a systematic process used to analyse and estimate the distributional effects of regulatory proposals.[107] A sound RIA must ensure core elements, including timeliness in the lawmaking process and the feasible quantification of the perceivable impacts of regulatory and non-regulatory options — usually considering costs and benefits.[108] Importantly, it requires effective public consultation to afford all stakeholders opportunities to comment on cost–benefit effectiveness and enforcement strategies of these options. It is an integral part of policy analysis to achieve better regulations.

An effective RIA can entail plenty of benefits. It provides evidence-based justifications for pursuing different policy objectives and improves budgetary efficiency in lawmaking for economic developments.[109] Thus, RIA is essential for corporate law reforms to develop effective rules, especially in developing economies. For instance, the Organisation for Economic Co-operation and Development (OECD) estimated that each effective RIA would reduce time and costs for the state, business and civilians in Vietnam, with savings up to 100 000 times compared with the budget for such an RIA.[110] Functioning RIAs could improve productivity, efficiency and effectiveness in lawmaking — cornerstones for the better regulation that Vietnam desperately needs.[111]

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[107] OECD, *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers* (2008) 14–15.

[108] Ibid 11, 16–17.

[109] This key role of RIA remains achievable even if data are limited or not readily accessible. OECD, *Building an Institutional Framework*, above n 107, 15. See also Colin Kirkpatrick, David Parker and Yin-Fang Zhang, 'Regulatory Impact Assessment in Developing and Transition Economies: A Survey of Current Practice' (2004) 24 *Public Money & Management* 291; Camilla Adelle et al, 'New Development: Regulatory Impact Assessment in Developing Countries — Tales from the Road to Good Governance' (2015) 35 *Public Money & Management* 233.

[110] OECD, *Administrative Simplification in Viet Nam: Supporting the Competitiveness of the Vietnamese Economy* (Cutting Red Tape, OECD Publishing, 2011) 70.

[111] See Claudio M Radaelli, 'Diffusion Without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment' (2005) 12 *Journal of European Public Policy* 924.

RIA principles were brought to Vietnam by experts from experienced OECD countries, including the United States (US) and Australia.[112] They assisted with raising awareness among state actors, building capacity and developing guidelines to pilot RIAs for *Enterprise Law 2005* and other market laws.[113] Capitalising on these foundations, *LOL 2008* fully adopted pre-drafting, Bill-drafting and post-implementing RIAs, with compulsory public consultation and disclosure to assess the varied effects of the new regulations.[114] This progress showed initial efforts to depart from the pre-WTO spontaneous lawmaking.

Vietnam has not fully observed the good practices of OECD countries. It has not established a dedicated institution to screen and prepare RIAs for a specific legal instrument, even though such professional practices have informed RIA effectiveness in these countries.[115] Vietnam converted these specialised functions into ad hoc tasks and subjected them to the sponsor ministry's discretion. The following discussions examine the enterprise law RIA conducted by the MPI's CIEM.

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[112] OECD, *Methodological Guidance and Frameworks for RIA* (2007) 8. Many actors assisted with RIA transfer to Vietnam, such as Raymond Mallon (Australia), Jacob and Associates (US), GTZ, UNIDO and USAIDS. Raymond Mallon and Le Duy Binh, *Effective Implementation of a Regulatory Impact Assessment Process in Vietnam* (GIZ, Hanoi, 2007); UNIDO, *Business Registration Reform in Viet Nam: A Situation Analysis of the Reform and of UNIDO Support* (2011); Scott Jazynka et al, 'Vietnam Competitiveness Initiative — Phase II (USAID/VNCI-II): Completion Report' (June 2013).

[113] RIA was introduced to the National Assembly, Ministries and selected local governments to prepare for market laws, including *Enterprise Law 2005* and *Investment Law 2005*. See Le Duy Binh and Doris Becker, *Regulatory Impact Assessment: An Effective Instrument to Improve the Quality of Business Laws in Vietnam* (GIZ, Hanoi, 2009); CIEM and Friedrich-Ebert-Stiftung, 'Strengthening the Effectiveness of Applying Regulatory Impacts Assessment (RIA) in Vietnam' (Center for Information and Documentation, No 6/2013); OECD, *Administrative Simplification in Viet Nam*, above n 110.

[114] A pre-drafting RIA is applicable to regulatory proposals to assess whether regulatory intervention is necessary and efficient, which was bypassed in the case of *Enterprise Law 2014*. A Bill-drafting RIA assists drafters to choose best regulatory options. A post-implementing RIA is conducted to assess regulation after 3 years of implementation.

[115] OECD, *Building an Institutional Framework*, above n 107, 15. See also OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries* (1997); OECD, *Sustainability in Impact Assessments: A Review of Impact Assessment Systems in Selected OECD Countries and the European Commission* (2012).

4.6.2 Regulatory Impact Assessment for Enterprise Bill 2014 as a Regulatory Capture Strategy

The RIA for *Enterprise Bill 2014* assessed all 14 blocks of amendment issues, including minority shareholder protection and SOE matters.[116] This full RIA indicated the CIEM's encouraging endeavours because it was an improvised task. On the surface, the RIA complied with the legal requirements; however, in practice, it had three significant execution problems.

(1) Staff capacities for the RIA of these extensive amendments were not ensured. The RIA was mainly executed by one key CIEM drafter.[117] While his relevant short-term training was important, he did not have the specialised political, legal, economic and communicative capacities necessary for the demanding teamwork of an RIA.[118] Despite this, the MPI did not contract experienced consultants or invite different experts to address these high performance criteria. Moreover, empirical data were not used in cost–benefit assessments of any issues, including restrictions on business licensing and minority shareholder rights.[119] These shortcomings were disappointing, considering that the drafting bodies and institutions — such as the MPI, CIEM, Vietnam Chamber of Commerce and Industry (VCCI) and Supreme People's Court — held extensive national data. Consequently, the RIA focused on general theoretical explanations.

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[116] See Drafting Committee of the (Amended) Enterprise Law Project, MPI, above n 70.

[117] This is an established practice. The author's meetings with members of the Editing Group on March 2013 as summarised in Appendix 1 confirmed this practice. The lack of experience and capacity for RIA by ad hoc legal drafters explained why Vietnam conducted only about 50% of re-drafting RIA, did not conduct post-implementing RIA and did not apply RIA to 15 types of subordinate regulations. See CIEM and Friedrich-Ebert-Stiftung, above n 113; Nguyen Duy Quy and Nguyen Tat Vien, *Vietnamese Law-Based State of the People, by the People and for the People — Theories and Practices* (National Political Publishing House, 2008) 256.

[118] For the benefits of these essential skills in conducting RIA, see OECD, *Building an Institutional Framework*, above n 107, 35–6. Mr Phan Duc Hieu, who wrote RIA for *Enterprise Law 2014*, only attended a short training course in RIA in October 2007 at a European university. This further explained why this RIA lacked the feasible cost–benefit quantification of regulatory proposals. See, Drafting Committee of the (Amended) Enterprise Law Project, MPI, above n 70.

[119] See Drafting Committee of the (Amended) Enterprise Law Project, MPI, above n 70. Evidence-based decisions are likely to achieve regulatory objectives more effectively without incurring foreseeable unnecessary economic costs. OECD, *Building an Institutional Framework*, above n 107, 17.

(2) The absence of an independent review undermined the objectivity of the RIA. This review was essential because the executer and other drafting members lacked autonomy. The RIA accordingly favoured bureaucratic measures over neutral alternatives that may have been inconvenient for ministries, with repercussions for their rents or effects on their big business alliances.[120] For example, the RIA was used to institutionalise the de facto shadow manager roles of bureaucrats over their SOEs, and did not recommend ending the preferential treatment of majority shareholders. These effects were far-reaching because the RIA formed the foundation for the government and National Assembly to decide on the Bill.

(3) Accountability for the RIA was unclear. The RIA report was not verified by an economist or signed off by the MPI Minister responsible for the Bill.[121] Personal accountability was avoided, as the report was treated as a collective product. Searching for such accountability among state officials is like 'chasing shadows'.[122]

When these deficiencies are considered alongside the delay of the RIA until the third Bill, the implication is that the RIA was used to justify predetermined bureaucratic objectives, rather than to develop effective and neutral regulatory options. The RIA was used to rationalise regulatory capture, rather than the objective of efficient and effective corporate law drafting.

[120] For example, RIA for *Enterprise Bill 2014* did not adequately assess costs of differentiated rights unfavourable to minority shareholders, problematic provisions about general meetings of shareholders, abuse of voting rules at such meetings, problems of SOEs and inconsistencies with other related legislation, including securities law and investment law. See Report No 1853/BC-UBKT13 of 18 April 2014 of the Economic Committee preliminarily verifying the (Amended) Enterprise Law Project.

[121] RIA must be verified by economists because the necessary monetisation of costs and benefits is central to regulatory assessments, as seen in good practice of the UK and Australia. See OECD, *Sustainability in Impact Assessments*, above n 115, 10–11, 23–5; OECD, *Administrative Simplification in Viet Nam*, above n 110, 71.

[122] See generally M Ramesh, 'Health Care Reform in Vietnam: Chasing Shadows' (2013) 43 *Journal of Contemporary Asia* 399.

4.7 Public Consultation in Drafting Enterprise Bill 2014

Public consultation was a legally binding requirement following WTO accession.[123] This procedural improvement provided opportunities for all stakeholders to comment on the 2014 Bill. Sound consultation practices require a balance of state and non-state inputs, diverse methods, appropriate dialogue partners, the management of conflicts of interest, and due treatment of constructive comments.[124] These public–private dialogues seek to benefit from collective wisdom, while enhancing information transparency, procedural fairness and public oversight to make the drafting more effective. Drafters must organise internal consultation, public consultation via online disclosure of the Bill package, and meeting-based consultations.[125] The manner in which these measures are conducted sets the tone for the consultation process.

4.7.1 Internal Bill Circulation and Role of the Vietnam Chamber of Commerce and Industry

The MPI circulated the Bill to ministerial bodies and the VCCI to privately solicit their comments and ideas.[126] Despite feedback obligations, some ministerial bodies responded briefly because the reform goals strongly affected their vested interests in SOEs and licensing.[127] This modest outcome showed the poor cooperation and trivial contribution of state stakeholders. In contrast, the VCCI seized this opportunity to reinforce its stance as the business community representative. Given that the VCCI also participated in the drafting bodies, this necessitates examining how its structure informed its responses to the MPI.

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[123] *LOL 2008* ss 4, 33, 35.

[124] Thomas Finkel, 'Public Private Dialogue in the Making of the Unified Enterprise Law and the Common Investment Law in Vietnam' (Paper presented at the International Workshop on Public–Private Partnership, Paris, 1–2 February 2006); OECD, 'OECD Reviews of Regulatory Reform: Government Capacity to Assure High-Quality Regulation in Australia' (2010); OECD, *Sustainability in Impact Assessments*, above n 115, 9–10.

[125] *LOL 2008* s 35; Decree No 24/2009/NĐ-CP of 5 March 2009 of the Government regulating details and measures to implement *LOL 2008* s 27.

[126] Ibid. See also Section 4 above.

[127] The majority of the ministries opposed substantial reforms. See MPI, 'Report Synthesising Suggestions of Line Ministries on the (Amended) Enterprise Bill' (21 April 2014).

The VCCI's structure and functions are problematic. It represents both state and private businesses, yet the majority of its members are large institutional investors.[128] Moreover, it carries a Party cell subordinate to the Party Organisation for Central SOEs.[129] While it embraces contrasting functions, the Party control and its SOE links raise questions about its independence. Nevertheless, the presence of private businesses adds external viewpoints to the VCCI, and prevents it from being totally absorbed by the dominating party-political views. Thus, this quasi-Party organisation struggles to maintain consistent viewpoints, although it thoroughly understands neutral and liberal legal values through extensive Western cooperation.

The VCCI used to have a strong voice against unfair legal treatments. This was the case when the reformist Vice President Pham Chi Lan sat in the prestigious Prime Minister (PM) Research Commission and later in the Institute of Development Studies.[130] This retired high-profile expert left lasting influences that created an organisation adopting a dualistic approach. This approach focused on protecting minority investors to mirror the concerns of business. Concurrently, the scope for this approach remained limited because the VCCI must consider its concerns for SOEs.

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[128] See VCCI, *VCCI: 50 Years Side by Side with Enterprises* (Truth–National Political Publishing House, 2013) <http://vcci-hcm.org.vn/tin-hoat-dong-vcci-hcm/tt4781>.

[129] Bui Van Cuong, 'Restructuring State-Owned Enterprises in the Central Enterprise Section: Requirements, Difficulties and Solutions' in Ho Chi Minh National Academy of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 25 June 2014) 29, 29. In the past, the VCCI was a purely socialist organisation presenting only SOEs. The party still regards the VCCI as an instrument to guide the business community. See John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 1st ed, 2006) 152, 229–33.

[130] After retirement, Ms Pham Chi Lan remains a preferred consultant for donors. Recently, she was appointed to jointly prepare various topics for the World Bank and the MPI of Vietnam, such as *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy* (2016). She is a member of the Advisory Board for the Justice Index 2013 and 2015. The then prime minister Nguyen Tan Dung dissolved the Prime Minister's Research Commission. Decision No 1008/QĐ-TTg of 28 July 2007 of the Prime Minister dissolving the research commission and the foreign economic study group of the Prime Minister. Moreover, the IDS dissolved itself on 14 September 2009 to protest against his controversial decision unfavourable to private independent research. Decision No 97/2009/QĐ-TTg of 24 July 2009 of the Prime Minister on issuing lists of fields in which individuals are entitled to establish scientific and technological organisations.

Recently, the VCCI's president was given a seat in the Party-controlled National Assembly. This membership afforded him more opportunities to speak publicly, yet under closer political scrutiny. In addition, many financial wrongdoings at the VCCI were uncovered in 2014, which affected its leadership's credibility.[131] Although the president still openly called to overhaul enterprise law, its influence was fading. This organisation now takes heed of already consensual issues, while its stance on contentious matters was inconsistent.

The VCCI's conflicting functions and compromised independence shaped its replies to the MPI's internal consultation. The VCCI supported easier market access for private investors, while suggesting either reviving an SOE law or retaining a distinct chapter for SOEs.[132] These suggestions broke the nature of universal enterprise law and were not useful for minority shareholder protection. This exacerbated the underlying problems of a lack of neutral provisions and proper enforcement concerning SOEs.[133] As Vu argued, 'if unsure of the change, it would be better not to propose it'.[134]

In addition, the VCCI's controversial suggestions about distinct provisions for SOEs would exacerbate public concern about Vietnam's attitudes towards the principle of fairness. This is because WTO accession forced the party-state to abolish SOE laws and differential legal treatment. By proposing resurrecting this problematic past, the VCCI pandered to the

[131] See Notice No 1575/TB-TTCP of 8 July 2014 of the Government Inspectorate on conclusive notice of the inspection at the VCCI.

[132] MPI, 'Report Synthesising Suggestions', above n 127, suggestion 22 by the VCCI; 'Suggestions on the (Amended) Enterprise Bill from the Vietnam Chamber of Commerce and Industry (VCCI) in Response to Official Letter No 698/BKHĐT-QLKTTW Dated 12 February 2014 of the Ministry of Planning and Investment on Collecting Suggestions for the Second (Amended) Enterprise Bill' <http://www.vibonline.com.vn/Forum/TopicDetail.aspx?TopicID=5158>.

[133] For these problems, see detailed discussion in Chapter 3, Section 3.9.3.

[134] Vu Xuan Tien, 'Suggestions on the (Amended) Enterprise Bill: Suggestions Remain … Inapposite', *Labour* (online), 19 March 2014 <http://laodong.com.vn/doanh-nghiep/gop-y-cho-du-thao-luat-doanh-nghiep-sua-doi-van-con-nhung-kien-nghi-lac-long-187110.bld>.

government leaders and regulatory capture bureaucrats in drafting bodies to consolidate their vested interests in SOEs.[135]

The practices of the VCCI suggested that its institutionalised roles in compulsory internal consultation and in drafting bodies had modest effectiveness. Party control and contrasting functions did not afford VCCI's independence or encourage it to oppose regulatory capture and call for the protection of minority investors.[136] Above all, internal consultation was unnecessary because of the compulsory online public consultation, as discussed in the following section.

4.7.2 Formalities of Online Public Consultation

Online public consultation is an important measure of the public–private dialogue. This measure allows all stakeholders to express their views on proposed amendments. However, in Vietnam, prior to 2009, drafters occasionally 'floated' a draft to test public reactions[137] because disclosure and consultation were optional. The consequences were often abruptness, prejudice and non-transparency in legal reform.

Since 2009, legislators have made online public consultation binding to address complaints of investors about closed lawmaking.[138] The MPI and its subordinate CIEM performed this duty to publish Bill documents on their websites for at least 60 days, while often propagating them

[135] Early in the drafting process, the deputy prime minister publicly required separate provisions for SOEs. Huyen Thu, 'Deputy Prime Minister: Need Distinct Mechanism for State-Owned Enterprises', *VnExpress* (online), 14 March 2014 <http://kinhdoanh.vnexpress.net/tin-tuc/doanh-nghiep/pho-thu-tuong-can-co-che-quan-ly-rieng-cho-doanh-nghiep-nha-nuoc-2963728.html>.

[136] The VCCI's roles advantaged big businesses more than minority shareholders because the VCCI was at times caught mediating business consultations. Gillespie, *Transplanting Commercial Law Reform*, above n 129.

[137] John Bentley, 'Completion of Vietnam's Legal Framework for Economic Development' (UNDP Discussion Paper 2, March 1999) 56.

[138] Ibid 65. Closed lawmaking increased legal risks and discriminations. See Le Hong Son, 'Inequal Practice on Business Conditions towards Small and Medium Enterprises in Legal Instruments' (Paper presented at the Policy on Developing Small and Medium Enterprises — Vision and Action, Hanoi, 3 June 2016); Minh An, 'The Year 2012, Legal Risks are "Biggest" Holes', *Securities Investment* (online), 27 December 2012 <http://tinnhanhchungkhoan.vn/phap-luat/nam-2012-rui-ro-phap-ly-la-khoang-ho-lon-nhat-20514.html>.

through the state media.[139] Likewise, the VCCI and National Assembly Office conducted voluntary disclosures. Multiple disclosure channels have clearly eased public access to these documents.

However, the effectiveness of online public consultation depends on how the disclosure is handled. The MPI and CIEM mainly published the main technical materials of the third Bill, without background papers, while instructing comments to be sent to the key drafter's mobile telephone and email.[140] These impromptu measures were insufficiently informative and facilitative to assist interested stakeholders in understanding the proposed amendments. As a result, this process barely attracted any public comments, in contrast to the web-integrated submission methods on the VCCI's and National Assembly Office's Bill-dedicated portals, which included more materials and progress updates.[141]

The MPI's and CIEM's practices showed inadequate diligence for online public consultation. This task was treated as a formal measure for disseminating the Bill. While such dissemination is proven effective for raising awareness, gaining support and improving application regarding law,[142] it was unlikely to optimise public consultation values. The ineffective practices of these bodies did not capitalise on nuanced public ideas for the drafting, and only slightly improved the freedom of information, merit of transparency and convenience-based legal governance. Once again, the concentrated functions and limited

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[139] Disclosed documents included RIA report, Bills, Bill assessment reports and drafted submission letters. The minimum 60-day period was mandatory. *LOL 2008* s 35; Decree No 24/2009/NĐ-CP of 5 March 2009 of the Government regulating details and measures to implement *LOL 2008* s 27.

[140] The instruction was as follows. 'Suggestions should be sent to Mr Phan Duc Hieu, Deputy Chief of Business Environment and Competitiveness Department, Central Institute for Economic Management, Ministry of Planning and Investment. Address: No 68 Phan Dinh Phung, Ba Dinh, Ha Noi. Mobile phone: 0912967575. Email: hieu@mpi.gov.vn': <http://ciem.org.vn/tintuc/tabid/63/articleType/ArticleView/articleId/1284/D-tho-Lut-Doanh-nghip-sa-i.aspx>.

[141] Bills have been published by the VCCI at <http://m.vibonline.com.vn/Duthao/Index> and by the National Assembly Library of the National Assembly Office at <http://duthaoonline.quochoi.vn/Pages/default.aspx>. The latter tool is better organised, more informative and hence more useful for the public.

[142] See Bentley, above n 137, 57; OECD, *Building an Institutional Framework*, above n 107, 32, 48; Ermal Vila and Lili Sisombat, 'Lessons Learned and Proceedings: 7th PPD Global Workshop Public Private Dialogue for Sustainable Business' (German Federal Ministry for Economic Cooperation and Development, GIZ, GmbH, World Bank and International Finance Corporation, 3–6 March 2014) 24.

accountability of the MPI were underlying reasons for these problematic consultation practices.

Finally, disclosures were fragmented because of a lack of inter-agency cooperation. Each institution disclosed information in its own ways, although the National Assembly Office deployed a more systemic approach than did the bureaucratic MPI and CIEM. Despite its voluntary function, this office had the potential to improve the merits of online public consultation. It should have been the main executer of this important task to assist the legislature with public views and monitor the regulatory capture of the drafting. Thus, all disclosure portals need to be systemised and integrated.

4.7.3 Meetings as a Prevailing Consultation Practice

Meetings are an important measure to complement the internal and public consultation. This measure allowed the MPI, its subordinate CIEM and the VCCI to proactively engage with like-minded dialogue partners to garner support and address concerns. These bodies invited 'thousands of stakeholders' across all party-state and civil society sections to 10 meetings, sponsored by donors, including Australia.[143] These meetings were held in different regions throughout the year to facilitate participation.

The composition of attendants and practices of organisers set the tone for the meetings. Ministries and other state bodies outnumbered the press and legal professionals in the meetings held by the MPI and CIEM.[144] In such a bureaucratic environment, alongside the endemic practices of inviting familiar businesses and flattering ministries, the formal compliments and nominal criticism overpowered the critical legal comments. In contrast, the

[143] See MPI, 'Report Synthesising Suggestions', above n 127; Report No 761/BC-UBTVQH13 of 28 October 2014 of the NASC accepting, modifying and explaining the (Amended) Enterprise Law Project 1; Report No 1896/BC-UBKT13 of 23 May 2014 of the Economic Committee verifying the (Amended) Enterprise Law Project, 1; Report of 6 September 2014 of the NASC on some contents of the (Amended) Enterprise Law in need of ideas at the meeting of dedicated National Assembly deputies. These conferences were largely held in 2014 and updated at <http://www.ciem.org.vn>.

[144] For example, lists of attendants at conferences held by the CIEM on 10 April 2014 and 24 July 2014 (on file with author).

VCCI's business community meetings were more conducive to such comments because vocal critics — such as private investors, lawyers and academia — could raise candid concerns without upsetting authoritarians, as in state-centred meetings.[145]

Despite the different atmospheres, these meetings echoed the vast public support for protecting minority shareholders. This was evidenced with popular suggestions about enhancing director duties and adding universal rights to commence direct lawsuits against directors.[146] Legal professionals particularly reminded drafters to consider corporate theories, endemic misconduct in companies, and law implementation when refining provisions involving these shareholders.[147]

Although the ministries did not reject these mainstream viewpoints, they either publicly or privately resisted the attempt at ending their direct control over SOEs.[148] Given that the bureaucrat–SOE nexus underlined the existing majority shareholder primacy law,[149] this persistent opposition subtly sabotaged the planned radical change to minority shareholder protection and the associated SOE governance. Thus, a major roadblock to these reform goals was a small number of powerful vested interested ministries.

The remaining issue was how the lead drafting MPI and party-state leadership responded to the public support and bureaucratic resistance. This is tricky because they appeared too

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[145] The VCCI has a legal duty to consult the business community separately. Decree No 24/2009/NĐ-CP of 5 March 2009 of the Government regulating details and measures to implement *LOL 2008* s 24(4).

[146] See, eg, Truong Thanh Duc, 'Commenting on Amendments in the Enterprise Law 2005' (Paper presented at the Enterprises Recommending Changes to the Enterprise Law 2005, held by the VCCI, Hanoi, 9 December 2013); Truong Thanh Duc, 'Commenting on Amendments of Enterprise Law 2014' (Paper presented at the Amending Laws on Investment and Business, held by the VCCI and Government Office, 22 July 2016). Moreover, the VCCI published more than 17 articles from a significant conference on 11 March 2014 at Ho Chi Minh City on <http://www.vibonline.com.vn/Forum/Topic.aspx?ForumID=361>.

[147] See Nguyen Viet Khoa, 'Suggestions on the (Amended) Enterprise Bill' (Paper presented at the Workshop Collecting Ideas on the Drafts of Enterprise Law and Investment Law, held by the Ho Chi Minh City Branch of the VCCI, MPI, Government Office and Vietnam Business Forum, in collaboration with GIZ, Ho Chi Minh City, 11 March 2014).

[148] Comments of lawyer Vu Xuan Tien, head of the Consultancy and Policy Review Department, Vietnam Association of Corporate Directors, quoted in Hang, 'Suggestions on the Amended Enterprise Bill', above n 100.

[149] See detailed discussion in Chapter 3, Section 3.9.3.

sympathetic towards the concerns of the ministries. After the legislature's first examination of the Bill, the MPI and CIEM were directed to hold similar consultation meetings on the already discussed issues, especially SOEs.[150] This practice demonstrated the overuse of such meetings, thereby undermining their efficiency and efficacy. The above clear outcomes were adequate for the national leadership to act for the public interests if they had wanted.

In contrast, online consultation or public hearings were not held to further debate the overlooked controversies, such as retaining earlier preferential provisions that disadvantaged minority shareholders. Discontented with the MPI's and CIEM's consultation practices favouring vested interests,[151] the civil society sector became more proactive in reinforcing viewpoints. The following section considers this movement.

4.8 Rising Voice of Civil Society and Treatment of Non-state Viewpoints

Legal idea contributions from civil society groups are integral to pragmatic legislative drafting. These contributions require a broad political space for the press, academia and legal profession.[152] In Vietnam, this space is gradually broadening because of the relative freedoms of speech, press and information in corporate lawmaking brought by WTO accession.[153]

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[150] The National Assembly discussed *Enterprise Bill 2014* on 17 June 2014. Informatic Centre, National Assembly Office, 'A Synthesis of Discussions at the Parliamentary Chamber' (Transcribed from a tape recording, the National Assembly Term XIII Session 7, morning 17 June 2014). After this discussion, the MPI and CIEM organised conferences on 24 July 2014, 29 August 2014 and 3 September 2014 (for the southern region).

[151] Sound consultation required a balance between state and non-state inputs, with more opportunities for private actors to express viewpoints. See Finkel, above n 124; Productivity Commission, 'Regulation and its Review 2004–05' (Annual Report Series, Productivity Commission, 2005). The MPI and CIEM have failed this precondition.

[152] Civil society was broadly regarded as a metaphor for uncoerced political space in which non-state stakeholders could confront the state. See Michael Walzer, 'The Civil Society Argument' in Chantal Mouffe (ed), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (Verso, 1992) 89, 89–91. This thinking was applicable to Vietnam. See Joe Hannah, 'Civil-Society Actors and Action in Vietnam: Preliminary Empirical Results and Sketches from an Evolving Debate' in the Heinrich Böll Foundation (ed), *Towards Good Society: Civil Society Actors, the State, and the Business Class in Southeast Asia — Facilitators of or Impediments to A Strong, Democratic, and Fair Society?* (Heinrich-Böll-Stiftung, 2005) 110–11.

[153] See Chapter 3, Section 3.8.6. Vietnam encourages public participation in lawmaking, but has tightened civil society freedom in law and practice in other areas, including peaceful demonstration to call for environmental protection. The European Parliament and Human Rights Watch criticised the party-state for

Within this domain, compulsory public consultation via online disclosure has enabled both the general public voice and critical legal voice. However, a more important issue is the due treatment of this voice.

4.8.1 Proactive Press as a Driver for Public Voice

The mass media used the socioeconomic importance of the enterprise Bill project (2012–2014) as business leverage. In particular, the press pioneered and fuelled the public consultation campaign, with dedicated resources and columns to bring this Bill alive with the latest news. For instance, reporters attended consultation meetings to update the drafting progress, while also interviewing key drafters, state officials, prominent scholars, well-known lawyers and successful investors to publish multifarious comments and provide a fuller picture of the reforms.[154] These proactive activities kept the wider public informed of this topical Bill, while improving the press popularity and commercial benefits. As the State President acknowledged, the proactive press left an indelible imprint on the national development, including legal dissemination.[155]

The press coverage attracted the wider public for various reasons. In Vietnam, information access is easy, fast and convenient because of the 700 affordable printed newspapers, as well as free online access (nearly half of the population using the internet and the active blogosphere of legal professionals).[156] More importantly, the press enabled largely

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this tendency. European Parliament Resolution of 9 June 2016 on Vietnam (2016/2755(RSP)) ss H, J, L. See also Human Rights Watch, 'World Report: Events of 2016' (2017) 668–74.

[154] For example, the *Law Newspaper*, *Securities Market* and *CafeF* actively updated public comments. Likewise, the *Investment Newspaper* held a meeting on suggestions for the amended *Enterprise Law* on 17 May 2014 and had a dedicated section to continue with this activity until October 2014 at <http://baodautu.vn/bao-dau-tu-to-chuc-gop-y-luat-doanh-nghiep-sua-doi.html>.

[155] For the role of the press, see Truong Ngoc Tuong and Nguyen Ngoc Phan, *The Press in Ho Chi Minh City* (Saigon Cultural Publishing House, 2007); Peter S Hill et al, 'Mandatory Helmet Legislation and the Print Media in Viet Nam' (2009) 41 *Accident Analysis and Prevention* 789; Phan Van Ken, *Social Criticism of the Vietnamese Press via Noticeable Events* (IC Publisher, 2015). Statements of the State President Truong Tan Sang at his meeting with the press on 17 June 2015, quoted in V Thinh, N Nhan and T Lam, 'The Development of the Country Always Has Imprints of the Press', *Ho Chi Minh Law* (online), 18 June 2015 <http://plo.vn/thoi-su/chinh-tri/qua-trinh-phat-trien-dat-nuoc-luon-co-dau-an-cua-bao-chi-562559.html>.

[156] See John Gillespie, 'Localizing Global Rules: Public Participation in Lawmaking in Vietnam' (2008) 33 *Law & Social Inquiry* 673; Edmund Malesky, 'Vietnam in 2013. Single-Party Politics in the Internet Age' (2014)

unmediated exchanges because the freedoms of press and opinions in lawmaking were steadily improved.[157] With these conveniences, the proactive press became a popular channel for general legal updates, and became a public voice, especially for those avoiding making sensitive comments in state meetings. This explained why the public were uninterested in the bureaucratic online public consultation via state portals.

The press remarks and public comments mainly invoked economic and legal aspects.[158] The public trust erosion and protracted economic difficulties caused by the SOE protectionism, endemic corruption and red tape had muted the socialist arguments on the leading role of state business in earlier legal debates. People especially urged the rescission of undue legal discriminations against minority investors regarding business rights and corporate governance to enhance business opportunities, corporate performance and minority shareholder protection.[159] These comments conveyed a clear message that the people and minority investors were tired of the unfair enterprise law.

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54 *Asian Survey* 30; Jason Abbott, 'Introduction: Assessing the Social and Political Impact of the Internet and New Social Media in Asia' (2013) 43 *Journal of Contemporary Asia* 579. In 2014, 48% of the Vietnamese population used the internet. World Bank, *World Development Indicators 2016* (2016) 117.

157 Pham Chi Dung, 'Would Economic Crisis Happen That Leads to Political Crisis in Vietnam?' (August 2013) 28 *New Age Journal* 11, 20–1. See also Dao Tri Uc et al (eds), *Participation of People in the Constitutional Making Process: Theory and Practice in the Word and Vietnam* (Hanoi National University Press, 2013); Edmund Malesky and Jonathan London, 'The Political Economy of Development in China and Vietnam' (2014) 17 *Annual Review of Political Science* 395.

158 In reality, civilians generally care less about socialist-oriented markets than do politicians, but more about economic fairness, employment and income. See Hy V Luong, *Revolution in the Village: Tradition and Transformation in North Vietnam, 1925–1988* (University of Hawaii Press, 1992). See, eg, 20 submissions from academics lawyers and business associations at <http://www.vibonline.com.vn/Forum/Topic.aspx?ForumID=414>.

159 See, eg, Bui Xuan Hai, 'Some Recommendations on Amending and Supplementing Enterprise Law 2005 Regarding Protection for Shareholders and Company members' (Paper presented at the VCCI's Conference on Review of Enterprise Law on 16 August 2011); Vu Xuan Tien, Discussion on the Reasonability, Practicality and Transparency of the Sixth (Amended) Enterprise Bill (Paper presented at the VCCI's Conference on Collecting Ideas of Businesses regarding the (Amended) Draft Enterprise Law on 7 October 2014); Bich Ngoc, 'Enterprises "Die" Because of Inequality', Interview with economic expert Pham Chi Lan (Press Interview, 22 April 2013) <http://baodatviet.vn/kinh-te/tai-chinh/doanh-nghiep-chet-la-la-do-bat-binh-dang-2345702>.

4.8.2 Rising Critical Voice from the Legal Community

Legal professionals were vocal forerunners in reinforcing the public mainstream in the press. Apart from participation in the consultation meetings, outward-looking research institutions, including the State and Law Institute, alongside Ho Chi Minh City Law University, hosted conferences for eminent academics and lawyers to communicate submissions directly to drafters of the MPI and CIEM.[160] These legal professionals acknowledged the drafting efforts, yet did not shy away from forthright comments.

Associate Professor Pham Duy Nghia was vocal that the burdensome enterprise law had arisen from interlocking problems, such as SOE favouritism, bureaucratic rent-seeking, lax rules of law for state stakeholders, and deficit market exit mechanisms.[161] Underlying these problems were the party-state's ongoing attempts to seek market profits at the expense of small-scale investors. Similarly, Associate Professor Ngo Huy Cuong invoked Anglo-American corporate provisions to show that bureaucratic drafters strategically designed major amendments, including internal corporate procedures and insider trading, which overall would only need to fine-tune corporate accountability and minority shareholder protection to justify the so-called changes.[162]

The legal profession dug deep into the reasons behind such drafting tactics. Corporate lawyers Le Minh Toan and Le Minh Thang uncovered that bureaucratic drafters indulged in their own preferences and submissions from the Financial Investors Association representing big

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[160] Key members of the Editing Group, such as Mr Phan Duc Hieu from the CIEM and Mr Quach Ngoc Tuan from the MPI, attended the major conference held by the State and Law Institute, and Konrad Adenauer Stiftung. See State and Law Institute and Konrad Adenauer Stiftung, *Completing Laws on Enterprises and Investments in the Context of Market Institution Reform in Vietnam Today* (Scientific Conference, Hanoi, 24–25 April 2014).

[161] See Pham Duy Nghia, 'Overview on Enterprises and Investments in the Context of Market Institution Reform in Vietnam' (Paper presented at the Scientific Conference: Completing Laws on Enterprises and Investments in the Context of Market Institution Reform in Vietnam Today, Hanoi, 24–25 April 2014). Nghia's criticism was shared by scholars at the Economic Institute. Tran Dinh Thien and associates, Vietnam Economic Institute, 'The Vietnamese Economy 2014: An Overview' in the National Assembly Economic Committee (ed), *Proceedings of the Spring Economic Forum* (2015) 1, 1–11.

[162] Cuong, above n 104.

businesses to retain corporate governance and litigation loopholes that disadvantaged minority shareholders.[163] More significantly, well-known lawyer Le Net argued that redrafting different SOE rules, whether to be stricter or looser, while missing effective implementation provisions, was a regressive development.[164] This disguised sectional interests and drove Vietnam further away from the legal neutrality seen among its advanced trading partners.

These insightful comments demonstrated the growing proactiveness and profound knowledge of legal intellectuals in enterprise law reforms. This was clearly sustained by their career interests in arguing for more sophisticated law. For this reason, they invoked cross-national legal comparisons, corporate theories, court cases and statistics to substantiate their published comments.[165] This practice appeared more common among professionals who were interested in foreign law research (Ngo Huy Cuong) or who graduated overseas (Pham Duy Nghia obtained a PhD in Germany and Le Minh Toan obtained a PhD in Australia). Legal professionals increasingly used and publicised commentaries on Bills as an effective intellectual catalyst to advance their research interests and career reputation.[166]

The increasing contributions of these perceptive comments were promising inputs to legal drafting in foreign law transfers. These comments could assist with these transfers because global legal ideas enter recipient countries through research communities that sympathise

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[163] Le Minh Toan, 'Legal Framework on the Governance of Public Companies in Vietnam Today' (Paper presented at the Scientific Conference: Completing Laws on Enterprises and Investments in the Context of Market Institution Reform in Vietnam Today, Hanoi, 24–25 April 2014) ; Le Minh Thang, 'Minority Shareholder Protection under the Perspectives of Lawyers via Typical Disputes in Vietnam' (Paper presented at the Scientific Conference: Completing Laws on Enterprises and Investments in the Context of Market Institution Reform in Vietnam Today, Hanoi, 24–25 April 2014).

[164] Hai Van, 'Differentiation between State-Owned Enterprises and Non-State-Owned Ones: A Regression!', Interview with lawyer Le Net, *Industry and Commerce* (online), 28 July 2014 <http://baocongthuong.com.vn/phan-biet-dn-nha-nuoc-voi-dn-khong-phai-nha-nuoc-se-la-buoc-lui.html>.

[165] There were also many party-state scholars who were embedded in ideologies of the socialist-oriented market economy and the leading role of SOEs. See generally MPI, *Proceedings of the Conference on Reforming the Economic Institutions of Vietnam for Integration and Development for the 2015–2035 Period* (Hanoi, 2015).

[166] Some noticeable examples include Pham Duy Nghia at <http://phamduynghia.blogspot.com.au/>; Le Minh Toan at <http://www.luatleminh.vn/danh-muc-bai-viet/139/cac-bai-viet-cua-cong-ty.html>; Luu Thanh Duc at <http://www.basico.com.vn/vi-VN/News/List/10/NewsList.aspx>.

with new approaches to regulation.[167] This means that legal intellectuals can function like intermediaries, explaining Western rules in local terms to address local needs. It is possible that they could bridge the legal gap left by the MPI's ad hoc drafting bureaucrats.

Moreover, the comments of these legal intellectuals demonstrated underlying legal drafting problems. In particular, ad hoc drafting bureaucrats did not showcase any sophisticated foreign corporate jurisprudence, which Kahn-Freund considered essential to legal transfer.[168] In contrast, they followed substandard institutional practices that are barriers to reforms. These practices were not spontaneous because legal professionals conveyed those concerns to key drafters early in the process. This included challenging the lead drafting MPI to invite eminent legal professionals to redraft or revise the substandard Bill and review it neutrally.[169] This showed concern among legal professionals regarding the direct consequences of the MPI's regulatory capture strategies.

The ad hoc drafters experienced another blow as some senior legislators publicly shared their views with legal professionals. Le Minh Thong, the Vice Chair of the National Assembly Law Committee, lamented that legislative drafting still followed the orthodox approach to reinforce the vested interests of bureaucratic bodies, and reiterated that ultimate lawmaking goals serve the overall interests of all stakeholders.[170] Putting these comments into perspective, Vu Viet Ngoan, a National Assembly Economic Committee member, reminded that the drafters 'should not let majority shareholders decide everything'.[171] These comments echoed the desperation of minority shareholders for a fairer Bill.

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[167] John Gillespie, 'Globalisation and Legal Transplantation: Lessons from the Past' (2001) 6(2) *Deakin Law Review* 286.

[168] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 27.

[169] Cuong, above n 104.

[170] See Hoang Ngoc, 'Need for Strong Renewal of Lawmaking Thinking', Interview With Le Minh Thong, Deputy Chairman of Law Committee, *People's Deputies* (online), 3 July 2013 <http://daibieunhandan.vn/default.aspx?tabid=76&NewsId=285053>.

[171] Comments of Mr Vu Viet Ngoan, who was also chair of the National Financial Oversight, quoted in Huu Hoe, 'Amending Enterprise Law: Do Not Let Majority Shareholders Decide All', *Securities Investment*

On a larger scale, the proactive activities of legal professionals were an organic part of a growing peaceful dynamic civil society stream in legal reform. It has become steadily systemic, powerful and constructive to seek the rule of law for all. This movement reached an unprecedented peak with three court cases against the PM by a law doctorate scholar, Cu Huy Ha Vu,[172] and the intelligentsia-led Petition 72 of 6 000 signatories to respect the constitutional freedoms of association, protest and referendum.[173] Civil society movements have ascended ever since, especially with active voices from retired senior Party members.[174]

4.8.3 Bureaucratic Treatment of Consultation Outcomes

The above outcomes of the consultation and civil society activities revealed both stances of stakeholders. The majority of stakeholders supported equitable extensive amendments, especially regarding SOEs and litigation, to better protect minority shareholders. In contrast, ministries in the minority opposed the radical reform, although they could not block these amendments, which were goals in the *Master Plan on Economic Restructuring 2013–2020*. Thus, the MPI faced a conscious choice between public expectations and peer-group pressure when redesigning the post-consultation Bill.

The MPI took the traditional partial compromise to discharge its duty. It commissioned a report to accept various suggestions from ministries, yet did not address the insightful

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(online) 15 April 2014 <http://tinnhanhchungkhoan.vn/thuong-truong/sua-luat-doanh-nghiep-dung-de-co-dong-lon-quyet-tat-93646.html>.

[172] Cu Huy Ha Vu is a son of a former minister and the famous poet Cu Huy Can. Three lawsuits were filed in June 2010, October 2010 and October 2015. He was sentenced to 7 years but was soon released on 6 April 2015 as a US refugee. The case of Vu attracted worldwide attention and support. See, eg, message by Mr Franz Jessen, Ambassador-Head of the EU Delegation to Vietnam, 'Vietnam: The Party vs Legal Activist Cu Huy Ha Vu' (Human Rights Watch, 16 April 2014).

[173] See Dung, above n 157, 11, 20–1; Zachary Abuza, 'People's or Party's Army in Vietnam?' (Policy Brief No 168, Institute for Security & Development Policy, 2015) 1–2; Petition 72 signed on 19 January 2013.

[174] These retired prominent party members include Professor Tuong Lai (former chairman of the Institute of Sociology), Professor Nguyen Minh Thuyet (former vice chairman of the Vietnam National Assembly's Culture and Education Committee) and lawyer Tran Quoc Thuan (former deputy chairman of the National Assembly Office).

comments from legal professionals.[175] To further appease the ministries, the MPI revoked the long-awaited proposed Section 172, which prohibited state bodies from interfering with the business operations of SOEs, transferred SOEs from state bodies to dedicated independent agencies, and required SOEs to ensure fair competition with other investors.[176] This decision undercut the reform goals because the bureaucrat–SOE nexus underlay the unfair enterprise law. Accordingly, the MPI-led drafters maintained legal discrimination when altering corporate governance and shareholder litigation provisions.[177]

Legal and political advantages assisted the MPI to proceed with this bureaucratic capture. The concentrated discretionary drafting powers, absolute control over subordinate key drafters, and shared vested interests with fellow ministries enabled and incentivised the MPI to prioritise these sectional interests over the national interest. Although lawyers publicly requested accountability for these actions, and economic expert Pham Chi Lan suggested that government leaders should overrule these practices and reinstate Section 172 for debate in the legislature,[178] the leadership's silence meant that the regulatory capture was systemic and business as usual, without accountability for inferiors.

These problematic institutional practices have caused lasting effects. Improvements in RIA, public consultation, online disclosure and the resultant transparency facilitated a civil society

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[175] MPI, 'Report Synthesising Suggestions', above n 127. The sponsor ministry must synthesise, study and adopt recommendations. *LOL 2008* s 33(4).

[176] Four fundamental drafted provisions, 170–174, which end the control of ministries over SOEs, were removed from the fourth version of *Enterprise Bill 2014*. Some state-owned corporations also wanted to de-link with ministries. Le Minh Chuan, 'Vietnam National Coal–Mineral Industries Holding Corporation Limited: Achievements, Lessons and Recommendations ' in Ho Chi Minh National Academy of Politics and Vietnam Energy Association (eds), *Proceedings of National Conference on State-Owned Enterprises: Success and Expensive Lessons* (Political Theory Press, 2014) 44.

[177] For detailed examination of these issues, see Chapter 5, Section 5.6.

[178] Thu Hang, 'Amending Enterprise Law Has to Deter Group Interests', Interview with lawyer Tran Huu Huynh (Press Interview on the Ho Chi Minh City Law, 4 August 2014); Hang, 'Suggestions on the Amended Enterprise Bill', above n 100, quoting lawyer Vu Xuan Tien; T Hang, 'Do Not Let Reform Thinking Be Eliminated From the First Round', Interview with economic expert Pham Chi Lan (Press Interview on the Ho Chi Minh Law Newspaper, 8 April 2014) <http://plo.vn/thoi-su/dung-de-nhung-tu-tuong-cai-cach-bi-loai-ngay-vong-dau-487075.html>. The MPI operated under the direction of government leaders. See Report No110/BC-CP of 17 May 2012 of the Government on the overall project of economic restructuring together with growth model transitioning towards increasing effectiveness, productivity and competition capacity.

voice and oversight. However, the concentrated drafting powers, absent accountability and vested interests, as noted above, made these important improvements inadequate to deter the regulatory capture. This has eroded public trust in the bureaucratic legal drafting.[179] Moreover, the government's limited responsiveness to public wisdom has affected the Bill's quality. The last version was the least progressive because it retained the biased nature and prevalent vague mottos, such as 'unless the law provides differently, or except other matters'.[180] Such unfairness and unpredictability in the Bill revealed the usual rent-seeking tactics and limitations of drafting skills and legal knowledge.[181] Thus, the fate of this Bill lay in the legislature's decisions.

4.9 Politics of Discussing and Voting on Enterprise Bill 2014

Detailed discussions and voting occurred in two meetings of the National Assembly, as legally required.[182] The first plenary session was when the legislature scrutinised this Bill. The second meeting three months later was mainly to vote after the drafters had fine-tuned the Bill.[183] Although the procedure was simple, political power structures and operations within the legislature revealed how the authoritarian leadership addressed the dire economic pressures and broad demands for deep reforms.

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[179] See Pip Nicholson, 'Access to Justice in Vietnam: State Supply — Private Distrust' in John Gillespie and Albert H Y Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, New York, 2010) 188, 199.

[180] Comments of National Assembly members Truong Trong Nghia and Vu Viet Ngoan in Informatic Centre, National Assembly Office, above n 150; Cuong, above n 104.

[181] Vuving stated that 'rent-seekers have gradually become the dominant force in … Vietnam, where the state … is accountable to none but itself': Alexander L Vuving, 'Vietnam in 2012: A Rent-Seeking State on the Verge of a Crisis' in Daljit Singh, Institute of Southeast Asian Studies (eds), *Southeast Asian Affairs 2013* (Institute of Southeast Asian Studies, 2013) 323, 325.

[182] *LOL 2008* s 51(1).

[183] As standard practice, the Prime Minister delegated an MPI minister to read the submission of the Bill at the National Assembly on 26 May 2016. On 28 May 2016, the Bill was discussed by the National Assembly in small groups. On 17 June 2016, the National Assembly held a plenary session to discuss the Bill. Two months later, the NASC considered the Bill but mainly approved it. On this basis, the National Assembly passed the Bill at the second plenary on 26 November 2014. See Informatic Centre, National Assembly Office, above n 150; Report of 6 September 2014 of the NASC on some contents of the (Amended) Enterprise Law in need of ideas at the meeting of dedicated National Assembly deputies; Report No 761/BC-UBTVQH13 of 28 October 2014 of the NASC accepting, modifying and explaining the (Amended) Enterprise Law Project.

4.9.1 Political Power Arrangements and Operational Principles inside the National Assembly

Party membership and leadership determine the exercise of power in the National Assembly. With a vetted election system, Party members occupy approximately 90% of the 500 seats, with the majority being bureaucratic elites and their inferiors, while the remaining 10% are mostly well-connected wealthy businesspeople.[184] The top national leaders are the Party General Secretary, PM and National Assembly Chairperson from the Politburo. Six of 16 Politburo members manage the Party, six run the government, three control the National Assembly together with its Standing Committee, and one is the State President.[185] These arrangements enable the Party to lead the state apparatus, and the government to control voting in the National Assembly.

The Party used three main principles to manage the legislature. First, *democratic centralism* allowed legislators to discuss and obey (rather than debate and criticise) the decisions made by the ruling elite, as 'political retribution regarding freedoms inside the legislature were quite plausible'.[186] Second, *co-optation* offered vetted open-minded legislators the opportunity for some influence to ease social concerns.[187] This enabled small critical cliques to emerge that supported fairer laws. Third, the Party reiterated *coordination* among the overlapping blocs of

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[184] For practices and problems of vetting candidates through three rounds and selecting top leaders for the three arms of government, see Nguyen, Do and Tran, above n 82, 4; Edmund Malesky and Paul Schuler, 'The Single-Party Dictator's Dilemma: Information in Elections without Opposition' (2011) 36 *Legislative Studies Quarterly* 491; Edmund Malesky and Paul Schuler, 'Star Search: Do Elections Help Nondemocratic Regimes Identify New Leaders?' (2013) 13 *Journal of East Asian Studies* 35. Details about the National Assembly I (1946–60) to the current XIV (2016– 21) are available at <http://dbqh.na.gov.vn/>.

[185] This conventional structure was the same for the term 2016–20, but there were 19 politburo members for this term. The party structure and leadership arrangements from the Party Congress I to XII (2016–20) are available at <http://dangcongsan.vn/tu-lieu-van-kien.html>.

[186] Edmund Malesky, Paul Schuler and Anh Tran, 'The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly' (2012) 106 *American Political Science Review* 762; James H Anderson, 'Sunshine Works: Comment on "The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly"' (Policy Research Working Paper 6602, World Bank, 2013) 18–20; Gillespie, 'Localizing Global Rules', above n 156, 673, 687.

[187] Edmund Malesky, Paul Schuler and Anh Tran, 'Vietnam: Familiar Patterns and New Developments Ahead of the 11th Party Congress' in Daljit Singh (ed), *Southeast Asian Affairs 2011* (Institute of Southeast Asian Studies, 2011) 339, 354. For cooptation and authoritarianism, see, eg, Ora John Reuter and Graeme B Robertson, 'Legislatures, Cooptation, and Social Protest in Contemporary Authoritarian Regimes' (2015) 77 *Journal of Politics* 235; Wonik Kim and Jennifer Gandhi, 'Coopting Workers under Dictatorship' (2010) 72 *Journal of Politics* 646.

conservatives, rent-seekers and modernisers in the party-state to control disagreement.[188] These principles were used to decelerate the emerging legislature.[189]

Mounting economic instabilities have favoured the co-optation approach and empowered modernisers. Eminent legislators evoked public distrust and the need to hold bureaucrats accountable. Nguyen Minh Thuyet even proposed a vote of no-confidence in the PM for the collapse and corruption of the Vinashin and Vinalines conglomerates, and for approving bauxite mining, with its ongoing social and ecological costs, despite being forewarned of these costs.[190] To placate electorates, the legislature rejected some of the government's 'narrow-interest' Bills and an expensive bribe-driven project proposal.[191] While these unprecedented actions have not led to an authentic democratic legislature, they have established a precedent for constructive dissent. *Enterprise Law 2014* was examined in this topical context.

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[188] See Alexander L Vuving, 'Vietnam: A Tale of Four Players' in Daljit Singh (ed), *Southeast Asian Affairs 2010* (Institute of Southeast Asian Studies, 2010) 366. See also Quang Truong, above n 82; Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart, 2009) 120; A Thayer Carlyle, 'Political Legitimacy of Vietnam's One Party-State: Challenges and Responses' (2009) 28(4) *Journal of Current Southeast Asian Affairs* 47, 51.

[189] See Edmund Malesky and Paul Schuler, 'Nodding or Needling: Analysing Delegate Responsiveness in an Authoritarian Parliament' (2010) 104 *American Political Science Review* 482. See also Jennifer Gandhi and Adam Przeworski, 'Cooperation, Cooptation, and Rebellion Under Dictatorships' (2006) 18 *Economics & Politics* 1; Jennifer Gandhi and Adam Przeworski, 'Authoritarian Institutions and the Survival of Autocrats' (2007) 40 *Comparative Political Studies* 1279.

[190] Malesky, Schuler and Tran, 'Vietnam: Familiar Patterns and New Developments', above n 187, 339, 341; Malesky and Schuler, above n 184, 491, 501. Nguyen Minh Thuyet was a deputy chairman of the National Assembly Culture and Education Committee and a legislator from 2002 to 2012.

[191] See Edmund J Malesky, 'Understanding the Confidence Vote in Vietnamese National Assembly: An Update on "Adverse Effects of Sunshine"' in Jonathan D London (ed), *Politics in Contemporary Vietnam: Party, State, and Authority Relations* (Palgrave Macmillan UK, 2014) 84. On 19 June 2010, the legislature rejected a proposed rail project costing USD58.85 billion, equivalent to 50% of the GDP, pushed by a JPY80 million bribe and a questionable research expense of USD7 billion. Nguyen Xuan Thanh, 'North–South Express Railway' (Fulbright Economics Teaching Program CV09-32-39.0, 1 September 2009); P V, 'From Corrupt Suspicion of VND16 Billion, "Exposing" a "Research" Costing USD7 Billion', *Informants* (online), 29 March 2014 <http://www.nguoiduatin.vn/tu-nghi-an-hoi-lo-16-ty-lo-vu-nghien-cuu-7-ty-usd-a128034.html>; Minh Chien, 'A JPY80 Million Bribe: The Ministry of Transport Will Repay the Money Following International Practices', *VTC News* (online), 3 April 2015 <http://vtc.vn/hoi-lo-80-trieu-yen-bo-gtvt-se-hoan-tra-tien-theo-thong-le-quoc-te.2.548139.htm>. In 2011, the Capital Bill, which created special administrative and budget mechanisms for Hanoi capital, received 35.9% of votes. This Bill was passed in 2012.

4.9.2 Positives in Legislative Discussion on the Bill

The importance of the Bill for reinvigorating the small investor-driven economy motivated 26 delegates to examine it thoroughly.[192] Although supporting the government's intention to overhaul this Bill, they required drafters to revise the 'unnecessary wording, replace unclear phrases of other provisions with plain principles, and reduce inconsistencies'.[193] Concurring with civil society advocates, they requested an upgrading of the Bill to be closer to international standards, especially for corporate governance and shareholder litigation, and to encourage small investments.[194] Therefore, the speaking delegates asked the MPI to consider the practical suggestions of lawyers and business associations, both domestic and foreign, to rectify the vague and piecemeal drafting style.

The need for legal equity to address extensive misconduct reinforced the performance demands on the Bill. Taking a political risk, many delegates urged enhanced accountability among ministries, to revoke the SOE chapter, to end legal bias in accordance with the Constitution 2013, to honour the existing WTO commitments, and to incorporate the upcoming Trans-Pacific Partnership Agreement, which would benefit Vietnam.[195] They warned that the violations of these foundational laws enabled managing bureaucrats, majority shareholders and company directors to abuse the law.[196] These delegates requested the strongest judicial protection for minority shareholders against endemic misconduct in companies that the Bill had not addressed.[197]

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[192] Informatic Centre, National Assembly Office, above n 150, 53–4.

[193] See, eg, Ibid 2–5 (Duong Hoang Huong), 5–6 (Mai Huu Tin), 9 (Phung Duc Tien), 14 (Ha Sy Dong).

[194] See Informatic Centre, National Assembly Office, above n 150.

[195] See, eg, Ibid 19 (Mai Thi Anh Tuyet), 20 (Le Cong Dinh), 26 (Tran Hoang Ngan), 37–8 (Nguyen Van Son), 43 (Nguyen Anh Dung), 44 (Tran Xuan Hoa), 50 (Nguyen Vinh Ha). This Agreement is unenforced and replaced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership on 8 March 2018.

[196] See, eg, Informatic Centre, National Assembly Office, above n 150; at 16 (Pham Thi My Le), 46 (Truong Trong Nghia), 50 (Pham Huy Hung).

[197] See, eg, Informatic Centre, National Assembly Office, above n 150, 30–1 (Nguyen Thi Hue), 41 (La Ngoc Thoang), 48–50 (Vu Viet Ngoan).

The pressure for increased transparency also shaped these evolving improvements. Focused media coverage, published discussion transcripts in dedicated Bill portals, and live broadcasts of plenary meetings gradually expanded the freedom of information and public awareness of lawmaking.[198] This encouraged the forthright delegates to be active legislators to push for more sustainable reforms.[199] Their active engagement enlivened the legislature and ensured that all legislators, including party-state leaders, were aware that the Bill remained unclear and unfair.

4.9.3 Negatives in Discussion, Bureaucratic Influence and Political Control over Voting

Many problems hindered improvements in the Bill's deliberations. Speaking delegates rarely invoked legal arguments and academic resources in their repetitive comments because they were seldom lawyers.[200] The vetting process meant that relative amateurs were elected to the National Assembly. [201] As such, they lacked legal expertise, assistance and organisation in a part-time legislature. Although they supported law transfers to redress unfair practices, they were largely unaware that Anglo-Saxon countries developed oppression sections specifically for this purpose. Further, legislative leaders discounted requests to improve flexibility and

[198] See Malesky, Schuler and Tran, 'The Adverse Effects of Sunshine', above n 186, 762, 770; Anderson, above n 186, 20; annual surveys of the Viet Nam Provincial Governance and Public Administration Performance Index from 2010 to 2016 <http://papi.org.vn/eng/documents-and-data-download>. A dedicated channel of the National Assembly also operated from 1 January 2015 <http://quochoitv.vn/>.

[199] Transparency and public attention improve performance of politicians in Vietnam. Malesky and Schuler, 'Nodding or Needling', above n 189, 482. See also Aymo Brunetti and Beatrice Weder, 'A Free Press Is Bad News for Corruption' (2003) 87 *Journal of Public Economics* 1801; James E Alt, David Dreyer Lassen and David Skilling, 'Fiscal Transparency, Gubernatorial Approval, and the Scale of Government: Evidence from the States' (2002) 2 *State Politics & Policy Quarterly* 230.

[200] Bui Van Cuong, above n 129, 29. Moreover, repetitive viewpoints of 28 discussants indicated lack of organisation and favouritism of quantity.

[201] Only about 30% of the existing National Assembly deputies are allowed to run for re-election. For debates and concerns about the effectiveness of these deputies, see Do Ngoc Hai, 'On the Criteria of National Assembly Deputies in the Context of Vietnam Being a WTO Member' (2009) 23(160) *Legislative Study Journal* 36; Nguyen Thi Phuong, 'Should Qualification Be a Criterion for National Assembly Deputies' (2010) 2(163) *Legislative Study Journal* 22; Nguyen Duc Lam, 'Training Elected Representatives in Vietnam: Context, Approach, Process' (Paper presented at the International Conference: Effective Capacity Building Programmes for Parliamentarians, Bern, Switzerland, 19–20 October 2011).

competence and to allow direct debate so that legislators could pressure the government to improve the Bill.[202] Such inaction enabled the ministries to undermine the legislature.

The sweeping powers of the government forced legislators to lean towards it. As the single party owed equal leadership on the government and allocated more legislative seats to it, this deterred the peak legislature from opposing this government's Bill. Concurrently, this encouraged legislators to build networks with ministries, avoid frustrating senior bureaucrats to advantage long-term careers and ignore warnings that 'the legislature is serving state interest groups which could causes a crisis of policy corruption and public distrust'.[203]

Authoritarianism further hindered legislative activities. The party-state leadership designed a part-time National Assembly, with its own Standing Committee acting as a gatekeeper.[204] Moreover, Politburo members who chaired both bodies also presided over discussion and voting sessions. Together with the PM and Party General Secretary, they entrenched centralism.[205] Delegates frequently criticised these practices because legislators must confront the Standing Committee which excessively controls their speeches on Bills.[206] Despite its

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[202] The ruling party itself considered its designed legislature incapable of performing complex legislative functions. Malesky and Schuler, 'Star Search', above n 184, 35, 36. See requests for change from the deputy Nguyen Thi Quyet Tam quoted in Quoc Thanh, '"Dedicated" or "Professional"?', *Youth* (online), 30 June 2014 <http://chuyentrang.tuoitre.vn/TTC/Index.aspx?ArticleID=615062&ChannelID=702>; suggestions for the National Assembly leaders from a former head of the National Assembly Office, Vu Mao, quoted in Le Kien and V V Thanh, 'National Assembly Deputies Speak the Voice of Whom', *Youth* (online), 20 July 2014 <http://tuoitre.vn/tin/ban-doc/20140720/dai-bieu-quoc-hoi-noi-tieng-noi-cua-ai/624361.html>.

[203] See Nguyen, Do and Tran, above n 82, 4, 7–8; Malesky, Schuler and Tran, 'The Adverse Effects of Sunshine', above n 186, 762; Quoc Hoc, *National Assembly Deputies: Do Not Let the National Assembly to 'Serve' Covert Interest Groups* (24 July 2014) <http://trandaiquang.org/dung-de-quoc-hoi-phuc-vu-cho-nhom-loi-ich-ngam.html>; Le Kien, 'National Assembly Deputies Giving a Speech of Others Are Not Earnest', *Youth* (online), 17 July 2014 <http://tuoitre.vn/tin/chinh-tri-xa-hoi/20140717/db-quoc-hoi-phat-bieu-bai-nguoi-khac-la-khong-nghiem-tuc/623056.html> (quoting leaders of the National Assembly).

[204] See generally Legislative Studies Institute, Legislative Studies Journal and Institute of Policy and Law, *Organising the State Apparatus Following the Constitution 2013* (Scientific Conference Proceedings, Hanoi, 6 May 2014). The National Assembly sits for approximately 3 months annually. Its Standing Committee takes charge of the remaining 9 months. *Law on National Assembly Organisation 2013* (Vietnam) s 90.

[205] Matthieu Salomon, 'Power and Representation at the Vietnamese National Assembly: The Scope and Limits of Political Doi Moi' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan US, 2007) 198, 215; Malesky and Schuler, 'Nodding or Needling', above n 189, 482; Cao Huy Thuan, 'Democracy? Still a Dream?' (2015) 33 *New Age Journal* 1.

[206] Deputy Tran Du Lich's comments quoted in Quoc Thanh, '"Dedicated" or "Professional"?', *Youth* (online), 30 June 2014 <http://chuyentrang.tuoitre.vn/TTC/Index.aspx?ArticleID=615062&ChannelID=702>. The Standing Committee decide whether or not to accept ideas of deputies: See Report No 761/BC-UBTVQH13

exposed basic flaws, the committee's chairperson assessed that, 'this Bill has many new breakthrough changes and very strong reforms to encourage corporate development, create a convenient business environment, and implement the Constitution [sic]'.[207]

Such intensive hegemony and unquestioning political loyalty compelled almost all legislators to vote following the party-state leadership, instead of their constituents.[208] Modest entitlements within a part-time legislature further disincentivised most delegates from acting diligently and voting responsibly.[209] Consequently, the party-state leadership easily pushed this Bill through the legislature, even though the Bill continued to breach the legal equity principles that were enunciated in reform policies and foundational laws.

This result demonstrated that the inconsistent improvements in the single-party legislature have barely compensated for its failures. It did not deter the ministries from capturing the enterprise law, or represent the interests of minority investors. There remained a large credibility gap between the party-state leadership's actions and policies to protect and ensure legal fairness for all investors. Consequently, *Enterprise Law 2014* continued to favour the vested interests of the ministries, the SOEs and their allied majority investors.

These failures are rooted in the absence of multiple parties with an in-built system of checks and balances. The single-party legislature has no system of checks and balances to pressure

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of 28 October 2014 of the NASC accepting, modifying and explaining the (Amended) Enterprise Law Project; Report of 6 September 2014 of the NASC on some contents of the (Amended) Enterprise Law in need of ideas at the meeting of dedicated National Assembly deputies.

[207] Informatic Centre, National Assembly Office, above n 150, 54–5 (Nguyen Thi Kim Ngan, who was vice chairwoman of both the National Assembly and its Standing Committee). She was promoted to chairwoman of the National Assembly (2016–20).

[208] This has been an enduring practice. See Vo Van Kiet, 'Challenges to the National Assembly' (Paper presented at the Workshop on 60 Years of the National Assembly's Development, Hanoi, 3–4 January 2006); Tran Ngoc Duong and Ngo Duc Manh, *Organisational and Operational Models of the National Assembly and the Government in the Vietnamese Socialist Law-Based State* (National Political Press, 2008) 404. Malesky and Schuler, 'Star Search', above n 184, 35. There were 425 out of 428 present members voting for the Bill on 26 November 2014, regardless of numerous problems discussed by 26 delegates noted above.

[209] Ngoc Quang, 'Professor Nguyen Minh Thuyet: "In Vietnam, Ineffectual People Still Sit the Entire National Assembly Term"', Interview with Nguyen Minh Thuyet (Press Interview on Vietnam Education (online), 17 November 2014) <http://giaoduc.net.vn/Xa-hoi/GSNguyen-Minh-Thuyet-O-ta-nguoi-khong-duoc-viec-van-ngoi-het-khoa-post152306.gd>; Malesky and Schuler, 'Nodding or Needling', above n 189, 482; Malesky, Schuler and Tran, 'Vietnam: Familiar Patterns and New Developments', above n 187, 339, 354.

the party-state leaders to strengthen the integrity, expertise, transparency and accountability of themselves and their inferiors to introduce law reform in the national interest. As Downs argued, 'there is no reason to believe that the men running the government would maximise public interests' because 'the horse named Morality rarely gets past the post, whereas the horse named Self-interest always runs a good race'.[210]

[210] Anthony Downs, 'An Economic Theory of Political Action in a Democracy' (1957) 65 *Journal of Political Economy* 135, 136. The second quote was from former prime minister of Australia, Gough Whitlam, writing in the London Daily Telegraph on 19 October 1989 and quoted in Delbert D Thiessen (ed), *A Sociobiology Compendium: Aphorisms, Sayings, Asides* (Transaction Publishers, 1998) 26.

Conclusion

The transformation of the Australian oppression sections was informed by the cooperative lawmaking approach. Separate statutory powers, the independence of functional institutions and the public criticism of prevalent corporate wrongdoing combined to induce the government to consider broad interests and refrain from being captured by interest groups. This encouraged contributions to legal reforms from non-governmental stakeholders.

In Vietnam, the more widespread corporate misconduct and reform recommendations from the legal community only yielded modest effects on the interest group of ministerial bureaucrats. As they gained benefits from protecting SOE majority shareholders through enterprise law changes under the auspices of the party-state leadership, these bureaucrats used concentrated powers in a government-centric legislative process to capture *Enterprise Law 2014*. Such regulatory capture is an enduring systemic problem, underpinned by deficiencies of separate statutory powers and independent institutions.

On this basis, this chapter reaffirmed that the transformation of oppression sections was linked with an inclusive legislative process, effective political leadership, functional lawmaking institutions and the important roles of civil society in corporate lawmaking. In contrast, the reform of litigation provisions in *Enterprise Law 2014* was constrained by the limited quality of the legislative process, the lawmaking institutions and the political leadership, despite active civil society.

However, minority shareholder protection policies resulted in some improvements in shareholder litigation rights in *Enterprise Law 2014*. The next chapter examines such litigation rights in Vietnam and minority shareholders' recourse to the court system via the oppression sections in Australia.

CHAPTER 5: LEGISLATIVE DESIGN AND JUDICIAL IMPLEMENTATION OF AUSTRALIAN OPPRESSION SECTIONS AND VIETNAMESE LITIGATION PROVISIONS

Introduction

The high standard of legislative design and judicial implementation of legal rules shape and inform effective practice. Researchers recommend that both design and implementation factors are important and complementary,[1] and that they should be considered in their evolving contexts.[2]

Chapter 2 compiled the legal transfer framework that guided the examination of the legislative design and judicial implementation. This framework expanded Teubner's legal irritation theory and combined it with empirical findings of Berkowitz, Pistor and Richard about the transplant effect in corporate law reform.

Chapter 5 (this chapter) performs the third step (legislative design together with judicial implementation) in this legal transfer framework. This step aims to identify the major factors that informed the legislative design and judicial implementation of Australia's oppression sections, as well as Vietnam's litigation provisions. These results enable assessment of the effectiveness of the oppression sections and litigation provisions in protecting minority shareholders.

Part I identifies and analyses four essential elements of the Australian oppression sections: (1) legal standing, (2) litigable conduct, (3) grounds for court orders and (4) available remedies. It assesses how these elements were designed and implemented. The assessment reveals that both the sound design of the oppression sections and the judicial merits in the implementation

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1 See, eg, Jonathan R Hay, Andrei Shleifer and Robert W Vishny, 'Toward a Theory of Legal Reform' (1996) 40(3) *European Economic Review* 559–67; Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58(1–2) *Journal of Financial Economics* 3; Chee Keong Low, *Corporate Governance: an Asia-Pacific Critique* (Sweet & Maxwell Asia, 2002), 7; Leora F Klapper and Inessa Love, 'Corporate Governance, Investor protection, and Performance in Emerging Markets' (2004) 10(5) *Journal of Corporate Finance* 703.

2 Jean Michel Lobet, 'Protecting Minority Shareholders to Boost Investment' in Penelope J Brook et al (eds), *Celebrating Reform 2008 — Doing Business Case Studies* (World Bank, 2008) 61; David Nelken, *Beyond Law in Context: Developing a Sociological Understanding of Law* (Routledge, 2009); Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012).

of these sections were key factors in making it a regulatory success in protecting minority shareholders.

Part II examines the aforementioned four essential elements of Vietnamese litigation provisions. It also identifies and discusses four important factors that inform the judicial practice in law implementation: (1) public attitudes on dispute resolution through court, (2) political leadership (including outside and inside court), (3) the influence of the government and (4) the rise of the legal profession.[3] In contrast to the Australian experience, this part argues that the current legislative design and judicial features in adjudication are deficient, as these factors have not assisted minority shareholders to counteract oppression inside companies.

The chapter concludes that the legislative design and judicial implementation of Australia's oppression sections are central to determining the effectiveness of these sections in minority shareholder protection. The inclusion of fairness in both legislative design and judicial implementation has been key to the success of these sections. This has allowed these sections to operate in diverse situations by offering the broad scope of legal standing, litigable conduct, grounds for court orders and diverse remedies towards fairness. In contrast, Vietnam's litigation provisions have not provided effective protection for minority shareholders — both the legislative design and judicial implementation of these provisions have undermined fairness.

[3] Detailed discussions of these factors are necessary because direct shareholder litigation is new in Vietnam where the use of court and the provision of legal service are evolving with economic change after WTO accession. This is different from Australia where public access to the independent judiciary is facilitated.

Part I: Legislative Design and Judicial Implementation of Australia's Oppression Sections

This section examines four key elements important to the effectiveness of Australia's oppression Sections 232–235 in *Corporations Act 2001* (Cth). It argues that the legislative design of legal standing, litigable conduct, grounds for court order and available remedies (reworded in 1998) has provided flexibility for the judiciary to include the concept of fairness in legal implementation. It also argues that the manner in which the judiciary have interpreted legal standing has allowed for former and current members (including minority shareholders, majority shareholders and directors) to commence legal proceedings. Moreover, the broad range of litigable conduct has enabled the judiciary to review almost any conduct brought to it. Furthermore, the judicial interpretation of the unfairness ground for court order has been critical to the effectiveness of oppression sections. Finally, the diverse remedies available and granted have added to such effectiveness.

5.1 Legal Standing to Commence Litigation

Central to litigation is the right to commence a lawsuit, known as legal standing.[4] Leave of court, which is intended to discourage vexatious litigants from abusing the court process, does not apply to legal standing under oppression sections.[5] For instance, *Corporations Act 2001* (Cth) s 234 accords legal standing to former members, current members and people whom the Australian Securities and Investments Commission (ASIC) considers appropriate. 'Members' here refers to people listed in the company register, and people receiving shares by will or by

[4] Alternative terms are locus standi, or standing to sue. See, eg, Heather Elliott, 'The Functions of Standing' (2008) 61(3) *Stanford Law Review* 459; Joshua D Wilson and Michael McKiterick, 'Locus Standi in Australia — A Review of the Principal Authorities and Where It Is All Going' (Paper presented at the Conference of the Civil Justice Research Group, University of Melbourne, 2010); Martin J Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute' (2011) 26(1) *ICSID Review-Foreign Investment Law Journal* 34.

[5] For a landmark case about legal standing, see *Australian Conservation Foundation v Commonwealth* [1980] HCA 53. See also Eric B Schnurer, '"More than an Intuition, Less than a Theory": Toward a Coherent Doctrine of Standing' (1986) 86(3) *Columbia Law Review* 564; Eugene Kontorovich, 'What Standing Is Good for' (2007) 93(7) *Virginia Law Review* 1663, 1668; Evan Tsen Lee and Josephine Mason Ellis, 'The Standing Doctrine's Dirty Little Secret' (2012) 107(1) *Northwestern University Law Review* 169.

law.[6] To further address corporate mischief, the court accepts legal standing of people who are validly issued a share certificate, but their names are not entered in the company register.[7]

The legal standing of former members is limited to the cessation of their memberships, including a selective reduction of capital.[8] This is significant for their protection because such termination at times becomes oppressive.[9] However, they cannot bring action against oppression uncovered after they cease to be members, despite damage.[10] Allowing former members to bring action in this circumstance would increase the number of people with legal standing to question oppressive conduct in companies, which would further promote fairness.

The legal standing of current members differs in two respects. They may litigate oppressive conduct towards themselves in 'any capacity',[11] but may only do so in the capacity as members if their claims relate to an act or omission against another company member.[12] In both instances, applicants need not be members at the time the oppression occurred. This means investors may commence proceedings against conduct occurring before acquiring membership, as long as such conduct involves their interests.[13]

The judiciary has interpreted the legal standing of current members more narrowly than in the corporate statute. While the statutory term of 'any capacity' may include capacities as franchisees, employees and creditors, judges adopted the British approach to dismiss claims

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6 Such persons included administrators of the deceased shareholders' estates: *Corporations Act 2001* (Cth) ss 231–2 ('*Corporations Act*'). A member holding shares in the capacity of a trustee could obtain relief: *Re A Company (No 003610)* [1986] BCLC 391. See also Elizabeth Boros and John Duns, *Corporate Law* (Oxford University Press, 2nd ed, 2010) 307; R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, 15th ed, 2013) 717.

7 *Re Independent Quarries Pty Ltd* (1993) 12 ACSR 188.

8 For selective reduction, see *Corporations Act* s 256B(2).

9 See A Marsden, 'Prejudicial Relief' (1994) 15 *Company Lawyer* 78; Elizabeth Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995) 123. For common instances of oppressive conduct, see Austin and Ramsay, above n 6, 729–36.

10 This is a defect of oppression sections: Daniel D Prentice, 'The Theory of the Firm: Minority Shareholder Oppression: Sections 459–461 of the Companies Act 1985' (1988) 8(1) *Oxford Journal of Legal Studies* 55, 64.

11 *Corporations Act* s 234(a)(i).

12 Ibid s 244(a)(ii).

13 Austin and Ramsay, above n 6, 715.

regarding these capacities, except as directors.[14] Claims involving concurrent capacities, characterised as collateral purposes, were also dismissed as abuses of litigation process.[15]

Moreover, judicial decisions on the legal standing of members being majority shareholders have triggered debate. In *Re Polyresins Pty Ltd*, Mr Hartley owned over 60% of shares, while Mr and Mrs Galae held the rest.[16] The majority shareholder applicant alleged that deceptive conduct by minority shareholder defendants oppressed him. In particular, he was excluded from managing the company and not informed of the appointment of Mrs Galae as a director. The Galaes also used corporate funds to defend their conduct. Chesterman J ruled that Mr Hartley could not be oppressed because he could use a majority vote to eliminate unfairness.[17] This essentially meant that majority shareholders could not commence oppression proceedings.

However, this judgement contrasted with a ruling in similar earlier and later cases. In *Marks v Roe*,[18] despite legal requirements and company members' requests, a minority shareholder, who was both the chairman and managing director, had not held annual general meetings, not informed majority shareholders of corporate activities, and not repaid his interest-free loan, yet required that of other shareholders to be reimbursed. Thus, Mandie J held that this powerful minority shareholder oppressed majority shareholders holding over 70% of shares.[19] This finding was shared by many judges. Young and Bergin JJ agreed that minority

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[14] See, eg, *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63, [65]–[66] (capacity as a franchisee); *Re Alchemic Ltd* [1998] BCC 964 Ch D (capacity as an employee). *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (capacity as director) ('*Ebrahimi*' [1973] AC 360). British rules also accepted a member's capacity as a creditor, see *R & H Electric Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280. But Prentice convincingly argued against this approach: Prentice, above n 10, 64–5.

[15] See *Re Bellador Silk Ltd* [1965] 1 All ER 667.

[16] (1998) 28 ACSR 671. Mr Hartley provided all capital but owned 11 shares, whereas Mr and Mrs Galae held 7 shares although there was a dispute as to whether another person held one out of these 18 shares.

[17] Ibid 471, 681 (Qld SC). Chesterman J protected his Honour's reasoning in Justice R N Chesterman, 'Oppression by the Majority — or of It?' (2004) 25(2) *Australian Bar Review* 103.

[18] BC9602061 (Unreported, Victorian Supreme Court, Mandie J, 28 May 1996).

[19] The exact percentage was 70.65%. This possibility also existed in Canada and New Zealand: *Gillespie v Overs* (Unreported, Ontario High Court of Justice, 14 August 1987, O J No 747); *Cairney v Golden Key Holdings Ltd* (1987) 40 BLR 263; *Vujnovich v Vujnovich* [1989] 3 NZLR 513. See also Michael Rice, 'The Availability of the Oppression Remedy to Majority Shareholders in Ontario' 16 *Canadian Business Law Journal* 58.

shareholders could oppress majority shareholders in 'appropriate' circumstances so as to entitle the latter to relief.[20]

These court cases indicated that minority shareholders can use directorship to nullify the corporate control of majority shareholders. This is more likely when company constitutions afford minority shareholders powers disproportionate to shareholdings. For example, company constitutions may privilege minority shareholders with directorship until death or resignation to prevent majority shareholders overthrowing them.[21] Where majority shareholders cannot remove minority shareholders who are directors, legal standing is available for majority shareholders.[22] These cases also demonstrated the judicial tendency to recognise such standing of current majority shareholders when certain actions of minority shareholders could oppress majority shareholders. This result is attributable to fairness and flexibility in the judicial interpretation of legal standing under oppression sections.

As a precaution, legal standing is accorded to a person whom ASIC thinks appropriate.[23] This wording makes unclear whether ASIC could consider itself an apposite applicant, although earlier oppression sections plainly allowed ASIC to commence public interest litigation.[24] However, such proceedings were rare because of constraints on ASIC's resources and responsibility for the entire market, rather than just minority shareholders.[25] Thus, the current

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[20] *International Hospitality Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368, 370–71 (Young J). However, based on the facts, Young J found no oppression against majority shareholders. *Watson v James* [1999] NSWSC 600 (Bergin J). In the matter of *Re Richardson & Wrench Holdings Pty Ltd* [2013] NSWSC 1990 (Brereton J); *Goozee v Graphic World Holdings Pty Ltd* (2002) 170 FLR 451 ('*Goozee*' (2002) 170 FLR 451).

[21] This was the privileges given to Mr Whitehouse in a well-known High Court case *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 ('*Whitehouse*' (1987) 162 CLR 285) although this case concerned duties of directors rather than the oppression remedy. See also Boros and Duns, above n 6, 75–82.

[22] See *Goozee* (2002) 170 FLR 451 (Barrett J).

[23] Section 234(e).

[24] Formerly, the Australian Security Commission can commence oppression proceedings following its investigations: *Corporations Law 1999* (Cth) s 246AA(1)(b); *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489 ('*Australian Securities Commission*' (1993) 10 ACSR 489). ASIC may also intervene in proceedings taken by other others as in *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539 ('*Jenkins*' (1992) 6 ACSR 539).

[25] ASC, now ASIC, was a plaintiff in only one oppression court case: *Australian Securities Commission* (1993) 10 ACSR 489; Ian Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27(1) *Australian Business Law Review* 23, 27. For challenges regarding corporate law enforcement by ASIC, see

wording might imply the legislative intention to refocus ASIC's attention on major matters, without repealing its power under oppression sections.[26] This ensures public enforcement is in place, although private litigation retains primacy. Overall, legal standing in oppression proceedings is broadly and neutrally applied.

5.2 Comprehensive Range of Litigable Conduct

As important as legal standing, conduct in question must fall under the ambit of oppression sections. Under *Corporations Act* 2001 (Cth) s 232, this range covers the 'affairs of a company, an act or omission, and a resolution'. While precise statutory descriptions of these overlapping elements are not easy, judicial interpretations added even more complexities, as discussed below.

5.2.1 Affairs of a Company

Corporations Act 2001 (Cth) s 53 clarified that this concept encompasses vast issues. Many of these issues have direct bearing on minority shareholder interests, including internal governance, director duties, share matters, voting power and exit avenues. This coverage is so extensive that Drummond J stressed that this concept comprises almost all conceivable corporate activities.[27] His Honour even ruled that it includes the internal procedures of an audit firm auditing a company.[28]

Ian Ramsay, 'Enforcement of Corporate Rights and Duties by Shareholders and the Australian Securities Commission: Evidence and Analysis' (1995) 23 *Australian Business Law Review* 174, 177–9; Vicky Comino, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233.

[26] For guidance when ASIC will consider intervention: see ASC, Regulatory Guide 4: Intervention, 3 June 1991 (withdrawn); Australian Securities and Investments Commission, Information Sheet 180: ASIC's Approach to Involvement in Private Court Proceedings, June 2013 (current). For Priority functions of ASIC, see Treasurer's Statement of Expectations to ASIC: April 2014; Australian Securities and Investments Commission's Statement of Intent: July 2014. There is no legislative intention to change the roles of ASIC under oppression sections: Austin and Ramsay, above n 6, 717.

[27] *Australia Securities Commission v Lucas* (1992) 7 ACSR 676.

[28] Ibid 694–6. In this case, Drummond J of the Federal Court held that 'documents relating to the way Duesburys conducted its own business also related to the affair of the Quintex group, even though there was no suggestion that anyone in Duesburys was involved in any contravention' by this group. This showed a gradually liberal approach to interpreting oppression sections.

At times, conduct brought before the court involves other companies in a group. This has resulted in divergent judicial interpretations on whether the 'affairs of a company' include the affairs of these other companies. In *Morgan v 45 Flers Avenue Pty Ltd*,[29] Young J was unwilling to regard the conduct of a director in a subsidiary as an affair of the parent company, although this company had appointed the director. A more liberal approach was later devised. In *Re Norvabron Pty Ltd*,[30] the court held that business dealings with a subsidiary are part of the affairs of the parent company because of their common board. This approach was subsequently adopted in *Re Dernacourt Investments Pty Ltd*, which generated a similar outcome, despite no common board.[31]

These cases demonstrated that the *affairs of a company* is 'one of the widest import which can include the affairs of a subsidiary'[32] and can also include the affairs of a related company, as long as there is a control relationship.[33] This principle provided the missing link to explain the above judgement in *Morgan v 45 Flers Avenue Pty Ltd* that a mere appointment of a director was not necessarily synonymous with control. Both cases were considered in the late 1980s and early 1990s; thus, the then ubiquitous corporate misconduct could have driven a gradual judicial shift to more reasonably relaxing statutory interpretations. This shift also appeared to overcome strict applications of the term 'a company' and an entity theory of corporate law to better reflect realistic economic activities within a corporate group nexus.[34] By broadening the

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29 (1986) 19 ACLR 692.

30 (No 2) (1986) 11 ACLR 279.

31 (1990) 20 NSWLR 588.

32 The British Court of Appeal regarded these two Australian cases as persuasive authority to reaffirm this principle: *Gross v Rackind* [2004] 4 All ER 375, [26] (Sir Martin Nourse).

33 This principle would assist with identifying affairs of a company in a corporate group or even between related companies. See *Weatherall v Satellite Receiving Systems (Aust) Pty Ltd* (1999) 20 NSWLR 588. See also *Hough v Hardcastle* [2005] All ER 313 (Sir Donald Rattee).

34 See Prentice, above n 10, 69; Jennifer Hill, 'Protecting Minority Shareholders and Reasonable Expectations' (1992) 10(2) *Company and Securities Law Journal* 86, 99. See also Phillip I Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 *Delaware Journal of Corporate Law* 283; Hugh Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53(6) *Modern Law Review* 731.

litigable affairs of a company, both the legislature and judiciary were ready to address cunning oppressive practices to protect aggrieved shareholders and the market integrity.

5.2.2 An Act, an Omission and a Resolution

The concept of '*affairs*' of a company clearly entails an *act*, an *omission* and a *resolution* within a company. The need to separate these elements is explained for the following reasons. An act, an omission and a resolution can be either actual or proposed.[35] This means they can be in the past, present and foreseeable future, whereas the term 'affairs' excludes future conduct. These aspects emphasise the remedial and preventive objectives to increase the functionality of oppression sections.

The separation of an act, an omission and a resolution from corporate affairs generates robust warnings to wrongdoers. As an act and an omission are litigable, this highlights that both action and inaction can be sued. Likewise, the clarification of resolutions of majority shareholders at general meetings as litigable conduct means that majority rule is not immune to legal ramifications if used unfairly. These distinct measures clarify that any single conduct may face judicial reviews on oppression grounds.

As solitary conduct was no longer required to be ongoing at the time of application,[36] the judiciary examined claims against it cautiously. For example, in *Re Norvabron Pty Ltd*, Derrington J ruled that a single past act or sole omission must be serious for a continuing present affair to justify remedy.[37] Likewise, the proposed resolution should have reached a degree of maturity, with a strong likelihood that the company would implement it.[38] These

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[35] *Corporations Act* s 232(b)(c).

[36] Austin and Ramsay, above n 6, 720.

[37] *Re Norvabron Pty Ltd (No 2)* (1987) 11 ACLR 279, 289. In this case, Derrington J however states that 'a series of past acts may be cumulative and may be considered in respect of their present and future effect'. For a discussion on the unclear distinction between an act and an omission, see Prentice, above n 20, 71.

[38] See *Re A Company* [1983] Ch 178. A similar view can be found in *Re Gorwyn Holdings Ltd* (1985) 1 BCC 99, 479. This means a mere chance that oppression may happen is not enough to obtain remedy as seen in *Medical Research & Compensation Foundation v Amaca Pty Ltd* (2005) 51 ACSR 587.

requirements appear necessary to balance minority shareholder protection with potential abuse of comprehensive litigable conduct.

5.3 Traditional and Modern Grounds for Court Orders

Grounds for court orders are essential to the judiciary in many ways. They provide the foundations and benchmarks for these orders. They are also aimed at discouraging arbitrariness and encouraging diligence in legal reasoning to rationalise judgements and generate consistency in law application.

Oppression sections provide the judiciary with discretion to make an order if the litigable conduct is either:

- contrary to the interests of the members as a whole (the traditional corporate interest damage ground)
- oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or members (the modern unfairness ground).[39]

This section unveils the necessity, scope and application of these grounds. It demonstrates that the objective test to determine unfairness, judicial examinations of litigable conduct in broad corporate contexts, and equitable recognition of reasonable expectations have made the modern ground sophisticated and absorbed the traditional ground.

5.3.1 Traditional Corporate Interest Damage Ground

The concept of 'the interests of the company as a whole' originated from British precedents from 1877.[40] Lord Lindley MR later created a test for this concept in *Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656*. His Lordship held that the majority power to alter a company constitution 'must be exercised … bona fide for the benefit of the company as a

[39] *Corporations Act* s 232(d)(e).

[40] *Pender v Lushington* (1877) 6 Ch D 70, 75–6 (Sir George Jessel, MR).

whole'.[41] This test requires that minority shareholders must prove that such conduct is not performed in good faith or beneficial to the company.[42]

This test is problematic. It constitutes 'the primary restraint' on these shareholders who confront intrinsic difficulties, including uneasy access to information and limited corporate transparency.[43] This has provided majority shareholders with unfair procedural advantages. Moreover, given that such conduct adjusts the rights of shareholders *inter se*, speaking of 'the benefit of the company as a whole' is unhelpful. For example, Brennan J stated that this phrase is 'a scant expression' if conflicts of interest regarding members exist.[44] The good faith requirement further causes confusion because shareholders are not fiduciaries.

This test remains relevant to the exercise of powers by directors who owe fiduciary duties to the company as a whole.[45] However, like majority shareholders, these directors have exploited this troubling test to 'force minority shareholders to shoulder a heavier onus of proof and tilt the balance too far in favour of commercial expediency'.[46]

The Australian judiciary realised the constraints of this traditional ground on holding majority shareholders and directors accountable for their oppression. In *Peters' American Delicacy Company Limited v Heath*, the High Court considered this test problematic, too general, wider than necessary, and thereby 'inappropriate, if not meaningless'.[47] Consequently, this ground has rarely triggered legal proceedings,[48] notwithstanding that its statutorification has guaranteed the common law right of shareholders to take legal actions against alleged

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41 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671 (Lord Lindley MR).

42 *Heydon v NRMA Ltd* [2000] NSWCA 374, [38] (Malcolm AJA) ('*Heydon*' [2000] NSWCA 374).

43 *Gambotto v WCP Ltd* [1995] HCA 12, [8], [32] ('*Gambotto*' [1995] HCA 12).

44 In *Wayde v New South Wales Rugby League Ltd* (1985) 59 ALJR 798, 803 (Brennan J) ('*Wayde*' (1985) 59 ALJR 798), His Honour borrowed this phrase from Rich J in *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 138.

45 See *Mills v Mills* [1938] HCA 4, 187–8, *Ngurli Ltd v McCann* (1953) 90 CLR 425, 440; *Whitehouse* (1987) 162 CLR 285. *Glavanics v Brunninghausen* (1996) 19 ACSR 204, affirmed in *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.

46 *Gambotto* [1995] HCA 12.

47 (1939) 61 CLR 457, 512 (Latham CJ and Dixon J). See also *Heydon*' [2000] NSWCA 374, 393.

48 See Jason Harris, *Corporations Law* (LexisNexis Butterworths, 3rd ed, 2014) 266; Boros, above n 9, 119.

oppression. Hence, its practical contribution to minority shareholder protection is trivial (and gave way to the modern ground of unfairness).

5.3.2 Modern Ground of Unfairness

'Oppressive' was originally the solitary reason for granting remedies. This concept referred to combination of burdensome, harsh and wrongful, which lacked probity and involved some overbearing behaviour , as interpreted in *Scottish Co-op Wholesale Society Ltd v Myer*.[49] This was the first successful and only lawsuit to reach the British House of Lords.[50] While this interpretation was influential, it was too stringent to suit all circumstances in which remedy was necessary.[51]

Australia later eased such strict explanations with legal transfers. It linked 'oppressive' with 'unfairly prejudicial' and 'unfairly discriminatory' from Britain and New Zealand, respectively.[52] Conduct challenged under this extended ground would at least depart from fair dealing standards or violate the fair play conditions on which shareholders who entrust money to the company are entitled to rely.[53] In other words, unfairness is sufficient to make conduct oppressive.[54]

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[49] (1959) AC 324, 342.

[50] See L C B Gower, *Gower's Principles of Modern Company Law* (Sweet and Maxwell, 4th ed, 1979) [601]; Hill, above n 34, 86.

[51] Board of Trade, 'Report of the Company Law Committee' (Jenkins Report, Cmnd 1749, June 1962) [202]; Paul Redmond, *Corporations and Financial Markets Law* (Thomson Reuters, 6th ed, 2013) 689. Such strict interpretation was followed by various cases, eg, *Re Jermyn Street Turkish Baths Limited* [1971] 1 WLR 1042, 1059–60. *Re Tivoli Freeholds Ltd* [1972] VR 445 (Supreme Court of Victoria) ('*Tivoli Freeholds*' [1972] VR 445).

[52] 'Unfairly prejudicial' came from an English company law review in 1962 while 'unfairly discriminatory' derived from a recommendation made by a New Zealand committee. Australia transferred these two new elements to oppression sections in 1983. See Board of Trade, above n 51, [202], [204] (c); Ian Hannay Macarthur, 'Final Report of the Special Committee to Review the Companies Act' (Government Printer, 1973) [364], adopted in Companies Act 1955 (NZ) s 209.

[53] *Elder v Elder and Watson Ltd* [1952] SC 49, 55 (Lord Cooper) ('*Elder'* [1952] SC 49).

[54] Hill, above n 34, 94. Lord Keith stated that oppression involves 'lack of probity or fair dealing to a member … as a shareholder': *Elder* [1952] SC 49, 60. Such interpretation was adopted in *Re H R Harmer Ltd* [1959] 1 WLR 62, 78; *Re Bright Pine Mills Pty Ltd* [1969] VR 1002, [1011] ('*Bright Pine Mills*' [1969] VR 1002; *Tivoli Freeholds* [1972] VR 445 [452].

However, divergent judicial readings of this extended ground emerged. Many courts examined the *oppressive*, *unfairly prejudicial* and *unfairly discriminatory* elements separately, as seen in *Re G. Jeffery (Mens Store) Pty Ltd*.[55] Some courts still regarded these elements as different aspects of a compound expression of oppression.[56] This difference existed because the wording of oppression sections had not plainly indicated that the three elements were separate. This demonstrated the importance of clear-cut legislative design and the role of the judiciary in giving effect to law application.

Given this discrepancy, it is intriguing to see how judges interpreted the unfairness ground in typical cases concerning the majority rule in altering the company's constitution and concerning the actions of directors. This reveals the judicial ability to contextualise their decisions and interpret oppression sections in an independent manner.

5.3.3 Objective Test to Determine Unfairness

The 1983 reforms added the term 'unfairly' to the ground for court order in s 232 (e) — namely, 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members'. This substantial change prompted the court to focus on the 'unfair' concept, rather than the above strict 'oppressive' definition when applying this ground.[57] This shift demonstrated judicial effort to redress unfairness caused by oppressive conduct, thereby reinstating fairness.

This shift became mainstream following the landmark case of *Wayde v New South Wales Rugby League Ltd* (hereafter *Wayde*).[58] The High Court advanced an objective test to examine whether conduct of directors was unfair. The facts were that this company's constitution

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[55] (1984) 9 ACLR 193.

[56] For example, *Morgan v 45 Flers Avenue Pty Ltd* (1986) 19 ACLR 692 ('*Morgan*' (1986) 19 ACLR 692); *Shears v Phosphate Cooperative Company of Australia Ltd* (1988) 14 ACLR 747; *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588 ('*Dernacourt Investments'* (1990) 20 NSWLR 588); *McWilliam v LJR McWilliam Estates Pty Limited* (1990) 20 NSWLR 703 ('*McWilliam*' (1990) 20 NSWLR 703).

[57] This change evolved gradually before the addition of the terms 'unfairly' to oppression sections, as seen in *Bright Pine Mills* [1969] VR 1002 [1011] (the Full Court); *Tivoli Freeholds* [1972] VR 445 [452].

[58] (1985) 59 ALJR 798.

plainly authorised the board to decide which clubs should participate in the rugby league game. The board rejected the team Wests after extensive open consultations. Two minority members representing Wests in the company sought judicial remedy under the oppression sections.

Brennan J gave a leading judgement emphasising that the critical inquiry in determining whether oppression remedy was available considered whether the board's decision was unfair.[59] The court found that this decision prejudiced the Wests, yet complied with the constitution in good faith for the interests of the game and company. Moreover, the Wests fully appreciated that it had no secure rights to compete in the premiership. The court reasoned that no reasonable directors would consider this decision unfair.[60] Thus, the Wests team was not entitled to relief.

This summary shows that the High Court used an objective test to determine unfairness within s 232 (e) of *Corporations Act 2001* (Cth). This test identified fundamental criteria for reasonable directors. They must be imbued with the ordinary standards of fairness and reasonableness. In particular, they must use special skills, knowledge or acumen of the directorship to weigh the furthering of corporate goals against the disadvantages resulting from their proposed decisions to deliberate whether these decisions would be unfair.[61]

Brennan J ruled further that a mere difference was itself insufficient to cause oppression because proof of unfairness was a minimum critical requirement to decide whether conduct was oppressive.[62] His Honour concurrently stated that the court may intervene where conduct amounts to unfairness, even if it was exercised in good faith for proper purpose within constitutional discretion to advance corporate interests.[63] In other words, legitimate conduct

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[59] *Wayde* (1985) 59 ALJR 798.

[60] Ibid 803 (Brennan J).

[61] *Wayde v New South Wales Rugby League Limited* (1985) 180 CLR 459, 803, 806 (Brennan J).

[62] Ibid 472.

[63] Ibid 803. This issue is discussed further below in this section.

may result in unfair outcomes and thereby attract judicial remedies. This interpretation of oppression sections would place directors and majority shareholders on notice in using their powers.

Overall, the court in *Wayde* objectively examined the conduct in question as if such conduct was assessed by competent reasonable people who had expertise relevant to the conduct under examination. This approach was also illustrated in *Morgan v 45 Flers Avenue Pty Ltd*, in which such people were commercial bystanders because the case involved commercial unfairness.[64] In generalisation, these people can be either hypothetical, as in these cases, or actual, where court-appointed experts give unbiased viewpoints.

5.3.4 Complained Conduct Assessed in Corporate Contexts rather than in a Vacuum

In the unfairness test, the court examined both complained conduct and relevant factors. Justices in *Wayde* considered corporate interests (the traditional ground), the company constitution, and exchanges between both sides. Moreover, like the actions of respondents, the behaviours of applicants informed judicial decisions. For example, the obvious disinterest of applicants in the corporate affairs led to the ruling that a failure to consult them was not unfair.[65] Their unreliability, difficulty and slothfulness in their discharge of duties were also significant when valuing shares under oppression proceedings.[66] In essence, relevant factors depend on specific claims and judges do not favour any party.

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[64] (1986) 5 ACLC 222, 704. See also *Coombs v Dynasty Pty Ltd* (1999) 14 ACSR 60, 99; *Dynasty Pty Ltd v Coombs* (1995) 13 ACLC 1290, 1296 (‘*Dynasty*’ (1995) 13 ACLC 1290).

[65] *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273.

[66] *Re London School of Electronics Ltd* [1986] Ch 211 (‘*London School*’ [1986] Ch 211). An unjustifiable delay of plaintiff may trigger laches, which is an equitable principle that may defeat an equitable claim: see *Crawley v Short* (2009) 76 ACSR 286.

Applicants for relief are not required to have clean hands regarding disputed conduct.[67] Likewise, the dishonest motives, purpose and intention of respondents are deemed irrelevant because the manner and effects of conduct are material to whether such conduct was unfair.

5.3.5 Equitable Recognition of Reasonable Expectations under the Unfairness Ground

The clear understandings between the parties in *Wayde* — such as mutual exchanges and a plain corporate constitution — are not present in all oppression claims. The absence of unequivocal agreements makes the judicial examination of these claims more challenging. The 'reasonable expectations' of the parties have become important factors in this regard. This expression evolved from the term 'legitimate expectations' used by Lord Hoffman.[68] However, his Lordship had misgivings and warnings about its misleading notions because the word 'legitimate' appears to conclude the lawfulness of expectations.[69]

Australian judges accordingly perceived 'reasonable expectations' with different attitudes. Campbell JA stated that his Honour would use this term reluctantly to avoid the impression that the subjective aspirations of parties are decisive to judicial relief.[70] However, this statement is incongruent with the High Court's landmark objective test that determines unfairness. This statement also contrasts with the viewpoints of Basten JA and Young J that factors are assessed 'objectively in the eyes of a commercial bystander'.[71]

With caution, counsels and courts at large still use this term as a convenient shorthand label to describe the way *equitable considerations* operate. Priestley JA stated that:

> one useful cross-check is to ask whether the exercise of power in question would be contrary to what parties have actually agreed by words or conduct. Apart from corporate

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[67] *London School* [1986] Ch 211 pt 222 A–C (Nourse J); *Morgan* (1986) 19 ACLR 692, 706 (Young J).

[68] *O'Neill v Phillips* [1999] All ER 961, 970.

[69] Ibid (Lord Hoffman). See also *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97 (Spigelman CJ) ('*Fexuto*' [2001] NSWCA 97).

[70] *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121, 171.

[71] See *Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95; *Morgan* (1986) 19 ACLR 692.

> constitutional provisions, there may be promises by words or conduct that would be unfair to allow a member to ignore because promises may be binding as a matter of justice and equity.[72]

These viewpoints were recently reinforced in *HNA Irish Nominees Ltd v Kinghorn*.[73] The Federal Court of Australia stated here that:

> oppression sections purposefully empowered the Court to relieve a party from the strict enforcement of a contract constituted by the company constitution. While literal meanings may prevail in a court of law, equity can give effect to what is considered to have been the true intentions of the parties, by preventing or restraining the exercise of strict legal rights.[74]

Hence, a gradual increase in the equitable considerations of reasonable expectations helped reinstate justice and equity in oppression cases.[75]

Equitable considerations are useful in cases where there are no written agreements, implied common understandings or controversial corporate constitutions.[76] As these considerations uncover unfair conduct hidden behind vague corporate documentation, this helps the court to strike the misleading use of powers that may be superficially valid, yet is essentially unfair. This result provides a lifebuoy on which all company members can rely to counter oppression, especially for small and private businesses, with limited market exits and frequent majority control.

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[72] *Fexuto* [2001] NSWCA 97, 420 (Priestley JA). See also *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395, [45] (‘*Mopeke*’ (2007) 61 ACSR 395); *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWCA 342, [88]–[98]; *Remrose Pty Ltd v Allsilver Holdings Pty Ltd* [2005] WASC 251, [74].

[73] (No 2) [2012] FCA 228, 502.

[74] This point was also demonstrated in *Sutherland v NRMA Ltd* (2003) 47 ACSR 428; *Morgan* (1986) 19 ACLR 692; *Diligenti v RWMD Operations Kelowna Ltd* (1976) 1 BCLR 36. See also J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 341.

[75] *Ebrahimi* [1973] AC 360, 375 (Lord Wilberforce). See also *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, 467; *Fexuto* [2001] NSWCA 97; *Mopeke* (2007) 61 ACSR 395, [45]; Redmond, above n 51, 689. Judicial considerations of reasonable expectations can be traced to partnership law.

[76] For example, conduct that accords with the company’s constitution could be oppressive if it frustrates reasonable expectations of the members arising from their common understandings as to how the company would be run: See Austin and Ramsay, above n 6, 725–6.

Nevertheless, framing oppression claims based on reasonable expectations may face different challenges. First, these expectations are not static. For example, changes ceasing a quasi-partnership, alterations regarding corporate membership composition, or conversions into public companies can mean that common understandings on how businesses operate no longer have force.[77] Second, these understandings may not be established if membership arises from the inheritance of shares as in the case of family companies.[78] Third, this approach becomes more challenging when equivocal corporate constitutions permit actions that applicants allege contradict their expectations.

Equitable recognitions of reasonable expectations have disappointed some commentators for various reasons. This approach marked a significant shift from a narrow understanding of oppression as harsh, burdensome and wrongful conduct, towards a broader conception of unfairness, which undercut the unfettered majoritarian principle and a preference for judicial non-intervention, with the power to unearth internal misconduct.[79] This approach also allowed the court to overrule problematic agreements if fairness demanded it.[80] Wishart argued that these outcomes may not provide a certain business environment for investors with uncertain intentions.[81] This caution is explicable because the court once controversially reversed the onus of proof from the applicant to the defendant in a case where majority shareholders acquired minority shares.[82]

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77 *Morgan* (1986) 19 ACLR 692; Austin and Ramsay, above n 6, 726; Boros, above n 9, 40–1.

78 For example, *Re G Jeffrey (Mens Store) Pty Ltd* (1984) 9 ACLR 193 ('*Jeffrey*' (1984) 9 ACLR 193); *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686.

79 For a detailed discussion about corporate norms and oppression sections, see Hill, above n 34, 86.

80 See *Re J E Cade & Sons Ltd* [1992] BCLC 213.

81 See David A Wishart, 'Fairness in Company Law' (1990) 4(2) *Canterbury Law Review* 284.

82 This controversy occurred in *Gambotto* [1995] HCA 12. Parliament responded by amending corporate legislation to facilitate the compulsory acquisition of shares and limit the application of this case. This case received both support and criticism from academics. See Ian Ramsay and Benjamin Saunders, 'What Do You Do With a High Court Decision You Don't Like? Legislative, Judicial and Academic Responses to Gambotto v WCP Ltd' (Legal Studies Research Paper 537, University of Melbourne, 2011). See also Vanessa Mitchell, 'The High Court and Minority Shareholders' (1995) 7(2) *Bond Law Review* 58.

These concerns should be considered within the overall corporate, regulatory and judicial practices at the time. Majority shareholders and directors could legally justify their frequent unscrupulous behaviour at the expense of minority shareholders and the broader community.[83] It would be unjust to exempt these practices from judicial reviews. Moreover, the foregoing discussions showed that the judiciary had neutrally examined all factors relevant to oppression claims, including the competing interests of both sides. As a result of careful deliberation, controversial judgements on these claims have been rare. These realities, alongside the ineffectiveness of the narrowness of previous oppression sections, informed a broader judicial interpretation of the unfairness ground.

5.4 Diversity of Available Remedies

A prime goal of shareholder litigation is to seek a workable remedy. Having an unlimited array of remedies available conveys a clear message to investors that Australia is committed to protecting their interests. Table 5.1 lists the oppression remedies that were designed with this in mind.

[83] This practice occurred in the case *Jenkins* (1992) 6 ACSR 539, discussed further below. Widespread oppressive conduct has driven the transformation of oppression sections, as explained in Chapter 3, Section 3.3.2.

Table 5.1: Range of Oppression Remedies in Australia Based on Granted Frequency in Descending Order

Oppression remedies	Legal bases
The court can make *any order* that it considers appropriate in relation to the company, including an order:	CA 2001 S233
Requiring share purchase by any member or person, including an appropriate reduction of the company's share capital	1(d) (e)
Regulating the conduct of the company's affairs in the future	1(c)
Requiring a person to perform a specified act	1(j)
Restraining a person from performing a specified act or engaging in specified conduct	1(i)
Modifying or repealing the existing corporate constitution	1(b)
Allowing the company to institute, prosecute, defend or discontinue specified proceedings	1(f)
Authorising a member to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company	1(g)
Appointing a receiver, or a receiver and manager, of any or all of the company's property	1(h)
Winding-up the company	1(a)

The general wording of this section — namely, that the court can make any order it considers appropriate — confirms unfettered judicial discretion and unlimited remedies. This open-ended design gives judges more latitude to update global legal progress and develop cutting-edge solutions. Moreover, it guarantees investors unrestricted access to justice, with judicial solutions for unfair internal corporate practices. This also means that the listed remedies are only suggestive for courts, and purposive to assist applicants who must indicate the remedies

being sought. Despite this, litigants cannot affect the exercise of judicial discretion under oppression sections.[84]

These suggested remedies are useful because of their frequent use. Share purchase options and measures regulating the conduct of corporate affairs are often sought and granted.[85] This is pragmatic because aggrieved shareholders tend to exit the company or demand such conduct be corrected. Other common remedies require changes to the company constitution and require a person to perform or not perform a specified act.[86] This means that remedies are generally effective for mitigating oppression effects.

The characteristics of particular remedies inform their functionality levels. For instance, winding-up is not always just and equitable, especially concerning solvent or listed companies, as it may worsen oppression effects.[87] It is usually limited to special circumstances, such as insolvent companies or impasses, such as irreconcilable disagreements or a break-down in relationships without fault.[88] This remedy is only granted as a last resort because of its drastic nature.[89] Following are more practical remedies.

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84 *Page v Good Impressions Offset Printing Pty Ltd* [2011] NSWSC 1398, [17] ('*Page*' [2011] NSWSC 1398).

85 See Ramsay, 'An Empirical Study', above n 25, 23.

86 See G P Stapledon, 'Use of the Oppression Provision in Listed Companies in Australia and the United Kingdom' (1993) 67(8) *Australian Law Journal* 575; Ramsay, 'An Empirical Study', above n 25, 23; Michael Legg and Louisa Travers, 'Oppression and Winding Up Remedies after the GFC' (2011) 29 *Company and Securities Law Journal* 101.

87 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [61] ('*Campbell*' (2009) 238 CLR 304); *Dernacourt Investments* (1990) 20 NSWLR 588, 619–20. Oppression remedy does not provide 'no-fault divorce' as seen in *Jeffrey* (1984) 9 ACLR 193; *McWilliam* (1990) 20 NSWLR 703.

88 See *Shum Yip Properties v Chatswood Investment and Development Ltd* [2002] NSWSC 13 (Austin J); *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478; *Re A Company (No 007623 of 1994)* (1986) 2 BCC 99. A landmark winding up case was *Ebrahimi*' [1973] AC 360. See also John H Farrar and Laurence Boulle, 'Minority Shareholder Remedies — Shifting Dispute Resolution Paradigms' (2001) 13(2) *Bond Law Review* 1, 11–19. However, there is no 'principle' that an order winding up a solvent company is inappropriate: *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73, [68]–[70].

89 See *Sino International Development Pty Ltd v Mainland Projects (Oakleigh) Pty Ltd* [2012] VSC 231, [18]; *Re Keho Holdings Ltd* (1987) 38 DLR 368 (winding up refused, other measures granted). Legg and Travers, above n 86, 114.

5.4.1 Share Purchase as an Exit Remedy

Business freedom includes the right to seek profits and divest shares. These rights can be frustrated by corporate practices, including share blockage actions in broken partnerships. These problems can stop aggrieved shareholders from leaving the company at will, or from doing so without financial damages.

These examples demonstrate that share purchase is a pragmatic remedy in investment practices. This remedy is useful for public companies when a market exit is commercially viable, such as when corporate controllers obstruct an escape or their conduct affects it. This remedy becomes more important for small, private or closed companies, where market access may be narrower, and with more frequent restrictions on share transfer or pre-emptive rights over shareholdings in the corporate constitution.[90]

In such circumstances, the judicial order is essential for aggrieved shareholders to free shares obstructed by oppressive conduct. This exit remedy is usually applied to the shares of minority shareholders because they are often victims of unfair practices. At times, for more effective relief, the court accepts their 'unusual' requests to buy the shares of majority counterparts.[91] In any case, the court only makes orders regarding the shares of applicants, even if they also claim to represent other shareholders.[92] This avoids the erroneous equation of personal claim with class actions.

Oppression sections say nothing about share evaluation. Given that these rules allow the court to make any order it considers appropriate, the High Court ruled that there is no reason to give

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[90] Redmond, above n 51, 610.

[91] See, eg, *Fedorovitch v St Aubins Pty Ltd [No2]* [1999] NSWSC 776, [22] (Young J) ('*Fedorovitch*' [1999] NSWSC 776); *Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC 184; *Re A Company; Ex parte Shooter* [1990] BCLC 384.

[92] In *Morgan* (1986) 19 ACLR 692, the applicant claimed to represent not only himself but also his family trusts. Although the application was unsuccessful, Young J held that any relief would only be effective to the applicant's legally owned share.

the present provisions a narrower construction.[93] Accordingly, the implied principle is that pricing should be a proper exercise of a judicial discretion. Different solutions have been applied to this matter, depending on the facts of particular cases.[94] Although firm rules have not been established, Campbell and Young JJ stated that, in the public interest, courts should consider earlier similar cases, so that counsels and accountants of shareholders are able to advise them effectively.[95] This means that due consistency is another important principle.

Notwithstanding these principles, the evaluation of shares, especially in private companies, is not easy. The prospect that conduct triggering relief could also diminish share values would exacerbate the difficulties.[96] However, the argument that a reduction should apply to reflect the minority shareholding is usually ruled out.[97] The court noted a significant difference between minority shareholders selling shares voluntarily and those selling shares caused by oppression.[98] Moreover, shares in case of oppression still provide voting rights. These factors make a discount unfair.

Informed by these principles and problems, the court determines a price for compulsory purchase. Shareholder agreements on share evaluation for voluntary sales cannot hinder this decision.[99] Judges may also invite experts to advise on an unbiased evaluation. Judicial precedents show that justice and fairness in particular circumstances underpin the valuation to

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93 *Campbell* (2009) 238 CLR 304. See also *Garraway v Territory Realty Pty Ltd* [2010] FCAFC 9, [75]–[76].

94 For example, a fair valuation date can be the date immediately before oppressive conduct occurred as in *Dynasty* (1995) 13 ACLC 1290; the latest date when the company's balance sheet is available as in *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 47 ACSR 514 ('*United*' (2003) 47 ACSR 514); the date of the court's order as in *Mopeke* (2007) 61 ACSR 395; the date of commencement of proceedings as in *Joint v Stephens* (2008) 26 ACLC 1467, [154]–[156].

95 *United* (2003) 47 ACSR 514, 521 [38] (Campbell J). *Fedorovitch v St Aubins Pty Ltd (No 2)* (1999) 17 ACLC 1,558, 1559 (Young J). See also *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136, 146 [70] (Wilcox, Marshall and Jacobson JJ).

96 See eg, J F Corkery, 'Oppression or Unfairness by Controllers — What Can a Shareholder Do about It? An Analysis of S 320 of the Companies Code' (1983–85) 9(4) *Adelaide Law Review* 437, 455–7; D D Prentice, 'Minority Shareholder Oppression: Valuation of Shares' (1986) 102 *Law Quarterly Review* 179; Vern Krishna, 'Determining the "Fair Value" of Corporate Shares' (1987) 13(2) *Canadian Business Law Journal* 123.

97 *Roberts v Walter Developments Pty Ltd* (1997) 15 ACLC 882, 906–7.

98 See *Dynasty* (1995) 13 ACLC 1290; *Re D G Brims and Sons Pty Ltd* (1995) 16 ACSR 559.

99 *Campbell v Backoffice Investments Pty Ltd (2009)* 73 ACSR 1, [178]; *Page* [2011] NSWSC 1398.

provide a sensible price for both parties to ensure that oppressors do not profit from misconduct at the expense of others.[100]

Finally, share purchase is unsuitable in some exceptional circumstances. In *Re Bonython Metals Group Pty Ltd*,[101] the Federal Court found that this remedy was impractical and disproportionate because the majority did not have adequate funds to buy out the minority. Likewise, the High Court in *Campbell v Back Office Investments Pty Ltd*[102] did not grant this remedy because shares were almost worthless (as in provisional liquidation), despite the established oppression. In both instances, a winding-up order was made as a last resort.

5.4.2 Remedies Concerning Personal Conduct

Personal conduct remedies may provide suitable relief in case aggrieved shareholders choose to maintain investments in the company. Such remedies include requiring a person to perform a specified act. For example, in *Ghabrial v Romolly Pty Ltd*,[103] Cohen J ordered the directors to appoint a quantity surveyor to assess construction costs that some or all shareholders had to incur, respectively. In contrast, a judicial order may restrain a person from performing a specified act or engaging in specified conduct. These measures operated like injunctions, except that the former are granted for oppressive reasons, while the latter are based on the contravention of *Corporations Act* 2001 (Cth).[104]

The court could also authorise a member or person to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company. These remedies originated from the British Jenkins Committee's recommendations that 'a wrong done to a

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[100] See *Foody v Horewood* (2007) 62 ACSR 576, [35]; *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* [2004] FCAFC 153, [71]–[74]; Douglas K Moll, 'Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation' (2004) 54(2) *Duke Law Journal* 293; Alan Gregory and Andrew Hicks, 'Valuation of Shares: A Legal and Accounting Conundrum' (1995) *Journal of Business Law* 56.

[101] (No 6) [2011] FCA 1484.

[102] 73 ACSR 1, [179].

[103] (1991) 5 ACSR 611. See also *Hogg v Dymock* (1993) 11 ACSR 14.

[104] Injunctions can be sought following *Corporations Act* s 1324.

company could unfairly prejudice a minority, but a majority or a director that controls the legal action by the company improperly prevents this action against a wrongdoer'.[105]

These remedies were called 'derivative actions' under the oppression sections, and overlapped statutory derivative actions as a separate set of sections.[106] In both cases, the winning results went to the company, while the applicants incurred litigation costs in failed claims. Thus, these derivative measures were obtained in only one reported case during the life of the oppression sections over five decades.[107] Nevertheless, the derivative remedies reinforced the oppression sections because solutions remained available when directors were compromised or refused to act.

5.4.3 Remedies Concerning Corporate Affairs

Unfair conduct usually involves corporate affairs, thereby making remedies for these highly practical. Three common instances have been codified, such as appointing a receiver (or a receiver and manager), requiring the company constitution to be modified or repealed and (at its broadest) regulating the conduct of corporate affairs in the future.

These instances are illustrated in two landmark proceedings initiated by one tenacious minority shareholder, Mr David Jenkins. In *Jenkins v Enterprise Gold Mine NL* and *Re Spargos Mining NL*,[108] the companies were part of the complex corporate group of Independent Resources Limited (IRL). In both cases, the complained conduct involved substantial transactions of dubious commercial value. It also subordinated the benefits of Enterprise Gold Mine and Spargos Mining to IRL.

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[105] Board of Trade, above n 51, [206]–[208].

[106] Statutory derivative actions were regulated in *Corporations Act* Part 2F.1A. The codification of these actions was aimed at overcoming procedural obstacles to corporate litigation raised in *Foss v Harbottle (1843) 67 ER189*. See also Ian M Ramsay and Benjamin B Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Australian Statutory Derivative Action' (Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne, 2006) 29.

[107] In *Re Overton Holdings Pty Ltd* (1984) 2 ACLC 777, the court authorised a shareholder to commence a derivative action because attempts to convene a general meeting to address problematic loan arrangements between the company and a controlling shareholder were frustrated.

[108] (1992) 6 ACSR 539; (1990) 3 WAR 166, respectively.

In the first case, majority shareholders ratified the principal transaction via a general meeting resolution. This included the issue of preference shares, whereby AUD12 million went out of Enterprise Gold Mine without return. This resolution was passed because of the votes of wrongdoers, including Enterprise Gold Mine's directors, who either came from or were allied with IRL. In particular, at all relevant times, the IRL chair was a majority shareholder who held 45% of voting power in Enterprise Gold Mine.[109]

Malcolm CJ, Rowland and Franklyn JJ noted systemic problems regarding directors and the majority shareholder of Enterprise Gold Mine.[110] The directors indicated 'hopeless unresolved conflict of duty' and 'a fine disregard for the conflict of interest involved', alongside inadequate explanations, grave doubts about the benefits to this company, and the majority shareholders' decisive vote for the unjust transaction. The trial panel concluded that these problems resulted in oppression towards minority shareholders, costing the company AUD45 million. For remedies, the court ordered the appointment of a receiver and manager to preserve the corporate property and fully investigate transactions.

In the second related case, Murray J found similar problems. Properties and resources of Spargos Mining were transferred to IRL members through transactions that were beneficial to them, yet were 'almost entirely devoid of any discernible commercial benefit' to this company. His Honour reminded that 'unfairness may result from the conduct of corporate management, the lack of reasonable commercial justification, or simply in the decision making processes'.[111] The court concluded serious oppression and granted vigorous remedies. Murray J's order included the following.

1. All four incumbent directors were replaced with a new board to properly investigate previous transactions and other corporate affairs conducted by the displaced directors.

[109] The 45% included proxies held on behalf of the group and other shareholders.

[110] *Jenkins* (1992) 6 ACSR 539, 559 (Malcolm CJ, Rowland and Franklyn JJ).

[111] *Re Spargos Mining NL* (1990) 3 ACSR 1, 44(5) (Murray J) ('*Spargos*' (1990) 3 ACSR 1). See also *Ground & Foundation Supports Pty Ltd v GFS Management Services Pty Ltd* (2002) 21 ACLC 506, [39] (Wallwork and Anderson JJ and Burchett AUJ).

2. Every three months, the board had to submit investigation reports to the court and disclose these to shareholders per judicial direction.
3. The board had to prosecute any wrongdoer, in the name of the company.
4. Prior to the expiration of 12 months, the board had to convene a general meeting to elect an incumbent board.
5. For these purposes and effective relief, the court nullified various provisions in the corporate constitution, either temporarily or permanently.

The judge reiterated a statutory rule that the company was not allowed to amend the repealed or modified constitutional provisions without leave of court or until further order.[112] This was critical to prevent majority shareholders using their voting power to circumvent justice and to provide breathing space to manage the consequences.

These complex claims carried important implications. The practice in which directors colluded with majority shareholders or were majority shareholders had exacerbated the common tendencies of oppressing minority shareholders. These combinations of corporate powers facilitated general meetings to legalise this oppression and render the sections on director duties insufficient to address managerial misconduct. As demonstrated in the Enterprise Gold Mine case, these meetings could compound oppressive practices when controlled by wrongdoers.

To redress these mounting problems, the judiciary overcame its traditional reluctance to intervene in internal corporate operations. It granted intrusive remedies to reinstate fairness, deter recurrent wrongs and improve corporate governance, including appointing a new board, as in *Re Spargos Mining NL*,[113] or disallowing a general meeting, as in *Turnbull v NRMA Ltd.*[114] These actions demonstrated the pivotal judicial roles in interpreting oppression

[112] *Corporations Act* s 233(3).

[113] (1990) 3 WAR 166, [47].

[114] (2004) 50 ACSR 44, [51].

sections and making them function in line with the legislature's objectives of transforming the oppression sections in 1983 to protect the interests of minority shareholders and the entire market.

5.5 Effectiveness of Oppression Sections in Practice

One of the important proxies for the efficacy of legal rules is their use in practice. Many studies have indicated that oppression remedies are one of the most widely used statutory remedies, compared with statutory derivative actions and winding-up rules.[115] The growing corpus of oppression precedents that substantiated the foregoing discussions means that this trend has continued. Like Corkery and Welling, Hill also stated that oppression sections have become fundamental to robust protection for minority shareholders.[116] Their effectiveness is now well established.

This outcome has arisen from many major factors. The complementary primary factors include the sound legislative design of oppression sections, the sophisticated interpretations of such sections by a functional judiciary, as illustrated in the cases above. While lawyers' submissions and academic resources have assisted with implementation, implementation ultimately depends on judicial discretion. The following discussions provide deeper insights into the fundamental elements of design and implementation.

5.5.1 Legislative Design of Oppression Sections and Their Effectiveness

The open redesign of the contents and structure of oppression sections are deemed preconditions for increasing use of these sections. Both the meaning and structure of these

[115] See, eg, Ramsay, 'Enforcement of Corporate Rights', above n 25, 174; Ramsay, 'An Empirical Study', above n 25, 23; Ramsay and Saunders, 'Litigation by Shareholders and Directors', above n 106, 14. These studies are widely cited in well-known books, such as Boros and Duns, above n 6; Redmond, above n 51.

[116] See Corkery and Welling, above n 75, 326–46; Hill, above n 34, 86, 95. See also Colin Anderson et al, *Corporations Law* (LexisNexis Butterworths, 4th ed, 2013) 512; Helen Anderson et al, 'Shareholder and Creditor Protection in Australia: A Leximetric Analysis' (2012) 30(6) *Company and Securities Law Journal* 366.

sections have markedly changed. As an example, Table 5.2 shows a faithful extract before and after the sections were rewritten.

Table 5.2: Repealed and Current Legislative Designs of Australia's Oppression Sections

Repealed *Companies Act 1981* (Cth) **Part IX Conduct of Affairs of Company in Oppressive or Unjust Manner**	**Current *Corporations Act* 2001 (Cth)[117]** **Part 2F.1 Oppressive Conduct of Affairs**
320. (1) **An application to the Court for an order under this section may be made by** — (a) a member of a company who believes — (i) that affairs of the company are being conducted in a manner oppressive to one or more of the members (including that member); or (ii) that directors of the company have acted in affairs of the company in their own interests and not in the interests of the members as a whole or in any other manner whatsoever that is unfair or unjust to one or more of the members (including that member) other than the directors; or … (2) **If the Court is of opinion** — (a) that affairs of a company are being conducted in a manner oppressive to one or more of the members; or (b) that directors of a company have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that is unfair or unjust to other members, the Court may, subject to sub-section (3), make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders: (c) an order that the company be wound up; … (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital.	232. **Grounds for Court order** The Court may make an order under section 233 if: (a) the conduct of a company's affairs; or (b) an actual or proposed act or omission by or on behalf of a company; or (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either: (a) contrary to the interests of the members as a whole; or (b) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. Note: For affairs, see section 53. 233. **Orders the Court can make** (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order: (a) that the company be wound up; … (j) requiring a person to do a specified act. 234. **Who can apply for order** An application for an order under section 233 in relation to a company may be made by: (a) a member of the company, … (e) a person whom ASIC thinks appropriate …

[117] The contents of the current Part 2F.1 were largely established in amendments in 1983 while the language and structure were mainly improved in amendments in 1998, as discussed in Chapter 3, Sections 3.3, 3.4.

Table 5.2 indicates that the 2001 version removed various substantive restrictions, especially the 'being conducted' requirement. This redesign also added some prospective possibilities, such as a proposed act and proposed resolution, while deploying open terms, such as 'any order' and 'any other capacity'. At the same time, the language and structure are simpler, clearer and easier to comprehend, except terminologies such as 'oppressive' or 'unfairly', as explained above.

Moreover, a study found that, in almost 30% of judgements, the court did not have to apply the sophisticated oppression tests other than words of oppression sections, especially after their language and structure was simplified and clarified in 1998.[118] While this outcome is possibly attributable to particular cases, improvements of substantive, lingual and structural aspects are part of this overall result.

These progressive changes brought a new life to the sections, with a broader scope of coverage. As discussed above, the key to this transformation was the inclusion of fairness in the legislative design and judicial implementation of these sections. This accordingly provided more opportunities for company members through liberal legal standing to seek nuanced remedies for a wider range of unfair conduct in the past, present or future involving many actors (notably, majority shareholders, individual directors and the board) under the unfairness ground.[119] This comprehensive coverage could not be found in any other litigation option.

There are additional practical reasons for the usefulness of oppression sections. Legal actions following these sections can be taken for the interests of personal applicants and the company, whereas statutory derivative actions can only be commenced on behalf of the company and

[118] Ramsay, 'An Empirical Study', above n 25, 23, 29; Redmond, above n 51, 706.

[119] Borros and Duns even argued that, with the redesigns, many older cases where oppression was unsuccessfully claimed, but a winding up order was granted, could now be successfully brought under the current rules: Boros and Duns, above n 6, 323. Moreover, in *Chapman v E-Sports Club Worldwide Ltd* (2000) 35 ACSR 462, [15], the application based on statutory derivative action was refused because oppression was a more suitable remedy. In *Hassall v Speedy Gantry Hire Pty Ltd* [2001] QSC 327 [11], Moynihan J also ruled out a concurrent SDS because the relief available in the oppression proceeding will be adequate.

only for its benefit. Another advantage is that oppression legal actions in the first instance do not require leave of court, as they do in the appeal, yet statutory derivative actions must obtain such leave on both adjudication levels. Moreover, applicants can choose either the Supreme Courts of states and territories or the Federal Court of Australia for the first instance proceedings, which may all be appealed in the High Court.[120] On balance, oppression sections are designed to provide more procedural convenience and economic incentives than do statutory derivative action provisions.

However, there is room to improve the design of oppression sections. The string '*oppressive to, unfairly prejudicial to,* or *unfairly discriminatory against*' in the ground for court order enables varied understandings. Minor judicial inconsistencies and restrictions remain when this string is considered as either separate elements or a composite whole. As well-established precedents highlighted the binary of unfairness or fairness in interpreting oppression claims, the practical meaning of the 'oppressive' element was basically lost. Therefore, the design of this ground should concentrate on the unfairness concept.

5.5.2 Attitude Change and Professional Merits of the Judiciary Contributing to the Effectiveness of Oppression Sections

The effectiveness of oppression sections derives from the court. The expanded design of oppression sections would have had little meaning without judicial responsiveness. Legal reasoning and a wide interpretation of the sections showed that the court has appreciated these relaxations and moved far away from the original British strict implementation. The judicial refocus on the dimension of unfairness to explicate the term 'oppression' is a case in point. Like past problematic legal designs, this formulation of judicial viewpoints took several lengthy decades.

[120] See Ian Ramsay and Are Watne, 'Which Courts Deliver Most Corporate Law Judgements? A Research Note' (2008) 26 *Company and Securities Law* 392.

It is now established that judicial discretion under the oppression sections has been aptly exercised, with a view to ending oppression through granting suitable relief.[121] Driven by justice and equity, modern courts have overshadowed the untouchable corporate law norms in the old days, such as the majoritarian principle, managerial prerogative and non-interference with internal management. The judicial appointment of a new board in *Re Spargos Mining NL*, as discussed above, exemplifies this direction.[122]

This liberal tendency continued. In light of the broad design, the then Chief Justice French of the High Court reiterated that 'the provision is to be read broadly', while cautioning about judicially imposed limitations.[123] Judicial actions had observed the scope and purpose of oppression sections and ensured reasonable consistency, at least concerning cases with similar facts. As Young J postulated, it was important in the public interest that the uniform approach — fairly noticeable in the common law world concerning oppression sections — continued to be followed, so that counsel and accountants were able to advise applicants effectively.[124] 'The genius of the common law has been that of preserving the good of the past whilst discarding the outdated, the irrelevant and the erroneous'.[125]

In essence, the judiciary left behind strict practices to redefine a new trajectory to apply oppression sections more liberally. An increasing use of the sections could be seen flowing partly from this change. The bottom line was that liberal judicial interpretation made oppression sections a remedial tool that was highly useful for minority shareholders.

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[121] See *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, [122] (Giles JA); *Jenkins* (1992) 6 ACSR 539, 561.

[122] (1990) 3 ACSR 1.

[123] *Campbell* (2009) 238 CLR 304, [72] (French CJ). For similar views, see *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, 739–40 [50]–[5] (Young J); *Jenkins v Enterprise Gold Mines NL* (1992) 10 ACLC 136, 145–145 (Malcolm CJ and Rowland and Franklyn JJ).

[124] *Fedorovitch* [1999] NSWSC 776 [5] (Young J).

[125] Michael Kirby, 'Modes of Appointment and Training of Judges — A Common Law Perspective' (2000) 26(1) *Commonwealth Law Bulletin* 540, 548.

However, the fundamental judicial credentials were the decisive factor in the effectiveness of oppression sections.[126] Only the Supreme Court, Federal Court and High Court have jurisdictions over these sections. The previous examination of oppression cases demonstrated that the Justices of these institutions possessed high-level expertise, independence, impartiality and transparency when trying these challenging claims. The sophisticated legislative design of oppression sections would have been worthless without these judicial qualities.[127]

First, the high-level expertise of judges was evidenced in their insightful, albeit complex, legal reasoning. Their frequent use of elaborate language, intricate structures and diverse resources — including academic commentaries, lawyers' submissions, legal precedents and varied doctrines in Anglo-Saxon jurisdictions — clearly demonstrated profound knowledge and skills in domestic legal analysis and foreign law transfers. Judicial expertise appeared more prominent in landmark judgements that formulated the guiding principles for similar cases, such as the objective test to determine unfairness.[128] These practices enriched the interpretations of oppression sections and thereby contributed to their effectiveness.

Second, the judges were independent in delivering their judgements. As this was constitutionally binding, no one was allowed to interfere with the judicial functions of serving justice and fairness, following the rule of law.[129] This protected and prevented the court from being captured by the influence of authorities or litigants in trial.

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[126] For recent works discussing this topic, see, eg, Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (NSW Federation Press, 2016). The Bangalore Principles of Judicial Conduct 2001 set out eight basic principles, including expertise, independence and impartiality.

[127] Corkery, above n 96, 437. Whincop even argued that the Parliament giving the court maximum flexibility is an 'effective political strategy to transfer the responsibility' to the court: Michael J Whincop, 'The Political Economy of Corporate Law Reform in Australia' (1999) 27(1) *Federal Law Review* 77, 89.

[128] The objective test to determine unfairness, as discussed in Section 3 above, was formulated by the High Court in *Wayde* and often applied in court cases: Ramsay, 'An Empirical Study', above n 25, 23, 29.

[129] See generally Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001); Brian R Opeskin, 'Mechanisms for Intergovernmental Relations in Federations' (2001) 53(167) *International Social Science Journal* 129; H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013). The

Third, the judges were seen as impartial in deciding oppression claims. Judicial remedies did not favour those incurring or causing unfair conduct because they flowed from the equitable and objective consideration of the behaviour of all litigants. These remedies were also informed by the proportionality between the conduct and relief to end oppression without excessive effects on wrongdoers.[130] While sound legislative design, high expertise and reasonable independence were essential to sustain the judicial mission of reinstating justice and fairness, the effectiveness of oppression sections rested on due impartiality.

The combination of these three merits assisted the Justices to make fair decisions. Fair results are the ultimate goals of litigation, thereby rendering judicial fairness extremely important.

The merits of the Australian judicial system did not happen by chance. The Constitution provides guarantees, such as judicial independence, high entitlements, professional immunities and lifetime tenure.[131] The media, academia and civil society actors also play an active role in exposing judicial problems and driving reforms to increase courtroom integrity and transparency.[132] These complementary measures make court personnel less vulnerable to bribery, protect them from pressures and strengthen their accountability: 'Financial corruption is not a significant problem for the judiciary and police, albeit judges are sometimes

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Parliament may amend laws to reduce the effects of controversial judgements as in *Gambotto v WCP Ltd* (1995) 182 CLR 432; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, but the Parliament and the Government cannot interfere in judicial independence in a trial. See Ramsay and Saunders, 'What Do You Do', above n 82. See also Mitchell, above n 82.

[130] *Re Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484 (Robertson J). Less intrusive remedies come before intrusive ones: *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531, 539; *Martin v Australian Squash Club Pty Ltd* (1996) 14 ACLC 452, 475.

[131] See Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population' (2011) 39 *Federal Law Review* 33; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004). By default, judges hold office until the mandatory retirement age of 70.

[132] See generally Michael D Kirby, 'Attacks on Judges — A Universal Phenomenon' (1998) 72(8) *Australian Law Journal* 599; Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012); Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25(6) *Judicial Officers Bulletin* 47.

intellectually corrupted by ambition, the hope of promotion, or the prayer for a title'.[133] These issues were not found in oppression claim trials.

Judicial appointments also play a pivotal role in informing judicial merits. The federal and state governments generally appoint judges from a selection of eminent academics, law reform experts and experienced legal practitioners, who are imbued with intellectual acumen and personal dignity, and committed to upholding the universal rule of law.[134] Although political favouritism dictated some past selections,[135] most appointments and promotions are based on merit. Merit-based appointments have become instrumental in fostering judicial virtues as the main drivers for the invocation of litigation to tackle unfair conduct.[136]

In summary, Part I has demonstrated that the life and functionality of the oppression sections were shaped by both legislative design and judicial implementation. The sound legislative design ensured clarity, openness, neutrality and flexibility of oppression sections. These features informed the extensive scope of legal standing, litigable conduct, grounds for court order and available remedies. Concurrently, the well-functioning judiciary accommodated these important features through its implementation of oppression sections. The judicial merits of independence, expertise, impartiality and transparency informed the effective

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[133] Michael Kirby, 'Judicial Accountability in Australia' (2003) 6(1) *Legal Ethics* 41, 48–9, 54; Michael Kirby, 'Maintaining Judicial Integrity in an Age of Corruption' (2012) 35(3) *Australian Bar Review* 201. Corruption levels in court and in the police service are among the lowest among Australian institutions: Transparency International, 'Global Corruption Barometer' (2013) 35.

[134] See Kirby, above n 125, 542–3; Brian Opeskin, 'State of the Judicature: A Statistical Profile of Australian Courts and Judges' (2013) 35(3) *Sydney Law Review* 489.

[135] Examples of political appointments included the case of Justice Barwick and Murphy: Stan Ross, *The Politics of Law Reform* (Penguin Books, 1982) 184; Ian McAllister, 'Corruption and Confidence in Australian Political Institutions' (2014) 49(2) *Australian Journal of Political Science* 174, 176. Discussing the controversy of the repeal of the conviction of High Court Justice Lionel Murphy who had links with many serving politicians, Justice Murray McInerney opined that judges live in a community and at times have informal ties with members of the Legislature and the Executive: Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other ExtraJudicial Activities' (1978) 52 *Australian Law Journal* 540, 554.

[136] Statements of the New South Wales Chief Justice in 2005 quoted in Ramsay and Watne, above n 120, 397. Examples of merit-based appointments included Justices Robert P Austin, Ashley Black, Paul Finn, Peter Young, many High Court Justices (including the first female Chief Justice Susan Kiefel) and Justice James Edelman from 30 January 2017.

exercise of court discretion under these sections, as demonstrated in the above landmark cases of *Wayde, Jenkins v Enterprise Gold Mines NL* and *Re Spargos Mining NL*.[137]

The oppression sections went beyond redressing unfair conduct and could deter its recurrence, supported by diverse remedies, including amending a company's constitution. These dual functions of the oppression sections rendered them powerful and effective.[138] As victims of misconduct were mostly minority shareholders, the oppression sections became an important vehicle for them to seek fairness for almost any unfair conduct in companies.

The most significant success was the integration of fairness into the legislative design of oppression sections (including recognising unfairness as a ground for court order in the 1983 reforms) and into the judicial implementation of these sections. These legislative design features and judicial merits were complementary to the effectiveness of the oppression sections in reinstating fairness compromised by oppressive conduct. Fairness was of utmost importance because it was both a precondition and goal of the oppression sections.

The underlying concept of fairness is examined in the next part on the litigation provisions and court in Vietnam. This theme is also revisited in Chapter 6 and recapped in Chapter 7.

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[137] *Wayde* (1985) 59 ALJR 798; *Spargos* (1990) 3 ACSR 1; *Jenkins* (1992) 6 ACSR 539.

[138] The deterrence is regarded as a primary function of these sections: Redmond, above n 51, 636; James D Cox, 'The Social Meaning of Shareholder Suits' (1999) 65(1) *Brooklyn Law Review* 3; James D Cox, 'Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures' (1984) 52 *George Washington Law Review* 745.

Part II: Legislative Design of Vietnam's Litigation Provisions and Judicial Qualities in Legal Implementation

This thesis assesses the effectiveness of transferring Australia's oppression sections to Vietnam's litigation provisions. It recognises the importance of the clear, open, neutral and flexible legislative design of these sections, and the role of a well-functioning judiciary that is informed by independence, expertise, transparency and accountability (discussed above).

The concept of fairness has informed the legislative design of four elements in the oppression sections: legal standing, litigable conduct, grounds for court order and available remedies. The Australian judiciary has interpreted the concept of fairness broadly, including granting remedies for unfair conduct under the modern unfairness ground for court order. As demonstrated in this part, a similar experience is not present in Vietnam.

Part II examines all three shareholder litigation measures and judicial features in Vietnam to assess how effective the legislative design and judicial implementation could be.[139] This part begins by examining legal standing, litigable conduct, grounds for court orders and judicial remedies. It then considers the influences of socioeconomic changes on public attitudes towards commercial litigation, and the roles of lawyers in the courtroom. Finally, it discusses factors that impact judicial implementation of law, including political leadership and bureaucratic influence over the courts, in the context of independence, expertise, impartiality and transparency. This discussion will indicate how limitations in litigation design and judicial merits undermine minority shareholder protection in law and practice.

[139] The result of this examination informs the discussion in Chapter 6 on the level of effectiveness in the legal transfer of oppression sections from Australia to Vietnam, from a perspective of legal implementation. Although the expanded litigation provisions in *Enterprise Law 2014* only came into effect in 1 July 2015, a close examination of their design and judicial qualities will enable an informed assessment of whether these provisions would be effective.

5.6 Legislative Design of Three Litigation Measures

The Vietnamese *Enterprise Law 2014* provides shareholders with three litigation measures (Table 5.3). These include personal actions against majority resolutions of general meetings, personal actions against directors, and derivative actions against directors. Australian oppression sections encompass these measures, with personal actions as a key avenue.[140] The examination of these measures is aimed at assessing whether they can protect minority shareholders from oppression, and identifying the legislative design features required to test legal transferability from Australia.

[140] As discussed in Part I of Chapter 5, the Australian oppression sections provide for personal actions against conduct of any company members (including majority and directors), with a derivative action as one of the remedies.

Table 5.3: Three Litigation Measures in Vietnam

The repealed *Enterprise Law 2005* (effective until 31 June 2015)	**The current *Enterprise Law 2014* (effective from 1 July 2015)**
Section 107. Request for cancellation of decisions of a General Meeting Within 90 days, from the date of receiving the minutes of the General Meeting or the minutes of the results of counting of votes collecting opinions of the General Meeting, a shareholder, *a member of the Board of Directors, a Director or a General Director, an Inspection Committee* shall have the right to request a Court or an Arbitration to consider and cancel a resolution of the General Meeting in the following circumstances: 1. The order and procedures for convening the General Meeting do not comply with this Law and the constitution of the company; 2. The order, procedures for issuing a resolution and the content of the resolution breach the law or the constitution of the company.	Section 147. Request for cancellation of resolutions of a General Meeting Within 90 days, from the date of receiving the minutes of the General Meeting or the minutes of the results of counting of votes collecting opinions of the General Meeting, a shareholder, *a group of shareholders* provided in section 114 (2) of this Law shall have the right to request a Court or an Arbitration to consider, cancel a resolution or *a part of contents* in a resolution of the General Meeting in the following circumstances: 1. The order and procedures for convening the meeting and making decision in the General Meeting do not comply with this Law and the constitution of the company, except the circumstance provided in section 2 Section 148 of this Law;[141] 2. The contents of the resolution breach the law or the constitution of the company.
Not provided	Section 161. Right to sue members of the board of directors, directors, general directors 1. A shareholder, a group of shareholders holding a minimum 1% of the total ordinary shares during 06 successive months shall have right *on behalf of themselves or of the company* to sue members of the board of directors, directors or general directors for civil liabilities … 2. The order and procedures for taking legal actions follow provisions of civil law. Legal costs in case a shareholder, a group of shareholders sues on behalf of the company shall pass to company fees, except that their actions are rejected.
Notes: The emphasis in these sections is added to demonstrate the main amendments.[142]	

[141] *Enterprise Law 2014* (Vietnam) s 148 provided that resolutions of a General Meeting that are passed with 100% of the total number voting shares shall be legal and shall be immediately effective, even if the order and procedures for passing these resolutions were not implemented correctly as provided. This has not encouraged the company to ensure due process in holding General Meetings (‘*Enterprise Law 2014*’).

[142] These are faithful translations of the two Vietnamese provisions without streamlining original problems of language and structure to provide evidence for discussion on features of the existing legislative design.

As demonstrated in this table, legal drafters used two sections in *Enterprise Law 2014* to design three distinct litigation measures. First, legal challenge to a general meeting resolution is the earliest measure (s 147), recognised for a decade.[143] Second, a more recent measure is personal litigation aimed at board members, directors and general directors (s 161). This measure was piloted in 2010, but required shareholders to request the company's internal control committee to sue such directors first.[144] This indirect litigation was unworkable and repealed by s 161 because this committee is not independent from directors.[145] Third, this section adopted a new measure against directors, called a derivative action (s 161). These three litigation measures were localised from foreign legal rules, with advice from common law consultants.[146] This demonstrated an increasing tendency to empower shareholders with more Western legal avenues for court access.

However, the legislative design style remained cumbersome. As Table 5.3 shows, redundant wording and the old structuring technique continue. For instance, given that the court must 'consider' a resolution before it decides whether to 'cancel' this resolution, a combination of these terms in s 147 is not useful, neither is the separation of 'order' from 'procedures'. Another example is the string of 'members of the board of directors, directors and general directors' (s 161). This can be easily simplified by clarifying in a note or a definition section that directors include general directors, and directors inside or outside a board.[147] Instead of repeating this string, the term 'directors' is used beyond this point.

This legislative design style also lacks clarity. An example is the mix of personal litigation and derivative actions in s 161 (1). This provision failed to recognise that the former is

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[143] *Enterprise Law 2005* (Vietnam) s 107 ('*Enterprise Law 2005*'). It came into effect in 1 July 2006.

[144] This requirement was regulated in *Decree 102/2010/ND-CP Dated 1 October 2010* (Vietnam) s 25(1).

[145] See generally Phan Duc Hieu et al, 'Protecting Minority Shareholders: Theory, International Experiences and Recommendations for Enterprise Law Amendment' (Report of Ministerial Research 2013, Central Institution of Economic Management, Ministry of Planning and Investment, Hanoi, July 2014).

[146] For foreign legal advice for all Enterprise Laws through aids and informal exchanges, including from Australia, see Chapter 3, Sections 3.8, 3.9.

[147] This may include shadow and de facto directors. Vietnamese law has not included such directors.

essentially intended for the individual interests of applicants, while the latter is for corporate interests. As these measures differ in substance, they should have been separated in a section or another subsection to avoid confusion. However, the problem does not end there. All three litigation measures fail to clearly articulate legal standing, grounds for court order, litigable conduct and available remedies, although the wording allows for inference. The clarity of these fundamental elements is essential to facilitate legal application.

While these legislative design defaults may be seen as trivial in isolation, they were spread throughout *Enterprise Law 2014*. This led to a convoluted law, with various consequences. As shareholder litigation measures must be used together with relevant corporate governance provisions, the unclear law would unduly increase compliance costs and onus of proof. These issues unfairly disadvantage minority shareholders and conveyed a message to investors that this law was designed without great care, adequate skill or practical use in mind. Part of the problem is that the legislative design of all enterprise laws has been the preserve of bureaucrats.[148] Therefore, language experts have never been appointed to legal drafting bodies.

Table 5.4 summarises the existing legislative design of Vietnam's three litigation measures to provide a reference for subsequent discussions. Section 147 of *Enterprise Law 2014* provided for legal challenge to general meeting resolutions. However, section 161 of this law regulated both direct claims against directors, and derivative actions on behalf of the company against them. Therefore, this table and subsequent discussions do not separate the two measures against directors, unless stated otherwise.

[148] They were bureaucrats working CIEM of MPI, as discussed in Chapter 4, Section 4.5.

Table 5.4: Four Core Elements of Three Litigation Measures in Vietnam

Elements	**Personal actions against general meeting resolutions (majoritarian rules) (Enterprise Law 2014 s 147)**	**Personal and derivative actions against directors (Enterprise Law 2014 s 161)**
Legal standing	▪ A shareholder ▪ A group of shareholders holding a minimum 10% of the total ordinary shares during *at least* six successive months by default[149] (a 10-plus-six threshold) The constitution of a company is allowed to lower the percentage requirement[150]	▪ A shareholder ▪ A group of shareholders holding *a minimum 1%* of the total ordinary shares during six successive months (a one-plus-six threshold) Fixed conditions No 'at least' term
Litigable conduct	▪ Procedures of meeting and making decisions ▪ Contents of resolutions	▪ Conduct concerning duties of directors
Grounds for court order	▪ This process contravenes enterprise law and corporate constitution ▪ These contents violate enterprise law and corporate constitution	▪ Breaches of duties of directors
Available remedies	▪ Cancel a resolution ▪ Repeal a part of its contents	▪ Civil liabilities (eg, pay costs, require an action, etc.) ▪ Company repays fees for successful claims (derivative actions only)
Note: Personal actions against general meeting resolutions may be commenced at either a court or an arbitration centre.		

The elements in Table 5.4 are discussed in Sections 5.6.1 (legal standing), 5.6.2 (litigable conduct), 5.6.3 (grounds for court order) and 5.6.4 (available remedies).

[149] *Enterprise Law 2014* s 114(2).

[150] Ibid.

5.6.1 Legal Standing to Commence Litigation

Legal standing in Vietnam does not require leave of court in either the first instance or appeal applications. However, as seen in Table 5.4 above, legal standing in shareholder litigation is differentiated in the two following instances.

5.6.1.1 Conditional Legal Standing for Collective Legal Action

Collective legal action against general meeting (GM) resolutions and against the conduct of directors came into effect from 1 June 2015,[151] driven by the need to tackle prevalent oppressive practices in Vietnam. Such action is an important litigation form because it allows shareholders to share litigation costs and legal advice. The catch is that together shareholders had to meet two concurrent minimum conditions of a shareholding and an ownership period, hinging on whose conduct was sued in court.

The first condition was that shareholders together must hold *a minimum 10%* of the total ordinary shares of a company to challenge the conduct of the majority at the GMs. Although companies are allowed to lower this default percentage in their corporate constitution, this is rare in practice.[152] Directors and majority shareholders would not do this because it would increase their risk of facing court. The 10% threshold is unduly strict or even unachievable for minority shareholders, especially in large, public or listed companies, and those with state-owned enterprise (SOE) shareholdings.[153] Thus, this condition mainly assists majority shareholders to collectively litigate the conduct of others. The effect of this legislative design is inherently unfair to minority shareholders.

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[151] Ibid s 147.

[152] Nguyen Thi Dung and Nguyen Nhu Chinh, 'Guaranteeing Rights of Shareholders in Shareholding Companies following OECD Corporate Governance Principles' (2009) (10) *Jurisprudence Journal* 23, 25.

[153] For example, state-owned Vietcombank has easily treated minority shareholders poorly at general meetings because 15,800 minority shareholders together could not reach the 10% threshold: Bui Xuan Hai, *Enterprise Law: Shareholder Protection — Law and Practice* (National Politics Press, 2011), 216.

In contrast, collective actions against directors require only *a 1% threshold*.[154] This threshold shows a substantial relaxation of legal standing needed to sue directors collectively, in an effort to address their widespread abuse of powers. Nevertheless, lawmakers have not applied the same threshold to the above collective actions against the decisions of majority shareholders in GM resolutions, even though they also often engage in misconduct. This is an inconsistency.

The second condition is that the shareholding thresholds must be maintained for *at least six successive months*. This restriction does not have clear logic regarding why shareholders must wait for this period before they can together sue for wrongdoings and protect their ownership. This also means that legal standing in collective litigation does not exist in the first six months, notwithstanding the extent of their shareholdings. This condition causes unfair discrimination between old and new shareholders.

Legal standing in collective litigation does require suitable conditions to prevent the abuse of the court process. However, the combinations of 10% and 1% shareholding thresholds with the six successive month waiting period (hereafter called a '10-plus-six threshold' and a 'one-plus-six threshold') is unfounded and unfair. The use of percentages in these shareholding thresholds causes greater unfair disadvantages for minority shareholders in larger companies.

These unreasonable thresholds hinder minority shareholders from together challenging the GM resolutions of majority shareholders before the court. This action is even more difficult than collective litigation against directors. The restrictive legislative design renders this litigation form ineffective in protecting minority shareholders.

5.6.1.2 Unconditional Legal Standing for Personal and Derivative Actions

Unconditional legal standing applies when shareholders individually commence legal proceedings on behalf of themselves or the company in derivative litigation. This means

[154] *Enterprise Law 2014* s 161, becoming effective on 1 June 2015.

minority shareholders can challenge the conduct of majority shareholders and directors before a court, without facing the dual conditions as in collective legal action. Moreover, companies cannot create self-regulations to undermine the unconditional legal standing because it is legally binding. This ensures the right of minority shareholders to initiate personal and derivative actions.

However, there remain incongruities in regulating unconditional legal standing. A 90-day limit was imposed on litigation against GM resolutions.[155] This strict limit affects minority shareholders more than majority shareholders in exercising litigation rights, which is unfair. In contrast, legal standing to sue directors is valid for two years from the time of their conduct, under civil procedural law.[156] These restrictive deadlines undermine the value of unconditional legal standing, thereby failing to ease judicial access for minority shareholders.

Both cases raise the questions of why similar litigation rights need different time limits and why legal standing to commence civil proceedings requires tight deadlines. The argument that these variations relieve burden on the judiciary is unreasonable because its function is to review the case brought before it. Moreover, such time limits, like dual conditions in collective litigation, are not based on strong doctrinal and empirical studies. As tight time limits have not met the increasing needs for judicial dispute resolution in an emerging economy, this problem has induced shareholders to give rents to business management bureaucrats for their help.[157] This is the underlying cause for designing restrictive legal standing deadlines and unreasonable conditions in litigation provisions.

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[155] The period of 90 days was counted from the day shareholders received GM minutes or the results of collecting ideas: *Enterprise Law 2014* s 147.

[156] See, eg, *Civil Code 2005* (Vietnam) s 607, effective until 31 December 2016 ('*Civil Code 2005*'). It was replaced by *Civil Code 2015* (Vietnam) s 588, effective from 1 January 2017, which increased the time limit to three years ('*Civil Code 2015*').

[157] Mallon stated that 'corruption is a way of life in Vietnam': Raymond Mallon, 'Business Regulation Reform: A Toolbox for Vietnamese Policymakers' (CIEM, VNCI and USAID, October 2004) 36. See also Gjalt de Jong, Phan Anh Tu and Hans van Ees, 'Which Entrepreneurs Bribe and What Do They Get From It? Exploratory Evidence From Vietnam' (2012) 36(2) *Entrepreneurship Theory and Practice* 323; Governance and Transparency Working Group, the Vietnam Business Forum, 'The Vietnam Business Forum: Anti-Corruption and Corporate Governance, Specific Proposals For Change' (Position Paper, November 2013).

In addition, legal standing is given only to current shareholders. This is inadequate to address problems in practice when shareholder membership has ceased. For instance, shareholders who are squeezed out will not have legal standing because they are no longer shareholders at the time of application. Moreover, the Australian experience indicated that misconduct may affect directors (especially those who are minority shareholders). This means the revocation of legal standing given to directors unfairly discriminates against them. Thus, legal standing should be given to current members and former members in the company to provide all with fair access to the court.

The legislative design of unconditional legal standing in derivative actions entails both advantages and problems. These flexibilities have released litigants from strict conditions on legal standing, leave and notice in many East Asian and common law jurisdictions, including Australia.[158] However, a great challenge for taking derivative actions is the potential to incur costs. This makes such actions uncommon, except in the United States (US), with the contingency fees.[159] Vietnam does not apply such contingency fees or require compulsory release of documents to litigants.[160] Claimants in Vietnam, like in other countries, also have to pay all costs in the case of loss, whereas all benefits from successful actions will go to the company after recovering these costs for claimants.

This suggests that there would be little financial incentive for minority shareholders to take derivative actions. This also means that the unconditional legal standing to bring derivative actions advantages majority shareholders. Given that this litigation measure only came into

[158] Derivative actions were adopted in many countries, including Japan, Singapore and Malaysia, as well as all Anglo-Saxon countries: see Dan W Puchniak, 'The Derivative Action in Asia: A Complex Reality' (2012) 9 *Berkeley Business Law Journal* 1; Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 3.

[159] See Melissa Hofmann, 'The Statutory Derivative Action in Australia: An Empirical Review of its Use and Effectiveness in Australia in Comparison to the United States, Canada and Singapore' (2005) *Corporate Governance eJournal* 1. See also Arad Reisberg, 'Derivative Actions and the Funding Problem: The Way Forward' (2006) *Journal of Business Law* 445.

[160] France regulated compulsory release of documents to litigants in case of derivative actions: OECD, *Related Party Transactions and Minority Shareholder Rights* (OECD Publishing, 2012) 14.

effect in July 2015, it remains to be seen whether such unconditional legal standing could induce legal action to hold directors accountable.

The overall implication is that, when transferred litigation provisions may benefit majority shareholders, Vietnam removed the original requirements designed to deter vexatious claims, as in derivative actions. In contrast, when litigation rights are necessary for minority shareholders, Vietnam created unreasonable conditions, such as 90-day legal standing applied to claims against GM resolutions. Moreover, derivative actions only supplement oppression sections, which are the main tools for protecting minority shareholders, as demonstrated in Australia in Part I. Vietnam adopted the supplementary measure, while ignoring the primary mechanism. This appears to be an intention to prolong the status quo of unfair enterprise legislation.

5.6.2 Limited Range of Litigable Conduct

A variety of litigable conduct informs the breadth of opportunities to seek judicial remedies for disputes inside shareholding companies. The operations of these companies follow the resolutions of GMs and collective decisions of the board, both of which are implemented by individual directors. *Enterprise Law 2014* allows shareholders to take legal action against GM resolutions and the conduct of directors, while leaving the board untouched.

5.6.2.1 Challenging Conduct of Companies and Majority Shareholders in General Meetings

As shareholders are the providers of risk capital, they need remedies that provide for accountability. Companies must hold GMs to inform shareholders about comprehensive information and corporate performance that would assist their voting on the resolutions of these meetings. Shareholders have the right to litigate these resolutions on both procedural and substantive respects.

The first ground is that the procedures of GMs issuing these resolutions allegedly contravene legal prescriptions or corporate constitutions. Vietnam detailed and improved these

procedures to increase convenience and cost effectiveness, such as physical or video-link meetings and voting in person or in absentia (for example, proxy, online tools, mail, fax and email).[161] In essence, this ground allows legal challenges to the conduct of the company because it implements these procedures.

However, the gradual pace of reform and bureaucratic capture have impeded the design of other important issues. For instance, the increase of the meeting notice period from seven to 10 days gains little credit in a busy world, especially compared with 28 days in Australia.[162] Moreover, companies have no obligation to clarify proxy voting, explain draft resolutions and disclose conflicts of interest in voting, as well as having a lack of -practice guidelines and strict liabilities for non-compliance. Non-executive directors and external auditors are not required to attend the meetings to provide shareholders with insights into the true status of the financial health and management of the company.

These omissions provide opportunities for questionable conduct (including misleading conduct) to proceed without query. For example, companies tend to justify compliance by giving formal notices with technical documents of low-quality information, without full and accurate intimation of the substance of the resolution.[163] Procedural improvements in meetings and voting appear too modest to address corporate practices where many companies have not held annual GMs for three successive years.[164] Even assuming the greater compliance of companies, the current legislative design is unlikely to remove these practices. This necessitates strengthening the right of shareholders to challenge corporate misconduct.

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[161] *Enterprise Law 2014* s 140(2).

[162] *Corporations Act* s 249HA.

[163] The meeting notices of many companies only instructed which types of documents shareholders could request and where to receive them, while many companies only distributed documents at the meeting: Dung and Chinh, above n 152, 26. A proper notice and useful materials improve the satisfaction and decision-making of small shareholders: See, eg, Nicholas Apostolides, 'Exercising corporate governance at the annual general meeting' (2010) 10(2) *Corporate Governance* 140, 145.

[164] Nguyen Dinh Cung, 'Discussions on Shareholder Rights and General Meetings' (2008) (5) *Vietnam Securities* 5, 5; Ngoc Giang, 'Enterprises Do Not Holding General Meetings, Who Protects Interests Of Investors?' (2010) (78) *Securities Investment* 16, 16.

The second litigation ground is that the contents of the resolutions of GMs breach law or corporate constitutions. In substance, this ground allows shareholders to question the decisions of majority shareholders. This is essential to address the side effects of the prejudiced legislative designs that have empowered majority shareholders to influence or dictate the content of resolutions. For example, *Enterprise Law 2014* advantages them by pinning the 10-plus-six threshold to influential rights, such as placing items on the GM agenda, calling for extra GMs, nominating candidates for the board and accessing the financial reports, together with the minutes and resolutions of the board.[165]

Moreover, this Law permitted founding shareholders to use supvervoting shares in three years while giving the government's discretion to allow SOEs to own such shares indefinitely.[166] As these golden shares could enhance the voting power of these majority shareholders more than their shareholdings could provide, this unfairly empowers them or assists them to become controlling shareholders. The supervoting share regime is aimed at multiplying the voting power of particular majority shareholders, especially SOEs,[167] while reducing the voting effects of minority investors on the contents of GM resolutions. This disproportion between ownership and control undermines the voting fairness of the 'one share one vote' principle.[168] It constitutes unfair treatment between holders of the same class of shares, between state and non-state shareholders, and between minority and majority shareholders.

Another advantage for majority shareholders is voting thresholds required to pass resolution contents. These thresholds and meeting requirements are complex and vary according to a

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[165] *Enterprise Law 2014* s 114(2).

[166] *Enterprise Law 2014*; *Enterprise Law 2005* s 84(1). See also Dung and Chinh, above n 152, 29. There is no definite justification for an outright ban on super-voting shares, but they should be regulated so as to ensure fairness: See Saul Fridman, 'Super-Voting Shares: What's All the Fuss About?' (1995) 13 *Company and Securities Law* 31.

[167] In many companies, the state only held 26% of shares, but was able to exert significant influence: Cao Ba Khoat, 'Review Report on Enterprise Law 2005' (2012) 24, 8. See also Vu Thi Thuy Nga, 'Owners of Shareholding Companies: For "New Bottles, New Wine" '(2009) 3 *Finance* 5, 25; Ha Minh, 'Protecting Minority Shareholders: Knowing Disease But Yet Finding Remedies' (2008) 6 *Vietnam Securities* 9, 9.

[168] This principle is encouraged in most advanced jurisdictions: OECD, 'OECD Principles of Corporate Governance' (2004) 36.

three-convening formula, decision-making methods and types of corporate affairs. This is provided in *Enterprise Law 2014* ss 141, 144 and summarised in Table 5.5.

Table 5.5: Voting Thresholds Required to Pass General Meeting Resolutions in Vietnam

Convening times for each meeting	**Quorum (% of total voting shares of a company)**	**Special resolutions of some major corporate affairs[169] (65% of quorum)**	**Normal resolutions of resolutions (51% of quorum)**
First	51%	65% of 51% ≈ **33.15** % total voting shares of a company	51% of 51% ≈ **26.01%** of voting shares of a company
Second	33%	65% of 33% ≈ **21.45**% total voting shares of a company	51% of 33% ≈ **16.83%** total voting shares of a company
Third	Any positive quorum[170]	65% of any positive quorum ≈ **any** positive percentage	51% of any positive quorum ≈ **any** positive percentage
Note: Bold percentages are thresholds to pass resolutions. If a company replaces voting with polling, a fixed threshold of **51**% of the total voting shares of a company applies.[171]			

As Table 5.5 illustrates, these voting thresholds are rather low, especially in the case of the normal resolutions that are applicable to most corporate affairs. The combination of low thresholds, the differential rights for majority shareholders, and a high concentration pattern of share ownership by majority shareholders in Vietnam assists them to achieve control of GM resolutions, without requiring minority votes. This combination has enabled majority shareholders and directors to engage in unfair conduct that oppresses minority shareholders,

[169] Major corporate affairs include restructuring, a management reshuffle, material transactions, dissolutions, changes of business lines, classes and total number of shares: *Enterprise Law 2014* s 144(1).

[170] This may result in a meeting of one shareholder if this shareholder meets these percentages. This is unreasonable because a meeting should have at least two shareholders.

[171] This table showed that Vietnam has not appropriately realised WTO commitments, which required Vietnam to allow companies to use a minimum majority to pass all resolutions: See, *Accession of Viet Nam*, WTO Doc WT/ACC/VNM/48 (27 October 2006) (Report of the Working Party on the Accession of Viet Nam) [503]–[504].

without incurring accountability.[172] This result demonstrates that unreasonable legislative design has compounded unfair conduct.

Another problem is that replaceable rules in *Enterprise Law 2014* allow companies to use GM resolutions to place restrictions on the sale of shares in company constitutions.[173] In doing so, this law undermines the right to exit the company through sale of shares in market. It is argued that the party-state adopted this anti-market approach to help companies — especially loss-making SOEs — capture investments to avoid corporate bankruptcies because unfair regulations, an inefficient security market and widespread unfair practices had adversely affected public fundraising.[174]

The impacts of this method are worth exploring. It increased opportunities for directors and majority shareholders to manipulate GMs to self-regulate market exit rights. This causes minority shareholders more grievances, given that companies already used various illegal measures to undermine this right, such as regulating the first refusal right, requiring the approval of directors or charging fees for withdrawing shares.[175]

Overall, the biased legislative designs regarding GMs give majority shareholders numerous unfair advantages. This means empowering majority shareholders and directors to use these meetings to legalise oppression towards minority shareholders and to deter their market exit. Clearly, it is essential to reform and implement litigation provisions against conduct involving

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[172] Previous higher quorums and thresholds still failed to protect minorities from abuses: Bui Xuan Hai, 'Measures Protecting Shareholders and Company Members: Theory and Practice' (2011) (3) *Jurisprudence Journal* 10, 12.

[173] *Enterprise Law 2014* ss 126(1), 135(2)(dd).

[174] For example, in an initial public offering in late 2014, Vietnam airlines auctioned 49 million shares and allocated 282 million shares for potential strategic partners, but no foreign investors were interested. State-owned banks (Vietcombank and Techcombank) had to buy most of these shares: See Decision No 1611/QĐ-TTg Dated 10 September 2014 of the Prime Minister Ratifying the Equitisation Plan of the Parent Company — Vietnam Airlines Corporation. It also appeared that Vietnam relied on such an approach to realise the goal of 500,000 operating enterprises, which it still failed to achieve when the *Enterprise Law 2014* was made. See Pham Duy Nghia, 'Dream of a Half Millions of Enterprises and a Unified Law — Enterprise Law 2005 from a Comparative Perspective' (2006) 7 *State and Law Journal* 55.

[175] For example, in the Court Case No 321/2005/KDTM-ST Dated 1 November 2005 of the Ho Chi Minh City People's Court on Disputes between Company Members, the HCM Economic Court pronounced for the litigants, claiming a recovery of 2% fees imposed by BOD's self-regulations because of no legal base.

the procedures and contents of resolutions of these meetings. This accountability mechanism also applies to directors because they manage companies and are also often majority shareholders in Vietnam.

5.6.2.2 Challenging the Exercise of Powers and Duties of Directors

Share capital is an important financial source of joint stock companies. Minority investors are reluctant to provide funding unless there are functional rules to address the risk that their investments could be pocketed by directors.[176] The limited roles of GMs and market exit in protecting minority interests necessitate stronger litigation rights to question the conduct of their powers and duties before the court. These rights are important to reassure investors that they can hold directors accountable for wrongdoings. Thus, this is one of the important preconditions to improve market integrity and attract investment.

Aware of the importance of these rights, from June 2015, Vietnam allowed shareholders to directly sue directors and take derivative actions on behalf of the company against directors, following the same provisions. This is summarised in Table 5.6.

[176] When legislation does not allow minority shareholders to easily commence litigation to hold company directors accountable, investors would be reluctant to provide funding unless they become controlling shareholders: World Bank, 'Doing Business 2015: Going Beyond Efficiency' (2014) 96.

Table 5.6: Shareholder Rights to Challenge the Exercise of Powers and Duties by Directors in Vietnam

Rights to sue directors in the following instance in *Enterprise Law 2014* s 161(1)	**Duties of company directors in *Enterprise Law 2014* s 160(1)**
(a) breach director duties provided in s 160	(a) exercise powers and duties correctly as provided in this law, relevant law, company constitution, general meeting resolutions
(b1) exercise powers[177] and duties improperly; (b2) exercise incompletely or untimely, or do not exercise, the board resolutions	(b) exercise powers and duties honestly, diligently and in the ability for the maximum lawful interest of the company
(c) exercise their powers and duties vested by law, company constitution and general meeting resolutions improperly	(c1) loyalty to the interests of the company and shareholders
(d) (dd) use information, know-how, opportunities, assets, positions, rankings of the company for the interests of themselves, or others [such as relatives and friends instead of the company and shareholders]	(c2) not to use information, know-how, opportunities, assets, positions, rankings of the company for the interests of themselves, or other individuals or other organisations [such as relatives and friends instead of the company and shareholders]
	(d) timely, fully and accurately disclose businesses that they and their related parties own or control
(e) other instances provided in law and the company constitution	(2) other duties provided in this Law and the company constitution

Table 5.6 illustrates that the grounds for legal challenges to the conduct of directors are extensive. These grounds include both actions and omissions in the exercise of the powers and duties of directors. For example, they may face court for misusing corporate assets or missing obligations. Shareholders may also challenge the way in which directors act, such as acting improperly, incompletely or in an untimely manner. Moreover, the listed possibilities

[177] Powers and duties of the board, its chair and directors are respectively provided in *Enterprise Law 2014* ss 149(2), 152(3), 157(3).

of these grounds, powers and duties are complemented by 'other provided instances'.[178] These combinations of prescriptive and open designs increase the opportunities for shareholders to question the conduct of directors before the court. Some grounds are readily applicable, such as breaches of duties to timely, fully and accurately disclose businesses owned by directors.

The language and expression indicate that these grounds, powers and duties originate mainly from Anglo-Saxon jurisdictions.[179] Many transfers are replications of the broad common law rules that have been refined from vast literature and rich judicial precedents, such as duties of honesty, diligence and action in the interests of company. However, Vietnam's lack of similar resources, professional guidelines and regulatory explanations for these technical terms has hindered the legal application against directors.

Although these transferred grounds are necessary because powers and duties of directors are fundamental in corporate law,[180] shareholder litigation provisions need more than these bare necessities. Corporate claims are often complex; thus, Vietnam needs to distil foreign academic literature and well-established precedents into comprehensive commentaries to assist both applicants and courts when applying these foreign grounds. Until then, legal actions against the conduct of directors will be unduly onerous. This may consequently discourage directors from clarifying their duties or encourage the 'ticking boxes' compliance to evade accountability.

The legislative design has several flaws that add to its ineffectiveness. The contents of the grounds are broad, yet still leave loopholes for directors. For example, the conduct of directors can only be sued when they perform their written powers and duties. This means

[178] Legal drafters often list possibilities in provisions, but they could not list all possibilities. Therefore, they use the phrase 'other provided instances' to address this problem. Such a listing approach has created vagueness in law.

[179] Western legal transfer is the main approach to all Enterprise Laws in Vietnam as discussed in Chapter 3, Part II.

[180] Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 316; R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths Australia, 2005) 5.

they are not liable for conduct that is not mentioned in the law and internal company documents, including duplicating misconduct in developed markets. In addition, the board has excessive discretion over substantial issues, such as takeover, directorial election, remuneration policies, transactions of up to 35% of company assets and unregulated issues (including minority squeeze-outs).[181] These loopholes allow directors to oppress minority shareholders and legally expropriate their interests.

In addition, the unnecessary repetitions between sections 160 and 161, as seen in the above table, result in dense language that can create further confusion in applying the grounds.[182] These basic problems are typical examples of the limited drafting skills of regulatory capture bureaucrats. However, it is argued that the complicated legislative design is also intended to create loopholes for rent-seeking because ministries have the power to instruct unclear enterprise law provisions. These flaws could be rectified by clearly stating that the conduct of all corporate affairs is litigable. This would help streamline excessive legal overlaps and address the exploitation of convoluted provisions and legal deficiencies.

5.6.3 Grounds for Court Orders

Both arbitration centres and courts have powers to resolve business disputes. As a way to provide flexibility and reduce judicial workload, *Enterprise Law 2014* s 147 allows shareholders to file claims against GM resolutions in arbitration centres. However, this form of alternative dispute resolution has not been preferred or attracted any shareholder claim.[183] This is because these centres lack the state power to enforce their decisions. Moreover, the

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[181] *Enterprise Law 2014* ss 149(2)(h), 162(2). Section 135(1)(d) allowed the company constitution to increase the 35% threshold. Therefore, majority shareholders and directors may use the company constitution to empower the board at the expense of minority shareholders.

[182] There are unnecessary overlaps among ss 161(a)(b1)(c)(d)(dd).

[183] While the number of cases brought to arbitration centres was low, there was no shareholder claim: Nguyen Duc Tri, 'Arbitration of Corporate Governance-Related Disputes: A Vietnamese Perspective' (2011) 22(192) *Australasian Dispute Resolution Journal* 192, 192; Report No 09/BC-TANDTC Dated 9 August 2010 of the People's Supreme Court Review 5 Years of Implementing the Civil Procedure Code, 15–16, 29. Phan Thong Anh, 'Why Vietnamese Enterprises Are Not "Keen" on Commercial Contract Dispute Resolution via Arbitration' (2009) 7 *Democracy and Law Journal* 25.

courts rarely recognise and enforce foreign arbitral awards.[184] Lawyers accordingly tend to advise investors to use litigation, rather than arbitration. Thus, courts are the main trial bodies of shareholder disputes.

Courts must base their decisions on explicit grounds for court order to reduce arbitrariness and subjectivity in adjudication. They may grant relief only if the complained conduct illegally impairs the interests of shareholders or the company in derivative actions: *Enterprise Law 2014* ss 147, 161. This demonstrates that interests are the single ground for court order, which makes sense because they are important litigation goals.

There are instances when legitimate conduct can damage minority shareholders. As noted above, directors who are or who collude with majority shareholders can use GM resolutions to advance their own personal interests by oppressing minority shareholders and approving misuse of powers. As these instances of misconduct towards minority shareholders are technically legal under the enterprise legislation, they fall outside the interest ground for court order. This interest ground is not designed to redress such unfair practices prevalent in companies. This fundamental design error undermines the above improvements in liberal legal standing and litigable conduct.

This interest ground only empowers courts to examine the illegality of conduct. As such, they can only measure such conduct against the prescribed provisions regulating it. This is called a 'prescribed provisions-based test'. Providing that they perform this test properly, the outcomes are not always fair because so many enterprise law provisions are prejudiced in substance, as illustrated above. Consequently, this interest ground has not sustained the judicial role in reinstating fairness for oppressed shareholders.

[184] This is the case even though Vietnam is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Pip Nicholson and Minh Duong, 'Legitimacy and the Vietnamese Economic Court' in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Courts in Asia* (Routledge, 2010) 31, 48.

The unfairness ground for court order is indispensable for addressing unfair practices. As evidenced in Australia's experiences in Part I, this ground provides the judiciary with the discretion and flexibility to make appropriate decisions to reinstate fairness. It also allows courts to consider all interests relevant to the case in a fair manner, which effectively embodies the interest ground. With these values, the unfairness ground is essential for Vietnam's reform policies of protecting minority shareholders from widespread unfair conduct.

5.6.4 Range of Available Remedies

There are a wide range of civil remedies for shareholder disputes. Particular types of claims determine which order a court can make. Regarding legal challenge to GM resolutions, the court can only wholly or partly invalidate them.[185] These remedies are inadequate to address or deter the misconduct of majority shareholders and directors in GMs. Regarding legal action against directors, the court may require them to stop illegal conduct, pay costs and bank interests, offer apologies and publicise correction, and (where apt) restore initial status.[186] This demonstrates that default directors could incur some monetary and strict liabilities, which is important because corporate operations revolve around their decisions.

This range of remedies is not comprehensive. The limitation derives from the listing legislative design method that compiles mainly foreseeable remedies. Measures essential to minority shareholder protection — such as share purchase and company constitution amendments — are still absent. Consequently, this listing legislative design method does not provide the court with the flexibility to grant the remedies necessary to address diverse misconduct. In light of the Australian experience discussed above, this problem can be resolved by adopting the open legislative design. This approach accommodates the listed

[185] *Enterprise Law 2014* s 147.

[186] *Civil Code 2005* ss 304, 307. See also *Civil Code 2015* ss 351–364 (effective from 1 January 2017).

remedies, while allowing courts to grant any remedy it considers appropriate to ensure remedies are always available.

To recap Section 5.6, unconditional legal standing and a greater range of litigable conduct have widened the judicial access of minority shareholders. However, this is offset by the lack of the unfairness ground for court order and expansive remedies. An underlying cause is the lack of fairness, clarity, flexibility and comprehensiveness in the legislative design of all three litigation measures and corporate governance provisions. These problems have left loopholes in Vietnam's convoluted and unfair *Enterprise Law 2014* that advantage majority shareholders and directors, which effectively benefits SOEs in these capacities and their managing bureaucrats. Consequently, minority shareholders are not protected from prevalent oppressive practices.

Improving corporate governance provisions and removing these legal loopholes are important, yet these actions are inadequate to tackle widespread oppressive conduct. As Part I demonstrated, Australia has successfully mitigated such conduct with oppression sections because the legislative design and judicial implementation of these sections embodied the concept of fairness. This success suggests that Australia's oppression sections are suitable for legal transfer to Vietnam's litigation provisions. This necessitates examining in the following sections whether the Vietnamese public supports fairness and whether the judiciary can provide fairness.

5.7 Evolving Social Preference for Western Fairness-Based Litigation

Vietnam is a rapid developing country that is transitioning from a command economy to a market-based economy.[187] Commercial dispute resolution via the courts is still not as common a practice as in Australia. Given that Vietnam's expansions of Western-transferred litigation measures in *Enterprise Law 2014* became effective only from 1 July 2015, it is

[187] From 1992–2015, Vietnam has an average annual real GDP growth of 7.0% only after China with 10%: Australian Trade Commission, 'Why Australia: Benchmark Report 2016' (2016) 5.

necessary to explore the trend in public attitudes towards Western rules and judicial dispute resolution. This issue is important to the central question of this thesis because the transfer of Australian oppression sections would be unnecessary if the Vietnamese people were intolerant of Western law.

The examination of the public trend will assist with the coming discussions on court access and judicial implementation of law. A useful approach is to examine the socioeconomic changes over periods, such as colonialism (1858–1954), the US involvement in the capitalist South (1954–1975), the socialist command economy (1954–1975 in the North and from 1975 nationwide) and economic transition (from 1986 and especially from the World Trade Organization [WTO] accession in 2007). These timelines replicate those in Chapter 3 on the developments of enterprise laws to retain consistency and highlight the influence of these changes on public perceptions regarding court access to solve disputes.

Occupation by French colonialists for almost a century, followed by the US involvement in capitalist South Vietnam for another two decades until 1975, introduced not only capitalist corporate practices and commercial laws, but also a fairly independent judiciary that recognised property rights and the roles of lawyers.[188] As these factors were conducive to private business, a new class of merchants gradually emerged that was open to Western laws, while coexisting with feudal retailers.[189] This introduced changes in business operations and interactions, and decreased social antipathy towards formal litigation. For example, French officials at times complained about the growing number of civil claims initiated by Vietnamese (even though the effects of colonialism were uneven between civil lives and commercial activities).[190]

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[188] See detailed discussion in Chapter 3, Section 3.6.

[189] See detailed discussion in Chapter 3, Section 3.6.

[190] David G Marr, *Vietnamese Tradition on Trial, 1920–1945* (University of California Press, 1981) 2–4, 96. John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 53.

This change showed that a society infused with unfairness yearned for fairer foreign rules. This concurrently demonstrated that the social preference for litigation depended on the fairness of the existing regime, quality of the judiciary and presence of the legal profession. Above all, Vietnamese people were willing to embrace Western-style litigation where it fulfilled the desire for legal fairness.

These behavioural redefinitions were disrupted by the post-colonial socialist command economy. This regime shift de jure and de facto suppressed private business, forcing them to join the growing black market.[191] Socialist ideals were not strong enough to meditate commercial practices, where profits play an important role. Concurrently, the state emulated the Chinese tradition to insist on a harmonious socialist society and to discourage litigation by not establishing courts to replace the dismantled colonial commercial courts, despite their practical need.[192] As a result, the Vietnamese party-state lost several decades with economic and legal policies that neither encouraged the rule of law nor facilitated access to court.[193]

A new socioeconomic context emerged following the Renovation 1986, with commercial jurisdiction introduced over the next decade. The problem was that commercial and non-commercial disputes were resolved following divergent and onerous court processes.[194] These variations were reconciled in 2005 as a prerequisite for accession to the Western-led WTO two years later and prospective trade agreements.

Market liberalisation improved both business freedom and regulations, including the Western-transferred litigation measures, as discussed above. At the same time, growing business complexities rendered informal dispute resolution less effective. This forced post-WTO

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[191] See detailed discussion in Chapter 3, Section 3.7.1.

[192] See Michael Palmer, 'Compromising Courts and Harmonising Ideologies: Mediation in the Administrative Chambers of the People's Courts in the People's Republic of China' in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Courts in Asia* (Routledge, 2010) 251.

[193] Economic arbitration was recognised by *Economic Arbitration Ordinance 1990* (Vietnam).

[194] See Pham Duy Nghia, *Economic Law Textbook* (People's Public Security Press, 3rd ed, 2011) 441; *Ordinance on Economic Dispute Resolution Procedures 1994* (Vietnam); Resolution No 32/2004/NQ-QH11 Dated 15 June 2004 of the National Assembly on the Implementation of the Civil Procedure Code. These legal instruments are now repealed.

investors to be more aware of their legal rights, as the need to seek judicial intervention increased. These tendencies became more apparent when businesses cooperated or transacted with foreign investors.[195]

In summary, pluralistic social attitudes towards judicial dispute resolution in Vietnam were informed by Western colonial legacies, problematic socialist economic policies, and the ongoing return of state policies to Western transfers. These hybrid litigation origins existed side by side and jostled for dominance. French and US capitalism created a lasting legacy in the conduct of business and dispute settlement that overlaid the Chinese Confucian antipathy towards private business and law courts, and the diminishing socialist ideals endorsed by the state.[196] Above all, Western marketisation continued to push social attitudes and legal necessities towards the values of Western law and litigation.

5.8 Judiciary Qualities in Legal Implementation in a Single-party State

5.8.1 Evolution of Economic Courts and Their Jurisdictions

The judiciary in Vietnam has a chequered history. The French colonialists established the first judicial system in the 19th century. This included functioning commercial courts with lifetime appointments, high salaries, professional independence, appropriate expertise and case law application.[197] Since 1975, the Vietnamese party-state built a new system from scratch by borrowing ideas mainly from the Soviet Union, where the single political party led the judiciary.[198] However, the judiciary only had commercial jurisdictions when economic courts

[195] See Vu Thanh Tu Anh et al, 'Institutional Reform: From Vision to Reality' (A Policy Discussion Paper Prepared for the Vietnam Executive Leadership Program, sponsored by the Harvard Kennedy School, the Government of Vietnam, and the United Nations Development Programme, April 2015).

[196] For Chinese, French and Soviet influences on Vietnam: see Lisa Toohey, 'Judicialisation, Juridification and Legalisation: Themes in Comparative Legal Scholarship of Vietnam' (2010) *Lawasia Journal* 179, 180–3.

[197] Vu Van Mau, *Vietnamese Civil Law in Brief: Volume II — Contracts and Responsibilities* Ministry of Education, 1963) 6; see detailed discussion in Chapter 3, Section 3.6.

[198] Penelope Nicholson, 'Borrowing Court Systems: The Experience of Socialist Vietnam' (Legal Studies Research Paper No 352, Melbourne Law School, the University of Melbourne, 2007) 3. According to Nicholson, Vietnamese communists only introduced some courts from 1945, not a court system, because of war.

were formed in 1994.[199] These courts had the authority to decide disputes brought by shareholders from 1 January 2000 and by minority shareholders from 1 June 2015.[200]

The establishment of economic courts was aimed at improving the rule of law as an essential factor in economic liberalisation and the enforcement of private property rights. This also paralleled the trend in Asia, where 'new courts have mushroomed'.[201] The judiciary has experienced many changes, informed by the growing need for dispute settlement in an emerging economy and for compliance with the *US–Vietnam Bilateral Trade Agreement 2001* and the WTO agreement that Vietnam ratified in 2007. However, economic courts remain in an early developmental stage and need effective reforms to handle more complex corporate disputes.

With increasing demand from the market, structural changes affecting shareholder litigation were made in the *Law on Court Organisation 2014*, effective from June 2015. Through technical assistance, these changes considered the Australian experience, as listed in Table 5.7.

[199] Decision No 355-TTg Dated 11 July 1994 of the Prime Minister on Transferring Officials, Employees and Facilities of the State Economic Arbitration to the Judiciary and State Planning Committee; Resolution No 166-NQ/UBTVQH9 Dated 2 February 1994 of the National Assembly Standing Committee on the Implementation the Law Amending, Supplementing Some Provisions of Court Organisation Law. This Resolution disbanded the State Economic Arbitration as of 30 June 1994 and established the Economic Court accordingly. Private business disputes were disregarded before this change.

[200] *Enterprise Law 1999* (Vietnam) s 79. This Law became effective from 1 January 2000. Litigation rights of minority shareholders are slightly less restrictive in *Enterprise Law 2014*, effective from 1 June 2015.

[201] Andrew Harding and Pip Nicholson, 'New Courts in Asia: Law, Development and Judicialisation' in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Courts in Asia* (Routledge, 2010) 1, 1–2, 25.

Table 5.7: Summaries of Jurisdictions over Shareholder Litigation in Vietnam Compared with Australia

<table>
<tr><th>Main trial levels</th><th>Vietnam</th><th colspan="2">Australia</th></tr>
<tr><td>Reviews</td><td>Supreme People's Court (review or retrial when new legal issues or controversial judgements arise)</td><td colspan="2">High Court
(Hearing final appeals when new legal issues or controversial judgements arise)</td></tr>
<tr><td>Appeal</td><td>Three High Courts operated from June 2015[202]</td><td>Full Court of Supreme Court in states and territories</td><td>Full Court of Federal Court of Australia</td></tr>
<tr><td rowspan="2">First instance</td><td rowspan="2">Economic Courts in Provincial People's Court</td><td>Supreme Court in states and territories</td><td>Federal Court</td></tr>
<tr><td colspan="2">Applicants may choose either Supreme or Federal Court</td></tr>
</table>

The structural change established a three-tiered court system for shareholder litigation. The Economic Courts in the Provincial People's Court have the first instance jurisdiction. The Vietnamese High Court was a new adjudication level established to hear appeals. These two levels followed the civil procedures unified in 2005 and streamlined in 2015.[203] The new High Court deals with reviews or retrials when new legal issues or controversial judgements arise. It corresponds with the Federal Court of Australia, which assisted judicial developments in Vietnam from 1999 to 2013 (discussed below).

Australia is a Federation of six states and two territories. As such, applicants may choose to lodge their applications with either the Federal Court of Australia or the Supreme Court in

[202] Hanoi in the Northern region, Danang in the Central region and Ho Chi Minh City in the Southern region each has a High Court. These have operated from 1 June 2015: see Resolution No 957/NQ-UBTVQH13 Dated 28 May 2015 of the National Assembly Standing Committee Establishing the High Court.

[203] The *Civil Procedural Code 2004* (Vietnam), effective from 1 January 2005. It was replaced by the *Civil Procedural Code 2015* (Vietnam), effective from 1 July 2016 ('*Civil Procedural Code 2015*'). Only 40 out of 63 provincial units have Economic Courts, but not all of them receive claims: Nghia, *Economic Law Textbook*, above n 194, 431.

their States or Territories. In contrast, Vietnam has a hierarchical unitary system without this flexible option.

The structural changes clarify the role of the Supreme People's Court in Vietnam for examining the judgements of lower courts following two procedures. *Cassation reviews* apply when serious procedural breaches are found, while *retrials* apply when subsequent facts are discovered that fundamentally challenge the judgements.[204] These changes have streamlined the excessive powers of this court and prioritised important issues, in a similar manner to the Australian High Court.

Restructuring the jurisdiction of the Supreme People's Court in Vietnam will take time. It has retained its powers over professional training, performance reviews, management of the court system, and the annual consolidation of trial practices to issue directions, regulations and court-related Bills, just to name a few.[205] As the Supreme People's Court directly shapes the entire judiciary, meaningful examinations of judicial practices must consider this body. The next section examines whether structural changes could improve judicial actions to reinstate justice for 'the people', including minority shareholders.

5.8.2 Judicial Independence and the Political–Judicial Nexus

A functional judiciary plays a crucial role in the effective implementation of legal transfers. Örücü submitted that the legal transfer of foreign rules needs to be supported by judicial merits.[206] This has been the case in Australia, as analysed in Part I. The Australian judiciary impartially implemented oppression sections because the separation of powers provided it with independence from political influence to act fairly. Judicial independence is the key to

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[204] The Supreme People's Court of Vietnam, *Benchbook* (2nd ed, 2009) s 3. What is 'serious' and 'fundamentally' challenging is subject to the discretion of the SPC Chief Justice and the Procurator General who have powers to request cassational reviews or retrials. Moreover, a one-year time limit was used to restraint disputants petitioning these elites to use their discretion.

[205] *Law on Court Organisation 2014* (Vietnam) chs 2–3 (*Law on Court Organisation 2014*).

[206] Esin Örücü, 'Law as Transposition' (2002) 51(2) *International and Comparative Law Quarterly* 205, 205–24. See also T T Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59(01) *International and Comparative Law Quarterly* 65, 87.

informing the other judicial merits in Australia, such as expertise, transparency and accountability.

Judicial merits are at the core of a nation's foundational institutions.[207] This raises questions about whether the Vietnamese Constitution recognises, and arranges state powers to facilitate, these credentials. If this is not the case, judicial virtues are perceived as less likely in practice. To assess the potential effectiveness of legal transfer, this section investigates whether the state structure in Vietnam is as conducive to judicial merits as that in Australia.

Vietnam is committed to judicial independence and impartiality in both international and domestic instruments. The signature of the *International Convention on Civil and Political Rights* in 1982 and *Beijing Statement of Principles of Judicial Independence* in 1997 indicates this commitment.[208] Likewise, the Vietnamese Constitution 2013 reiterated that judges shall try cases independently and impartially following only the law, while prohibiting any interference with the trial.[209] Politburo Resolution 49/NQ-TW — a blueprint for current judicial reforms until 2020 — also echoed these vital principles.[210] These proofs demonstrate that Vietnamese leadership acknowledged the essential need for judicial merits.

This concrete recognition is significant, yet insufficient to reassure judges. A national empirical study of the United Nations Development Programme in 2014 found that most

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[207] Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, 5; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 52–4; Laurence Claus, 'Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond' (2006) 54 *American Journal of Comparative Law* 459, 476–83.

[208] Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region, opened for signature 19 August 1995 (As Amended at Manila, 28 August 1997). It was signed by 32 countries in 1997, including for Vietnam by the former Chief Justice of the Supreme People's Court, Pham Hung. *International Covenant on Civil and Political Rights* opened for signature 16 December 1966 (entered into force 23 March 1976) s 14. Vietnam signed it in 1982.

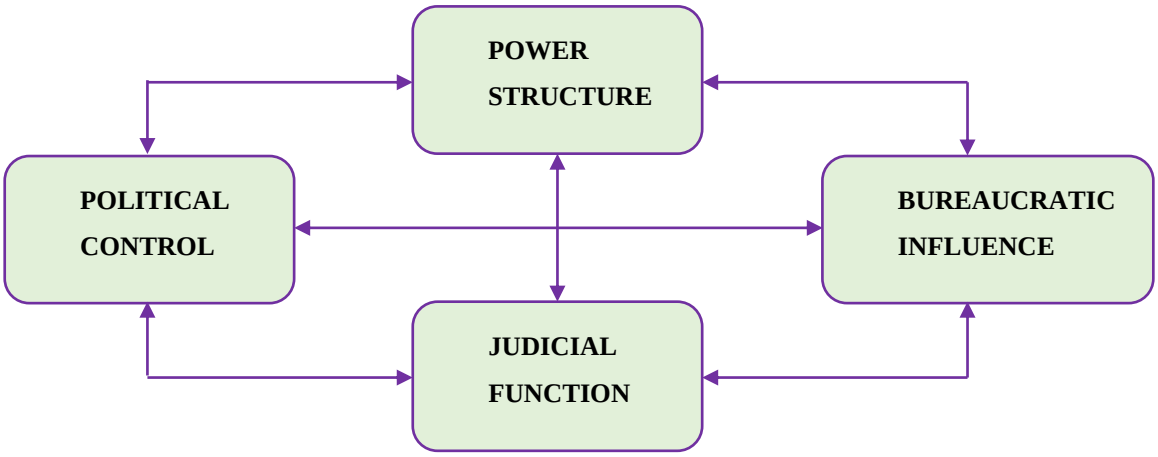
[209] *Constitution 2013* (Vietnam) art 103 ('*Constitution 2013*'). The first *Constitution 1946* (Vietnam) s 69 enunciated decisional independence during the trial. This is applicable to people's assessors (lay judges) in case they sit in the trial panel. They do not sit in the summary trial process.

[210] Resolution No 49-NQ/TW Dated 2 June 2005 of the Pulitburo on the Strategies of Judicial Reforms until 2020, s III.2 ('Resolution No 49-NQ/TW Dated 2 June 2005').

judges favour real independence over mere statements.[211] This expectation is understandable because the Vietnamese Constitution 2013 s 4(1) maintains that the Communist Party of Vietnam leads the state, and hence all state functions, including those of the court.

This double-bind between political control and judicial independence remains unresolved. This unresolved problem raises the four interconnected core issues of power, control, influence and function, as well as their effects on the independence, expertise, transparency and accountability of the court (and other state institutions) (Figure 5.1).

Figure 5.1: Four Interconnected Core Issues and Institutional Independence



5.8.3 Political Power Structure and Position of the Court

As the single party, the Communist Party of Vietnam (hereafter called the Party) constitutionalised the power concentration doctrine to legitimise its political leadership over state bodies.[212] The Constitution vested the National Assembly with all state powers nominally, while allocating legislative, administrative and judicial functions to the National Assembly, government and judiciary, respectively.[213]

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[211] Ministry of Justice and UNDP, 'Report on the Survey of the Reality of Local Court Governance in Vietnam' (2014) 70–2.

[212] *Constitution 2013* s 4(1). See generally Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart, 2009).

[213] *Constitution 2013* s 2. See also Gillespie, *Transplanting Commercial Law Reform*, above n 190, 205. Although the Procuracy, which accommodates no Politburo politicians, has broad powers to monitor and

The Party is collectively run by the 16 highest ranking politicians in the Politburo. By consensus, there are equal numbers of these Politburo politicians who manage the Party and the government, while fewer manage the National Assembly. This means the Party and government share the same political leadership level, and together control the operations of the National Assembly.

The judiciary does not have any Politburo politician. This means it is not given any political leadership power. The effect of this power structure is that the judiciary is subject to the political leadership of the Party and government. This means the Party General Secretary and Prime Minister are the most powerful national leaders, who can direct the judiciary. Moreover, the Party gives its members most positions in all state bodies, thereby mixing the political party with the state apparatus. This forms an inextricable party–state nexus in which politicians are state officials who share adjudication and other functions.

These constitutional and political arrangements place the judiciary and judges in a vulnerable position. Although the National Assembly determines judicial jurisdictions, budgets and entitlements in legal terms, in practice, the judiciary depends on the Party and government. These arrangements create a compromised environment in which politicians who sit in the judiciary as a lower-level political agency (judges) are prone to pressures from politicians in the Party and government (especially Ministers). Judicial accountability to the National Assembly is basically a formality.

Given the modest position of the court in the state apparatus, two major groups of interrelated factors affect judicial independence and other merits. One group is political control avenues: (1) judicial personnel arrangements, (2) Party cells inside the court, (3) the requirement to report a case during the trial to senior politicians as court leaders and (4) low salaries. The other group is methods within the court system: (5) mandatory professional guidance, (6)

intervene the Judiciary, the role of the Procuracy is more important in criminal trials than in shareholder litigation.

consensus in judgements, (7) the practice of seeking bureaucratic explanations and (8) corruption. These eight issues underpin the political, economic and cultural factors within the judiciary.

These eight issues are now examined, followed by discussions of their aggregate consequences on judicial implementation of shareholder litigation provisions. It is argued that these issues together have undermined judicial ability to act independently, effectively and fairly, thereby hindering judges from ensuring fairness in their implementation of litigation provisions.

5.8.4 Political Control over Personnel, Operations and Salaries in the Judiciary

5.8.4.1 Judicial Personnel

Judicial personnel arrangements influence the independence, expertise, impartiality and transparency of judges. Apolitical recruitments and appointments are important to promote these judicial merits and the protection of fairness through law implementation.

The recruitments and appointments of judicial personnel, including judges and their clerks, must follow political policies. The Politburo resolutions pronounced that the Party shall direct judicial agencies in personnel matters and political organisation to ensure that judicial activities follow Party viewpoints and state laws.[214] This conveys a clear message that political viewpoints are as important as formal laws so that courts must observe both. Political viewpoints are unpredictable and can undermine legal rules; thus, they are not conducive to building a functional judiciary.

Political control of judicial personnel exists in various forms. This begins with the cautious selection of job applicants through the use of a three-generation dossier system, which favours

[214] See, eg, Resolution No 49-NQ/TW Dated 2 June 2005; Resolution No 08-NQ/TW Dated 2 January 2002 of the Politburo on Some Central Missions on Judicial Affairs in Coming Years.

a good political record and nepotism.[215] Firm political competence takes precedence, while good health, good ethics, bravery, determination, incorruptibility, honesty and legal knowledge are also selection criteria.[216] After the successful applicants become permanent judicial clerks, they are 'in-line' to be appointed as judges.

This Soviet nomenklatura system is reapplied to higher level appointments with tougher criteria, especially on politics. Appointees are inculcated with the finer points of political policies and ideologies (including those on SOEs) at the Ho Chi Minh Political Academy for four years. The former Chief Justice Nguyen Van Hien stated that 'judges at all court levels should be trained effectively and strongly in politics in order to perform their judicial responsibility and protect against the phenomenon of mechanical and simple legalism, non-politics [sic]'.[217]

Politics-based appointments, rather than merit-based appointments, are ongoing practices. Appointees are not allowed to owe certificates issued by political schools, which equally applies to promotion. However, a recent national survey revealed that 'legal knowledge debt' — that is, appointees have no mandatory Bachelor of Law — remains applicable to provincial judges.[218] This suggests that judicial appointments are mainly confined to the generally 'lower qualified' resources of Party members or Party disciples inside the judiciary.[219] Thus, the pool

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[215] See generally Penelope Nicholson and Nguyen Hung Quang, 'The Vietnamese Judiciary: The Politics of Appointment and Promotion' (2005) 14(1) *Pacific Rim Law & Policy Journal* 1. For nepotism in Vietnam, see Kieu-Trang Nguyen, Quoc-Anh Do and Anh Tran, 'One Mandarin Benefits the Whole Clan: Hometown Infrastructure and Nepotism in an Autocracy' (Research Paper No 2011-11-02, School of Public and Environmental Affairs, Indiana University, 2011); *Law on Cadres and Civil Servants 2008* (Vietnam) s 5(4) ('*Law on Cadres 2008*').

[216] For detailed criteria to become a judge, see *Law on Court Organisation 2014* s 67. For judicial selection, promotion, discipline and removal in reality, see Vu et al, above n 195, 26–8; Nicholson and Quang, above n 215.

[217] Former Chief Justice Nguyen Van Hien, 'Criteria of Judges — Realities and Demands in the Renovation Period' (2001) 4 *People's Court Journal* 2, 2–6. The criteria of 'loyalty to motherland' and 'firmly defending the socialist legality' are also based on certificates of political knowledge levels issued by national political institutes: Joint Circular No 05/TTLN Dated 15 October 1993 of the Supreme People's Court and the Ministry of Justice Instructing the Implementation of Some Provisions of the Ordinance on Judges and Jurors in the People's Court, section II.

[218] 'Legal knowledge debt' remains in provincial courts: Ministry of Justice and UNDP, above n 211, 32, 39.

[219] Penelope (Pip) Nicholson, 'Vietnamese Courts: Contemporary Interactions between Party-State and Law' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and*

of talent outside the judicial system — such as prominent legal academics and practising lawyers — has not been utilised.

These policies and rules on judicial personnel, although occasionally modified, are 'strict and overly formal' — known as 'red dossier over technical skills'.[220] The result is that almost all judges are Party members and are imbued with unreserved party-political loyalty because all judges have legal duty to strictly follow the Party line and policy, without exception.[221] Moreover, short-term appointments — such as five years in the first term and 10 years for the next term[222] — further increase political control. Reappointments are likely, but not guaranteed.

The highest and most important judicial position is more embedded in Party politics. The National Assembly nominally elects one of its senior politicians as the Chief Justice of the Supreme People's Court, which actually takes place within Politburo.[223] The Chief Justice must report the annual performance of the judiciary to the National Assembly and may be questioned, or removed, depending on the decision of the Politburo members who lead the National Assembly.

The politicisation of the highest judicial leadership has far-reaching effects on the judiciary. The Chief Justice has a key role in all judicial appointments, chairing the Council of Judge Selection, and recommending candidates for Justices of the Supreme People's Court to be

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Reform in Vietnam (Palgrave Macmillan, 2007) 178; Dang Xuan Hop, 'Vietnam: The Past 25 Years, the Present and the Future' in Ann Black and Gary Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press, 2011) 185.

[220] Ministry of Justice and UNDP, above n 211, 40–1.

[221] *Law on Cadres 2008* s 8(1)(4); Ministry of Justice and UNDP, above n 211, 102. John Gillespie, 'Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia' (2007) 56(04) *International & Comparative Law Quarterly* 837, 846.

[222] *Law on Court Organisation 2014* s 74.

[223] See Edmund Malesky and Paul Schuler, 'Star Search: Do Elections Help Nondemocratic Regimes Identify New Leaders?' (2013) 13(01) *Journal of East Asian Studies* 35. See also Bryon J Moraski, 'Constructing Courts after Communism: Reevaluating the Effect of Electoral Uncertainty' (2013) 46(4) *Communist and Post-Communist Studies* 433.

ratified by the National Assembly and then formally appointed by the State President.[224] Moreover, the Supreme People's Court instructs and ensures universal legal implementation.[225]

In summary, the selection and management of judicial personnel, such as judges and clerks, follows a close political process. This process has become a powerful method for the Party to control the fate of judges and induce them to adhere to Party policies and viewpoints. As a result, the more senior judges are, the more they have to invest in the party-political process.

5.8.4.2 Party Cells inside Courts and the Political Role of Judicial Leaders

The political control over the court extends to daily judicial operations. Courts must house Party cells, often led by senior Party members who are court leaders (such as Chief Justices or Chief Judges). These cells hold monthly meetings to have discussions on Party resolutions, Party loyalty through self-criticism and trial issues. Accordingly, judges have to exist in a politically charged workplace with vigilant political leadership that does not facilitate judicial independence.

This political control has also made inroads into trial. Judges must 'report' the cases during trial to their court leaders (senior politicians).[226] In response, the presiding judges dutifully consult with court leaders on the direction for case outcomes in advance.[227] This leads to the

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[224] *Law on Court Organisation 2014* ss 70–1. As of 26 June 2015, the total number of Justices of SPC was 135 and increased gradually: see Resolution No 95/2015/QH13 Dated 26 June 2015 of the National Assembly Ratifying the Proposal of the Chief Justice of the Supreme People's Court on the Appointments of Justices of the Supreme People's Court.

[225] *Constitution 2013* s 104.

[226] The internal regulations of almost all courts require reporting a case during trial. These internal regulations have, at times, effectively improved judicial behaviours, but abuse is not uncommon: See Ministry of Justice and UNDP, above n 211, 32, 56–7. For example, the following controversial decision of Chief Judge in the People's Court of Hanoi City allegedly breached the constitutionalised judicial independence so seriously that the National Assembly Judicial Committee required the Supreme People's Court Chief Justice to order an explanation from the Hanoi court: See Decision No 13/QĐ-CA Dated 23 January 2013 of the Chief Judge of Hanoi City People's Court Issuing Regulations on Reporting Trial, Resolution of Criminal Cases, Civil Issues and Administrative Complaints to the Chief Judge of Hanoi City People's Court.

[227] Ministry of Justice and UNDP, above n 211, 54–6. Judges were sometimes disciplined for failing to report their cases, as exemplified in Khanh Hoa and Ha Tinh provinces, which caused public outcry: See Group of Legal Reporters, 'The Story of Judges Must Report Judgements to the Chief Judge in Khanh Hoa', *Informants* (online), 27 December 2012 <http://www.nguoiduatin.vn/chuyen-tham-phan-phai-bao-an-len-

practice of 'trial without the bench' or 'decision before trial' because court leaders effectively orient the outcomes.

5.8.4.3 Low Salaries

There is no constitutional guarantee to prevent judicial salaries being designed or delayed to compromise judicial independence and create political obedience. Politburo members in the National Assembly Standing Committee decide the judicial salary scale.[228] This is a great concern because giving Politburo members authority to determine judicial salaries effectively empowers them to influence the interests of judges. This would induce judges to listen to the Politburo. The Politburo agreed to develop 'appropriate salary and reward initiatives' in the *Judicial Reform Strategies 2005–2020*;[229] however, this has not yet materialised.

Judicial salary remains too low to cover normal personal daily expenses, let alone saving for family needs. It is tied to the exiguous salary regime for all state officials and is mainly based on working years and court levels, rather than competence and effectiveness. For example, in 2014, a judge who had nine years of experience with a clean profile and a daily hearing schedule earned approximately VND7.2 million per month, including all allowances — about AUD400.[230] The current salary regime has not encouraged diligence and integrity during the difficult work of upholding fairness.

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chanh-an-o-khanh-hoa-a56159.html>; Hoai Thu, 'Intervention in trial, Chief Judge of Ha Tinh has to explain', Traffic (online), 26 October 2015 <http://www.baogiaothong.vn/can-thiep-xu-an-chanh-an-ha-tinh-phai-giai-trinh-d125145.html>.

[228] The salary grade of judges was approved by the National Assembly Standing Committee while the salary of cadres, public servants and officials was decided by the Government: see respectively Resolution No 730/2004/NQ-UBTVQH11 Dated 30 September 2004 of the National Assembly Standing Committee on the Ratification of the Position-Based Payroll, Allowance Payroll for Leading State Officials; Professional Payroll in the Judiciary and Procuracy Branches; Decree No 204/2004/NĐ-CP Dated 14 December 2004 of the Government on the Salary Regimes of Cadres, Civil Servants and Military Forces.

[229] Resolution No 49-NQ/TW Dated 2 June 2005. Law prohibits the reduction of a judge's salary because such reduction can create corruption and effect the independence of judges: Judge Clifford Wallace, 'Resolving Judicial Corruption While Preserving Judicial Independence' (Spring 1998) 28(2) *California Western International Law Journal* 431.

[230] Ministry of Justice and UNDP, above n 211, 48.

5.8.5 Bureaucratic Influence on the Judiciary

Executive power is another institutional challenge to the judiciary. The Prime Minister and many of his Ministers are part of the national leadership team. With comprehensive managing functions, the central government has the authority to detail all laws, including those regulating the judiciary and shareholder litigation. Both Governmental Decrees and Prime Minister's Decisions rank above the legal instruments issued by the Supreme People's Court. Although this judicial body's legal instruments have recently been ranked above Circulars of Ministers,[231] the Chief Justice sometimes has to join Ministers to issue regulations governing courts.[232] The regulatory powers of Ministers and the government with its Party leadership are able to exert strong pressure on the judiciary.

As financial autonomy is one of the essential prerequisites for judicial independence, tight budget causes great pressures to the judiciary. Underfunding has forced the Supreme People's Court to request local governments to provide additional finances for the courts.[233] To a certain degree, this ties the judicial discretion to bureaucrats. Courts also need local government approvals for land use, construction, grand refurbishment, equipment procurement and budget expenditures.[234]

Like political leadership, bureaucratic influences have entered the courtroom, mainly to protect vested interests. Without much difficulty, senior bureaucrats are able to intervene by

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[231] SPC Justice Council issues resolutions while the Chief Justice issues Circulars and joint Circulars: *Law on the Making of Legal Instruments 2015* (Vietnam) s 4(7)(8).

[232] See, eg, Joint Circular No 01/2011/TTLT-TANDTC-BQP-BNV Dated 20 November 2011 of the Supreme People's Court, the Ministry of National Defence, the Ministry of Internal Affairs on the Instructions of Implementing Some Provisions of the Ordinance on Judges and Jurors of the People's Court; Ordinance Amending Some Provisions of the Ordinance on Judges and Jurors of the People's Court.

[233] Joint Official Letter No 16588/CVLT-BTC-TANDTC Dated 28 November 2012 of the Ministry of Finance and the Supreme People's Court on Funding People's Courts from Local Budgets. See also Official Letter No 09/TANDTC-KHTC Dated 21 January 2016 of the Supreme People's Court on Instructing the Management, Use of Usual Expenditure Budget 2016.

[234] See, eg, Nghia, *Economic Law Textbook*, above n 194. A potential threat to judicial independence comes from the proposal of judicial budget by state bodies instead of court and from the governmental control of the way of spending judicial budget: R D Nicholson, 'Judicial Independence and Accountability: Can They Co-Exist?' (1993) 67(6) *Australian Law Journal* 404. See also IBA Minimum Standards of Judicial Independence 1982.

'suggesting formally or informally how a particular case should be resolved and how the law should be applied'.[235] Judges in turn must know how to respect these suggestions to maintain their political relationships and careers.

Judges may sometimes seek bureaucratic advice on the 'correct' legal application in difficult cases involving SOEs that do not have diverse remedies or fit into the law.[236] This practice indicates that, when judges are not able to resolve a case from a textual reading of the law, they substitute tough legal reasoning with the 'objective' ideas of the governmental officials who administer the field. The notion that bureaucrats possess the necessary expertise and knowledge required to assess liability has become deep-rooted in judicial thinking. Such judicial deference has enabled bureaucrats to take over the courtroom discourse when convenient.[237]

Recent reforms of judicial recentralisation gained momentum following the Constitution 2013 and *Law on Court 2014*. These reforms have gradually reduced local power over the courts and increased the power of the Chief Justice of the Supreme People's Court, by removing local politicians and bureaucrats from jointly appointing judges and directly managing the internal court budget. These reforms caused tensions between executive and judicial powers. In response, bureaucratic rules are sometimes used to regain their local influence and prolong the legacy in which, for decades, Vietnam's courts have essentially functioned as offshoots of local government.[238] However, while such manoeuvres have slowly given way to judicial momentum, local bureaucratic leaders still share Party leadership. Thus, it is unclear how far this momentum frees local judges from bureaucratic influence.

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[235] See Nicholson and Duong, above n 184, 39; Gillespie, 'Rethinking the Role', above n 221, 851–3.

[236] See Nicholson and Duong, above n 184, 39; Gillespie, 'Rethinking the Role', above n 221, 851.

[237] Gillespie, 'Rethinking the Role', above n 221, 853.

[238] See, eg, UNDP, *Report on the Survey of Needs of District People's Courts Nationwide* (Justice Publishing House, 2007); Ministry of Justice and UNDP, above n 211; Pip Nicholson, 'Renovating Courts: The Role of Courts in Contemporary Vietnam' in Jiunn-Rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press, 2015) 528.

5.8.6 Functional Problems inside the Judiciary

5.8.6.1 Consensus in Judgement, Mandatory Professional Guidance and Practice of Seeking Bureaucratic Explanations

Internal judicial problems, like external political directions, come in different shapes and sizes. The first problem is the prevalent judicial practice of attempting to remove dissents in judgements. For example, a nationwide empirical study in 2014 showed that presiding judges often confer with other trial members who have divergent views, until reaching an agreement.[239] As presiding judges have an influential role on the bench, this practice effectively turns them into 'powerful lobbyists' for their own lead judgements. This contravenes the constitutional requirements that members of the bench have equal rights and must decide the case independently.

The second problem is the excessive mandatory professional guidance. Such guidance comes from the Resolutions of the Justice Council of the Supreme People's Court, and from an annual review process that usually comprises considering select rulings to provide instructions on unclear legal issues. The guidance aims to prevent improvisation, control corruption, induce uniformity in trial and prevent wrongful judgements.[240] However, to avoid accountability, many presiding judges prefer to seek such guidance from the Justice Council when laws are unclear, conflicting or deficient.[241]

While mandatory professional guidance can be seen as legalising precedents, it is more rigid and imperative than precedents in Australia. Such guidance limits hermeneutic approaches to legal implementation and confines judgements to prescriptive outcomes. This also contrasts with practice in Australia. For example, the Australian High Court have used such approaches

[239] Ministry of Justice and UNDP, above n 211, 29–30.

[240] Ibid 31–2. In the 1950s, Vietnam borrowed this Chinese practice of professional guidance purportedly to unify and stabilise the application of the law by judges who possessed little training: see Bernard Rudden, 'The Role of Courts and Judicial Style Under the Soviet Civil Codes' in F J M Feldbrugge (ed), *Codification in the Communist World: Symposium in Memory of Zsolt Szirmai (1903–1973)* (A.W. Sijthoff, 1975) 317.

[241] Over 5% of provincial judges consulted Justices or Chief Justice of SPC to resolve commercial lawsuits: Ministry of Justice and UNDP, above n 211, 32.

to develop the objective test that determines unfairness under oppression sections in the appellate case *Wayde* (also a prominent precedent — see Section 5.3). As this example suggests, mandatory professional guidance in Vietnam has eroded judicial discretion when the guidance informs the decisions of inferior courts outside the appeal process.

The third problem is that the Justice Council has at times sought legal clarifications from relevant ministries.[242] It should have used international practices, legislative deliberations and academic commentaries to clarify vague provisions. Such deference to bureaucratic powers compromises the development of judicial expertise to develop independent cogent legal reasoning based on principles of law.

Court reforms over two decades have not yet changed the view of judicial leadership on the influence of these three problems on judicial independence. The Supreme People's Court narrowed the constitutionalised independence *during trial* down to independence *during court sittings*. For instance, it insisted that consultations for case outcomes occur before or outside the sittings, and that the collective trial itself allows for such practices.[243] It also caused great surprise when reasoning that 'the law does not specify the independence of a court of this level from that of another level'.[244]

However, divergences are growing inside the judiciary. Some ranking judges supported these views — they voiced their concerns about political practicalities, low qualifications and the temptations of self-interest to discredit judicial independence from Party leadership, local authorities and superior courts.[245] Although these concerns are realistic, they do not enable the

[242] See, eg, Gillespie, *Transplanting Commercial Law Reform,* above n 190, 209–10; Gillespie, 'Rethinking the Role', above n 221, 853–4.

[243] Ministry of Justice and UNDP, above n 211, 31–2.

[244] To Van Hoa, *Judicial Independence: A Legal Research on its Theoretical Aspects, Practices from Germany, the United States of America, France, Vietnam, and Recommendations for Vietnam* (Juristförlaget i Lund, 2006) 453. For further discussion on judicial independence, see Nguyen Dang Dung, 'Principles of Judicial Independence and Constitutional Provisions 2013' (2014) 20(276) *Legislative Study Journal* 1; Nguyen Thi Hong, 'Guarantee of Judicial Independence in a Law-Based State: International Experiences and Recommendations for Amending Law on Court Organisation' (2014) 16(272) *Legislative Study Journal* 34.

[245] Ministry of Justice and UNDP, above n 211, 71–2.

creation of a judicial system that can apply law to accommodate the concept of fairness, as did Australia's High Court in *Wayde* (discussed in Section 5.3 above).

In contrast, most judges expect greater real independence. They understand that judicial independence requires that judges only obey the law and be impartial. For example, they support reforms that enable decisions 'without any interference from inside and outside of the court', backed by salary incentives, protection from bona fide errors, supportive state apparatus, facilitative supervision mechanisms and performance-based reviews for promotion or discipline.[246] These factors could incentivise judges to apply the law fairly and respect the rule of law to improve public confidence. These perception changes demonstrate the ascending readiness for change inside the judiciary. Despite this, the struggle for judicial independence must consider corruption.

5.8.6.2 Judicial Corruption

Corruption has become endemic and is increasing in the judiciary in correspondence to the national trend. There was an annual average of over 600 judicial defendants in the 2006–2012 period, and this number keeps rising.[247] Transparency International also found that the judiciary was in the top-four corruptors, which was comparable to state officials and civil servants, and just behind the most corrupt group of police.[248]

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[246] Ibid. It appears that 'there are "generational" differences, in which more newly minted judges seem more eager for change': see Christopher D Kimbrough et al, 'The Verdict Is In: Judge and Administrator Perceptions of State Court Governance' (2014) 35(4) *Justice System Journal* 344, 359.

[247] Tuong Duy Kien, 'Integrity in Activities of Law Enforcement Agencies: Sharing a Number of Findings of the Study on the National Integrity System (NIS) of Vietnam' in *Proceedings of the Workshop Integrity in Judiciary: International Standards and Implications for Vietnam* (Institute of Public Policy and Law, and Towards Transparency, Hanoi, 10 October 2014). See also UNIDO Evaluation Group, 'Independent Evaluation: Technical Assistance to Business Registration Reform in Viet Nam 2008–2013' (UNIDO Projects, 2013) 40; Quinn and Anh T T Vu, 'Farmers, Middlemen, and the New Rule of Law Movement' (2010) 30(2) *Boston College Third World Law Journal* 273, 197–8.

[248] See annual updates at http://www.transparency.org/gcb2013/country/?country=vietnam. Moreover, in 2013, Vietnam's corruption ranked 116 out of 177 economies and became more serious than Indonesia, Thailand, China and Malaysia. See also World Bank et al, *Corruption from the Perspective of Citizens, Firms, and Public Officials: Results of Sociological Surveys* (National Political Publishing House, 2nd ed, 2013).

This systemic problem affects access to courts for business dispute resolution and the business environment, given that all these corrupt actors are involved in enterprise law enforcement.[249] The studies of De Soto — a prominent regulatory capture scholar — indicated that corruption appears to be the primary way to operate a business in developing countries where laws are often unfair, unclear or inefficient.[250] This legislative design problem occurs in Vietnam, as noted above. Recently, the Party reiterated corruption as 'the most serious threat' to its legitimacy.[251] The then Prime Minister Phan Van Khai publicly admitted that:

> corruption in our country is widespread, neutralising the state apparatus. Even though there is the rule of law, it turns out to be no rule of law at all … [W]hen negative acts occur everywhere, then people do not have trust in us … [and] that can create an obstacle to business … Seeing the mistakes but not correcting them is a real risk to the country.[252]

The lack of transparency in law and court practices has complicated judicial corruption. The pre-trial mandatory mediation, by judges rather than lawyers, has enabled corrupt judges to 'run a case'.[253] The legislative design of unclear and unfair enterprise provisions, as noted above, has exacerbated this problem. Moreover, court practices are not transparent. For example, electronic case management is not developed, case receipts are not always issued and all judgements are held confidential.[254] Another problem is the internal practice of

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[249] For example, litigants may rely on state officials, civil servants and police to acquire documentation and give oral evidence, or may bribe them to influence judicial remedies.

[250] Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (June Abbott trans, Harper and Row, 1989) 134.

[251] AusAID, *Australia's Strategic Approach to Aid in Vietnam 2010–2015* (2010) 4.

[252] Prime Minister Phan Van Khai, quoted in http://www.amchamvietnam.com/comment-by-prime-minister-phan-van-khai-english-translation/. See also Governance and Transparency Working Group, above n 157.

[253] See Luu Tien Dung, 'Integrity in the Practice of Lawyering Profession: International and Vietnamese Standards' in *Proceedings of Workshop "Integrity in Judiciary": International Standards and Implications for Vietnam* (Institute of Public Policy and Law, Towards Transparency, Hanoi, 10 October 2014) 59, 64. See also IBA, OECD and UNODC, 'Risks and Threats of Corruption and the Legal Profession: Survey 2010' (2010).

[254] Ministry of Justice and UNDP, above n 211, 14–5. Online disclosure of unclassified information, such as hearing schedules and annual reports, is very limited. For justice-related problems and limited transparency of state institutions, see Viet Nam Lawyers' Association, Centre for Community Support Development

assigning cases based on the proposals of judges more often than on expertise and workload.[255]

These transparency problems have increased dependence on the court bureaucracy and on corrupt judicial practices via giving bribes to have disputes resolved.[256] 'As corruption is a way of life, it has invaded the judicial seat to the extent that a favourable decision may not be assured without a bribe'.[257] This effect has increased unofficial litigation cost, despite low official court fees. Moreover, the poor transparency has undermined freedom of information, public scrutiny to expose corrupt practices and ability to hold wrongdoers accountable.

Inadequate liabilities and ineffective preventive measures are also reasons for endemic judicial corruption. The criminal legislation regulates corruption offences very narrowly.[258] There is limited protection for whistle-blowers and no independent anti-corruption bodies, while police, procurators and judges are all highly corrupt and not independent, as noted above. Convicted offenders receive lenient sentences, political discipline or internal reprimand.[259] The increase in judicial corruption means that current measures purportedly

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Studies and United Nations Development Programme, '2015 Justice Index: Towards a Justice System for the People' (May 2016).

[255] Ministry of Justice and UNDP, above n 211, 22–3.

[256] Quinn and Vu, above n 247, 297. Bribery is a business strategy in Vietnam and around the world, but without corrupt judges, bribery is unworkable: see Edmund J Malesky, Dimitar D Gueorguiev and Nathan M Jensen, 'Monopoly Money: Foreign Investment and Bribery in Vietnam, a Survey Experiment' (2015) 59(2) *American Journal of Political Science* 419; OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing, 2014).

[257] Mallon, above n 157; Justice Michael Kirby, 'Tackling Judicial Corruption — Globally' (Speech delivered at The St James Ethics Centre, Sydney, Autumn 2001).

[258] See Dao Le Thu, Tran Van Dung and Trinh Tien Viet, 'Overview Report of Improving Provisions on the Bribery Offence in the Vietnamese Criminal Code from a Legal Comparative Perspective' (Central Department of Internal Affairs and UNDP, 29 October 2014). Corruption offences were amended in *Criminal Code 2015* ss 353–9, effective 1 January 2018.

[259] Vu Cong Giao, 'Integrity of the Courts' Activities: Sharing a Number of Findings of the Study on the National Integrity System (NIS) of Vietnam' in *Proceedings of the Workshop Integrity in Judiciary: International Standards and Implications for Vietnam* (Institute of Public Policies and Law, and Towards Integrity, Hanoi, 10 October 2014) 57; Tuong Duy Kien, 'Integrity in Activities of Law Enforcement Agencies: Sharing a Number of Findings of the Study on the National Integrity System (NIS) of Vietnam' in Proceedings of the Workshop Integrity in Judiciary: International Standards and Implications for Vietnam (Institute of Public Policy and Law, and Towards Transparency, Hanoi, 10 October 2014) 71.

preventing corruption (such as short-term appointments, the temporary relocation of judges[260] and compulsory professional guidance) have not worked.

In conclusion, the current policies, legislative design, institutional arrangements and practices are ineffective for building judicial merits and persuading judges to apply the law fairly. As a result, lawyers have an important role. The next section examines the influence of the presence of lawyers in the courtroom on the judicial implementation of litigation provisions.

5.9 Assessment of Judicial Effectiveness in Legal Implementation

Although reforms have gradually improved the status of the judiciary, senior bureaucrats still influence the court through budget subsidies and political leadership. The infiltration of political and bureaucratic powers into the judiciary diminishes the independence, expertise and impartiality of trial judges, while also undermining the development of the necessary skills and knowledge for sound legal reasoning in novel situations. In addition, there are problematic judicial practices, such as the excessive mandatory professional guidance that undermines judicial accountability, and endemic corruption that compromises judicial dignity.

Court corruption continues to exacerbate judicial problems. While there are some learned judges in economic courts, endemic corruption has overpowered the knowledge and integrity of these courts at large.[261] Above all, the existing institutional regimes and practices do not encourage judges to act in accordance with their competence and conscience, or to incentivise those attempting to uphold justice and fairness.

The principal actors in legal proceedings consist of the judges, the litigants and their lawyers. As commercial legal proceeding are both tough and tense, litigants usually engage lawyers to

[260] Short-term appointments are purportedly used for corruption control but mainly for political control. Likewise, the temporary relocations of judges to address a lack of judges in localities were also misused for political control and subtle discipline: Ministry of Justice and UNDP, above n 211, 44–7.

[261] See Report No 22/BC-TA Dated 4 December 2008 of the People's Supreme Court Reviewing Tasks in 2008 and Implementing Tasks in 2009 of the People's Judicial Branch, 17; 'Report No 03/BC-TA Dated 15 January 2015 of the People's Supreme Court Reviewing Tasks in 2014 and Central Tasks in 2015 of Courts' in People's Supreme Court (ed), *Materials of the Meeting to Implement Judicial Tasks 2015* (Hanoi, 2015) 15, 26. See also Gillespie, *Transplanting Commercial Law Reform*, above n 190, 215.

handle the proceedings and appear in court on their behalf.[262] As part of Vietnam's significant socioeconomic changes, rapid market expansions through WTO accession and other trade agreements have fuelled the business of legal services, with the flourishing of law firms and offices in urban areas.[263] Bar associations in large cities, especially Ho Chi Minh City, have also prioritised the development of skilled business lawyers with fluency in English to address increasing demands.

The influx of international lawyers has increased both competition and progress in the legal profession. While the presence of international law firms, including Allen and Baker & McKenzie, raised investors' expectations of local lawyers, this benefited local legal service providers. These firms became practical training environments to familiarise Vietnamese lawyers with the international standard services.[264] These lawyers subsequently established many successful firms and continued training new lawyers. In parallel, the opening of international markets led to a gradual increase in lawyers acquiring Western legal education. Commercial lawyers now play an important role in litigation, leaving behind their past peripheral position.

Progress in the legal profession has improved courtroom discourse. Stronger rights allow lawyers to cross-examine witnesses, test evidence, present legal reasoning and even request a change of trial members who are not considered impartial.[265] These rights are part of adversarial litigation.[266] There are approximately 8300 lawyers in Vietnam, yet they are not all deemed competent to capitalise on this litigation form, as it requires strong legal

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[262] This tendency is very significant in HCM City: See Nicholson and Duong, above n 184, 47–8. Gillespie, 'Rethinking the Role', above n 221, 858.

[263] Dung, above n 253, 64; Pip Nicholson, 'Access to Justice in Vietnam: State Supply — Private Distrust' in John Gillespie and Albert H Y Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010) 188, 191.

[264] Hop, above n 219, 185. Foreign law firms can recruit Vietnamese, but their lawyers are not yet allowed to present clients before court. This is unreasonable.

[265] See, eg, *Civil Procedural Code 2015* ss 46(2), 52, 56, 70(14), 75–6.

[266] In Vietnamese language: 'mềm nắn, rắn buông'.

reasoning.[267] However, the rapidly increasing competition in the legal profession has prompted skilled lawyers — especially those affiliated with foreign law firms — to deploy legal arguments to persuade judges to make orders following legal reasoning. Nicholson, Duong and Gillespie observed that the arguments of lawyers have enriched judicial knowledge and helped reshape courtroom debates.[268] The Vietnamese culture of 'the weak being oppressed but the strong being released' means that robust arguments are sometimes accepted.

The persuasion of judges is difficult and requires diverse skills and expertise. This is the case when the judiciary does not always desist from external influences and self-interest, and is not required to conduct legal reasoning to rationalise its judgements. Prominent lawyers have recourse to varied professional skills to address the judicial practices of political thinking and rudimentary legal application. For example, they use mandatory pre-trial mediation meetings to explicate debatable legal points to judges through informal hermeneutic arguments and soft suggestions.[269] It is important to not frustrate the judicial elites because good communication and relationships with judges inform successful counsel work. Moreover, the private settings mean that judicial attitudes are not on public display. These environments are more likely to encourage a reciprocating candour from judges, and to persuade them to endorse legal reasoning during the courtroom debate.

In addition, lawyers have the right to invoke international treaties that bind Vietnam to guarantee a fair trial by a competent, independent and impartial adjudicating panel. As noted above, these requirements came from the 1966 *International Convention on Civil and*

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[267] This figure was for 2013 and kept increasing: see Viet Nam Lawyers' Association, Centre for Community Support Development Studies and United Nations Development Programme, 'Justice Index: Assessment of Distributive Justice and Equality from a Citizen-Based Survey in 2012' (July 2013). See also Hop, above n 219, 185; Toohey, above n 196, 179.

[268] See Nicholson and Duong, above n 184. See also Gillespie, *Transplanting Commercial Law Reform*, above n 190, 215; Gillespie, 'Rethinking the Role', above n 221, 859.

[269] Pre-trial meditation by judges is compulsory and compromises judicial independence: *Civil Procedural Code 2015* s 48(7); Gillespie, 'Rethinking the Role', above n 221, 859; Penelope Nicholson, 'Judicial Independence and the Rule of Law: The Vietnam Court Experience' (2001) 3 *Asian Law Journal* 37, 48.

Political Rights and the 1997 *Beijing Statement of Principles of Judicial Independence*. Lawyers acting for foreign clients can also point to Vietnam's relevant agreements with the US and WTO. These landmark agreements rank above domestic laws and reinforce the principle of fairness that is designed to prevent authorities from favouring SOEs and state-allied litigants.[270]

These international requirements were upheld in the Constitution 2013, *Law on Court 2014* and *Civil Procedure Code 2015*. Moreover, the Politburo's Resolution 49/NQ-TW on judicial reforms until 2020 urged judges to be impartial and contemplate legal arguments when delivering judgements.

These international and national legal sources are useful for addressing judicial viewpoints based on lower-ranking instruments, such as bureaucratic guidelines, professional guidance and policies. In practice, lawyers have also used the public influence of the press to pressure prejudiced judges to make impartial decisions.[271] Greater attempts at legal reasoning by lawyers have reduced the effects of the literal readings of legal texts by the judiciary. A more competent legal profession is instrumental in opening new avenues in the search for justice, fairness and the rule of law.

With these accrued institutional and contextual developments, the court is now under the legal, political and social obligation to respect the right of litigants to justice and fairness. It must juggle various major forces, such as political leadership, bureaucratic influences, endemic corruption, the rising legal profession, the inquisitive press and public attention. The tendency of judicial actions in the shareholder litigation context would depend on whether litigants have links with these forces.

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[270] See detailed discussion on these trade agreements in Chapter 3, Sections 3.8.3, 3.8.6.

[271] UNDP, 'Access to Justice in Viet Nam: Survey from a People's Perspective' (May 2004); Catherine McKinley, 'Media and Corruption: How Has Viet Nam's Print Media Covered Corruption and How Can Coverage Be Strengthened?' (A Series of Policy Discussion Papers on Public Administration Reform and Anti-Corruption, the United Nations Development Programme Vietnam, January 2009).

Judges face multifarious pressures when litigants are SOEs. It is recalled here that SOEs are controlled by high-ranking politician-bureaucrats who implement the party-state policies of preference for these majority investors. As institutional arrangements are inextricably designed to subject judicial interests to political and bureaucratic powers,[272] partisan judges have a political mandate to observe these policies. Politicians and bureaucrats may not always interfere with judicial functions, but pressures from them always hang over judges.

This places judges in a difficult position, inducing them to minimise the disadvantages for SOE litigants. This is further illustrated by the common practice that SOEs receive more favourable treatment from authorities than do private litigants, although both engage in similar levels of judicial bribery.[273] It would be extraordinary for judges to refrain from corroding law requirements, judicial merits and legal reasoning when SOE shareholders or corruption issues are involved. Therefore, judges are not free to make fair decisions.

These outcomes may be different when litigants are foreign investors.[274] Judges know that party-state leaders prioritise attracting foreign investment and are under the obligations of international agreements to provide fair resolution for disputes for these investors. Moreover, foreign claims tend to be handled by lawyers who possess strong legal reasoning skills and know that such agreements rank above domestic laws. These factors encourage judges to apply the law appropriately because this action would be both politically and legally safer for them. Thus, judicial diligence is more likely to survive in these circumstances.

This is not guaranteed when litigants are private minority shareholders. They do not hold the same level of political and legal protection as do SOEs and foreign investors. The frequency

[272] See, eg, Brian J M Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control Over the Courts' (2003) 4(2) *Asian-Pacific Law & Policy Journal* 431; Gillespie, 'Rethinking the Role', above n 221; See Nicholson and Duong, above n 184.

[273] See, eg, de Jong, Tu and van Ees, above n 157. See also Dimitar Gueorguiev and Edmund Malesky, 'Foreign investment and bribery: A firm-level analysis of corruption in Vietnam' (2012) 23(2) *Journal of Asian Economics* 111.

[274] See, eg, Court Case No 82/2007/KDTM-PT Dated 28 August 2008 on Request for Abolishing Resolutions Passed by Written Idea Collection.

of political control, bureaucratic influence, internal direction and judicial corruption may cast doubt on whether judges are willing and able to make fair orders.

Nevertheless, the judicial implementation of the law cannot always be seen as unjust and unfair when the facts of cases fit into applicable law and skilled lawyers are present in the courtroom. Moreover, based on the groundwork of the Federal Court of Australia's assistance over 14 years, the Supreme People's Court has been building expertise to prepare for binding precedents applicable from 1 June 2016.[275] In line with this, the Ministry of Justice recently recommended that leading politicians in the National Assembly Standing Committee return the rights of legal interpretation to the court to address the growing need for access to justice.[276] Together, these actions might improve the roles of lawyers, independence, impartiality, transparency and expertise in the court.

On balance, litigation outcomes for minority shareholders appear circumstantial, although they may be gradually less problematic. These inconsistencies allow for an overall conclusion that the judiciary cannot guarantee a high level of effectiveness in law implementation. A key reason for this outcome is that the judiciary is not sufficiently independent to act fairly.

[275] Resolution No 49-NQ/TW Dated 2 June 2005. Binding precedents have been useful in China where the state system is similar to that of Vietnam: See Cheryl Xiaoning Long and Jun Wang, 'Judicial Local Protectionism in China: An Empirical Study of IP Cases' (2015) 42 *International Review of Law & Economics* 48; Björn Ahl, 'Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court' (2014) 217 *China Quarterly* 121.

[276] Report No 151/BC-BTP Dated 15 July 2013 of the Ministry of Justice Reviewing the Implementation of the Civil Code 2005.

Conclusion

This chapter has discussed oppression sections and litigation provisions. An overall conclusion is that the links of oppression sections with the reliable legislative design and judicial merits in legal implementation have informed effective minority shareholder protection in Australia, whereas the links of litigation provisions with deficiencies in legislative design and judicial institutions have not generated a similar result in Vietnam, as wrongdoers in companies rarely face accountability. Detailed observations can be made in this regard.

In Australia, oppression sections are expressed with an open-ended design with neutral language and a clear structure that resulted in a broad scope of legal standing, litigable conduct, grounds for court orders and available remedies. In parallel, the judiciary demonstrates independence, impartiality, transparency and expertise when it exercises unfettered discretion under these sections to reinstate fairness for minority shareholders oppressed by directors and majority shareholders. This combination made these sections an effective tool for vulnerable shareholders to protect their interests. Thus, the sound legislative design and the reliable judicial implementation have informed the vital role of these sections in remedying and deterring oppressive conduct to assist a functional market.

In contrast, the findings on Vietnam, where the rule of law is less consistent than in Australia, reveal a more complex picture. The additions of direct litigation against directors and statutory derivative action have expanded litigation measures. However, the soundness of all measures is affected by the unclear and narrow design of legal standing, litigable conduct, ground for court orders and available remedies. A central problem is that this design has not included the concept of fairness. This is compounded by the lack of provisions to address the oppression by majority shareholders and directors towards minority shareholders.

A functional judiciary should be above Party politics, yet this is not guaranteed in Vietnam. The judicial features are erratic when the independence, impartiality, transparency and expertise of courts hinge on whether political, bureaucratic, corrupt and internal influences capture judges in trial. The press attention and rising legal profession in the courtroom appear helpful for trials without SOEs or protected investors. Thus, judicial implementation is less reliable and more challenging for minority shareholders to counteract prevalent unfair practices. Overall, judicial fairness is less likely to be achieved.

These deficiencies necessitate reworking the existing protection measures — such as GMs, market exit and shareholder litigation — to enhance their usefulness in an exploitative growing market. However, lessons from Australia indicate that this would not empower minority shareholders to tackle unfair practices, unless oppression sections are transferred by an effective legislature and refined over time by a functional judiciary. The next chapter examines the transfer of the oppression sections to Vietnam.

CHAPTER 6: LEVEL OF EFFECTIVENESS IN THE LEGAL TRANSFER OF OPPRESSION SECTIONS FROM AUSTRALIA TO VIETNAM — A LEGAL IRRITATION TEST

Introduction

The principle of fairness underlies the oppression Sections 232–235 in Australia's *Corporations Act 2001* (Cth) (hereafter referred to as oppression sections). Fairness is demonstrated through the legislative design, and judicial interpretation of legal standing, litigable conduct, grounds for court order and remedies available under these sections (Chapter 5). The principle of fairness is also recognised in Vietnam's Constitution 2013 and *Enterprise Law 2014*, where fairness is considered the basis of a modern legal framework.[1]

Legal transfer is a common approach to improving corporate law in Australia and Vietnam.[2] This chapter applies the legal transfer framework (Chapter 2) to assess the factors that affect the transfer of Australia's oppression sections to Vietnam's litigation provisions in *Enterprise Law 2014* (hereafter referred to as litigation provisions). Legal transfer of these oppression sections is based on the premise that the introduction of fairness underpinning them to this law would create a better business environment for investors.

Chapter 2 explicated and expanded Teubner's legal irritants theory to formulate the legal transfer framework. This theory recognises the roles of factors that cause irritations which impede the cross-jurisdictional transfer of legal rules, and the roles of factors that generate the facilitation of this transfer, thereby allowing legal rules in one jurisdiction to function in another. This chapter considers both these factors — irritation factors and facilitation factors.

This chapter identifies similarities between Australia and Vietnam regarding the market problems, legal deficiencies, reform policies and roles of civil society (Chapters 3 and 4) that

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1 See Chapter 1, Section 1.2; Chapter 3, Sections 3.9.5. Fairness is emphasised in the *Constitution of the Socialist Republic of Vietnam 2013* (Vietnam) preamble, ss 3, 31, 35, 50, 55 ('*Constitution 2013*'); *Law on Enterprises 2014* (Vietnam) ss 9, 142, 180 ('*Enterprise Law 2014*') (including the requirement that general meetings of shareholders must ensure fairness). The *Constitution 2013* s 119 provides that the Constitution has the highest legal position with which any other legal instrument, including enterprise laws, must comply.

2 See Daphne Barak-Erez, 'Institutional Aspects of Comparative Law' (2009) 15 *Columbia Journal of European Law* 477; John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 1st ed, 2006), 23. See also Alan Watson, 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 335, 335.

could facilitate the transfer of oppression sections to Vietnam. These similar factors are considered facilitation factors.

Moreover, this chapter also evaluates the differences between the two countries in regard to the treatment of state-owned enterprises (SOEs), structure of legislative processes, qualities of lawmaking institutions, effectiveness of judicial institutions in legal implementation, and political leadership in the legislature (Chapters 4 and 5). It argues that these differences could impede the legal transfer because Australia's oppression sections may 'irritate' these four factors in Vietnam, as suggested in the legal transfer framework.[3] These different factors are deemed irritation factors.

This chapter contends that the coexistence of facilitation factors and irritation factors generates opposing results. The strong facilitation of transferring oppression sections largely derives from contextual factors: market problems, legal deficiencies, reform policies and roles of civil society (including foreign institutions in Vietnam). In contrast, major irritations to the legal transfer stem from state institutions, whose practices fall under the broad concept of regulatory capture:

- the legislative process assists the Ministry of Planning and Investment (MPI) to gather ministries to capture lawmaking to advantage SOEs.
- the judiciary is captured by political leadership, bureaucratic influence, and widespread corruption in legal implementation.

These opposing results place national leaders in a difficult situation. These leaders support broad reforms, yet are cautious about the unrest they could face from inside and outside the party-state (Chapter 3). Incentives are needed for them to rectify these regulatory capture problems to advance national interests. This chapter concludes that national leaders' reluctance to resolve these tensions would lead to a low level of effectiveness in the legal

[3] The terms 'irritate', 'irritation' and 'irritants' used in this thesis were coined by Teubner and discussed in Section 2.3 of Chapter 2 about the legal transfer framework.

transfer of oppression sections in the existing institutional environment. In doing so, this chapter directly addresses the research question: how effective could the transfer of Australia's oppression sections to Vietnam's litigation provisions be?

These discussions are presented in four main sections that consider: (1) facilitation factors, (2) irritation factors, (3) major irritations and (4) national leaders' management of tensions in the legal transfer of oppression sections from Australia to Vietnam.

6.1 Facilitation Factors in the Legal Transfer of Oppression Sections from Australia to Vietnam

This section compares four contextual factors that informed the considerable transformation of oppression sections in 1983 (now sections 232–235 of the *Corporations Act 2001* (Cth)) and the significant reforms of litigation provisions in 2014. These factors are market problems, legal deficiencies, reform policies and roles of civil society.[4] The result of this comparison will indicate whether these contextual factors are facilitation factors that could drive the legal transfer of oppression sections to litigation provisions.

6.1.1 Curing Market Problems (Similar Market Problems)

As discussed in Chapter 3, unfair practices towards minority shareholders were widespread in Australia (1960-1990) and are rife in Vietnam. These practices are compounded by the problematic market structure — for example, the concentrated share ownership, monopoly position of SOEs and dominance of large private investors increase the potential for exploitative corporate control.[5] These problems have damaged market credibility through corporate scandals and collapses. Accordingly, curing these problems to establish a market that attracts investments has been a primary reason for strengthening Australia's oppression sections and Vietnam's litigation provisions.

At present, these problems remain acute in Vietnam. They resemble those in Australia's development process between the 1960s and 1980s, when the oppression sections were

[4] Chapters 3 to 5 identified that both oppression sections (1983) and litigation provisions (2014) connected with eight major factors. Section 6.1 here compares four factors: (1) market problems, (2) legal deficiencies, (3) roles of civil society and (4) reform policies. Section 6.2 below compares four factors: (5) structure of lawmaking process, (6) qualities of lawmaking institutions, (7) law implementation institutions and (8) political leadership.

[5] See Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *University of New South Wales Law Journal* 1, 29; R I Barrett, 'Towards Harmonised Company Legislation — 'Are We There Yet'?' (2012) 40 *Federal Law Review* 141, 154. See also Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805.

introduced and strengthened.[6] This similarity suggests that market conditions in Vietnam are ripe for the adoption of oppression sections, as were conditions in Australia in the 1960s, thereby supporting the case for the legal transfer of these sections.

6.1.2 Repairing Legal Deficiencies (Similar Legal Deficiencies)

Legal deficiencies in addressing market problems have increased pressure for law reform. Australia transformed its oppression sections in 1983 after these sections failed to rectify widespread oppression because they were excessively restricted. This reform was crucial because the corporate governance rules at the time did not regulate oppressive conduct.[7] Likewise, Vietnam addressed its similar legal deficiencies by overhauling enterprise law in 2014 — specifically, the litigation provisions and corporate governance rules. However, substantial improvements fail to materialise because legal constraints are only slightly reduced (Chapter 5).

This ineffective reform in Vietnam repeats Australia's past failures to repair legal deficiencies in remedying oppressive conduct. Such conduct was effectively addressed only after Australia liberalised oppression sections, which included allowing the court to grant remedies based on the unfairness ground to reinstate fairness (see Chapter 5, Sections 5.5). These realities demonstrate that Vietnam needs oppression sections to rectify similar law failures because the 2014 reforms of litigation provisions have not provided remedies for oppressive conduct. These litigation provisions are inadequate in that they do not sufficiently accommodate the

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[6] See Michael Woods, 'Bottlenecks to Productivity Growth: Some Reflections on the Australian Experience' (Paper presented at the Restructuring for a more Competitive Vietnam (RCV) Project Launch workshop, Hanoi, 11 August 2014); 'Speech by Australian Ambassador' (Paper presented at the National Assembly Economic Forum Autumn 2015, Sam Son Town, Thanh Hoa Province, 27 August 2015); Vietnam Competition Authority, Ministry of Industry and Trade, 'Report on Economic Concentration in Vietnam 2014' (April 2015). See also Chapter 3.

[7] The term 'corporate governance' describes 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations. It encompasses the mechanisms by which companies, and those in control, are held to account': Commonwealth, HIH Royal Commission, *The Failure of HIH Insurance* (April 2003) vol 1, xxxiv; ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, 2014) 1. Substantial reforms of corporate governance rules occurred under CLERP (1998–2004).

principle of fairness in legal standing, litigable conduct, grounds for court orders and available remedies (Chapter 5, Sections 5.1 to 5.4).

6.1.3 Implementing Reform Policies Gradually and Inadequately (Similar Approach to the Implementation of Reform Policies)

Reform policies in Australia and in Vietnam are generally broad and gradually implemented. Oppression sections and litigation provisions in their current forms result from extensive policies to develop corporate law and complementary institutions.[8] Progress beyond fragmented policies has taken several decades, as both countries employ a gradual approach to reform. While slow legal changes facilitate stability, they are often used to prolong the status quo. For example, Australia fine-tuned oppression sections and Vietnam fine-tuned litigation provisions only after acute corporate misconduct took its toll on the market. This inflexible gradual approach fails to address pragmatic market needs.

Vietnam's recent progress towards longer-term comprehensive policies has considered Australia's experiences. This result derives from Australia's ongoing aid for the formulation and implementation of the *Master Plan on Economic Restructuring* until 2020, together with the reform outlook until 2035.[9] This contributes to the new policy direction, which prioritises minority shareholder protection and SOE operations aligned with international corporate governance practice. This fundamental shift in state awareness generates a favourable precondition for prospective legal and institutional transfers from Australia. Oppression sections would fit into the above gradual approach and these renewed policies. This would facilitate the legal transfer of these sections to Vietnam.

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[8] See Chapter 3. Examples of complementary institutions in Australia include the Office of Best Practice Regulation, the Office of Parliamentary Counsel, the Productivity Commission, the Australian Securities and Investments Commission (being an applicant under oppression sections) and the Federal Court of Australia (having jurisdiction over oppression sections).

[9] See Chapter 2, Section 2.2; Chapter 3, Section 3.9.5.

6.1.4 Emerging Roles of Civil Society (Similar Roles of Civil Society)

Civil society plays significant roles in legal reforms. It has actively promoted, debated and monitored the reforms of oppression sections and litigation provisions (Chapter 4). In Australia, these activities mainly derived from academics, lawyers and associations, as seen in their submissions and commentaries. The press did not focus on legal reforms. However, in Vietnam, civil society is more dynamic and cooperative owing to capacity development aid from donors, including Australia.[10] For instance, the academic, legal and business communities, together with the press and foreign commercial chambers in Vietnam, have proactively engaged in enterprise law reforms through various channels, such as press coverage, national forums, legal conferences and direct dialogues with drafters, ministries and government leaders.[11]

These dynamics do not mean civil society is more progressive in Vietnam than in Australia, where the lawmaking practices are highly inclusive. Rather, collective action in Vietnam is improvised as an effective catalyst to address the government-centric lawmaking process. Here, civil society participation constitutes a social campaign to increase public pressure to achieve fairer enterprise law reforms, monitor government practices and offer insights into the need for effective legal transfers. The ease and accessibility of the internet, which was unavailable when Australia transformed its oppression sections in 1983, add to Vietnam's

[10] See The Asian Foundation, 'Training Needs Assessment of Civil Society Organizations in Vietnam: Organizational Development and Community Mobilization in the Policy and Law-Making Process' (Civil Society Empowerment and Participation in the Policy and Law-Making Process in Vietnam Project, November 2008); Andrew Wells-Dang, 'The Political Influence of Civil Society in Vietnam' in Jonathan London (ed), *Politics in Contemporary Vietnam: Party, State, and Authority Relations* (Palgrave Macmillan UK, 1st ed, 2014) 162–83. For Australia's aids, see, eg, Department of Foreign Affairs and Trade, *Aid Investment Plan: Vietnam 2015–16 to 2019–20* (2015); Department of Foreign Affairs and Trade, 'Enabling and Engaging the Private Sector for Development in Vietnam' (2017).

[11] See Chapter 4, Sections 4.7, 4.8. Participants include investors, academics, lawyers, business chambers, aid agencies and donor consultants.

dynamic civil society. These developments contribute to a steadily growing momentum in civil society.[12]

Fundamental freedoms are essential to maintain an active civil society. Australia has supported this by the statutory freedom of information and the constitutionally derived freedom of opinions, including political expression.[13] Likewise, Vietnam has implemented these constitutionalised freedoms via compulsory information disclosure and public consultation.[14] International economic integration, growing public awareness and greater political acceptance of civil society in lawmaking have made this sector 'a prominent feature of the national political scene since 2014'.[15] The right to request state-held information in the first ever *Law on Access to Information 2016* further empowers this sector and renders its roles comparable to those in Australia.[16]

These increasing similar roles of civil society in the two countries could promote the legal transfer of oppression sections from Australia to Vietnam. This is also because the fairness principle underpinning these sections dovetails with strong support from the Vietnamese general public and legal academics for equitable foreign legal rules (Chapter 4, Section 4.8). Moreover, it could be argued that practising lawyers — who often call for better minority

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[12] See also Vu Thanh Tu Anh et al, 'Institutional Reform: From Vision to Reality' (A Policy Discussion Paper Prepared for the Vietnam Executive Leadership Program, sponsored by the Harvard Kennedy School, the Government of Vietnam and the United Nations Development Programme, April 2015) 21.

[13] See *Freedom of Information Act 1982* (Cth); *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119. The High Court held that an implied freedom of political expression exists as an essential part of the responsible government created by the Constitution: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106. This was reaffirmed in *Unions NSW v New South Wales* [2013] HCA 58.

[14] See Chapter 4, Section 4.7.2.

[15] See Benedict J Tria Kerkvliet, 'Regime Critics-Democratization Advocates in Vietnam 1990s–2014' (2015) 47 *Critical Asian Studies* 359; Pham Chi Dung, 'Would Economic Crisis Happen That Leads to Political Crisis in Vietnam?' (August 2013) 28 *New Age Journal* 11, 20–1.

[16] This Law was enacted in 2016 (effective in July 2018), advised by the executive director Toby Mendel of the Canadian-based Centre for Law and Democracy, and reviewed annually by this Centre. Mendel brought to Vietnam experiences from many countries including the UK, Canada, New Zealand, India and Thailand. See Centre for Law and Democracy, *Vietnam: Analysis of the Draft Law on Access to Information* (October 2015); 'Government of Vietnam and United Nations Development Programme' (Materials for the Conference on the Scope of Access to Information and Restrictions on Access to Information in Bill on Access to Information, Hanoi, 2014).

shareholder protection and more facilitative shareholder litigation because of their career interests — also back this transfer.

To recap, the above four contextual factors that link with Australia's oppression sections and Vietnam's litigation provisions bear substantial resemblances. This means that these oppression sections are considerably compatible with the market, legal, policy and social contexts in which the litigation provisions have evolved. In other words, these contexts facilitate the transfer of the oppression sections. As the legal transfer framework suggests, these four contextual factors are facilitation factors that could drive the legal transfer of the oppression sections to Vietnam.

6.2 Irritation Factors in the Legal Transfer of Oppression Sections from Australia to Vietnam

This section compares the differences between Australia and Vietnam. This task focuses on four factors: preference for SOEs, structure of the lawmaking process, qualities of lawmaking institutions and political leadership in the legislative institution. The purpose of this comparison is to identify the institutional factors that may irritate the Australian oppression sections when they are transferred to the Vietnamese litigation provisions. This result will lay the groundwork for Section 6.3. SOEs are examined in a separate section because of their important position, as demonstrated in Chapters 3 to 5.

6.2.1 Preference for State-owned Enterprises

SOEs in Australia previously experienced widespread problems, including monopolies and misuse of powers.[17] As they were often given excessive competitive advantages,[18] this caused

[17] See Frederick G Hilmer, Mark R Rayner and Geoffrey Q Taperell, 'National Competition Policy' (Report, Independent Committee of Inquiry, 1993); Ian Harper et al, 'Competition Policy Review: Final Report' (Report, 2015). See also Frederick G Hilmer, 'National Competition Policy: Coming of Age' (2013) 42 *Australian Business Law Review* 36.

[18] Matthew Rennie and Fiona Lindsay, 'Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries' (Corporate Governance Working Paper No 4,

considerable difficulties in remedying their misconduct. Australia considered this monopoly status and preference when introducing and reforming oppression sections. The fairness principle underpinning these sections effectively remedied oppressive conduct in any company and by any actor, irrespective of ownership, relationship, shadow management and de facto control.[19]

In contrast, the Vietnamese party-state's ongoing preference for SOEs undermines the evolution of litigation provisions in enterprise laws. Constitutions and reform policies persistently reinforce the leading role of these businesses, thereby encouraging state institutions to give them more rights and benefits than domestic private investors. For example, the government delays reforms of litigation provisions and subtly advantages SOEs through unfair provisions in enterprise laws, while central and local bureaucratic bodies give preferential treatment to their SOEs in practice.[20] Attempts at fair legal transfers that decrease the power of these businesses mainly receives the government's support in form.

For these reasons, oppression sections would irritate the widespread preference for Vietnam's SOEs and the interests of the senior bureaucrats controlling these businesses. Although the economic reform process has slowly reduced such preference, its substance has changed little. The government has recently begun restructuring the SOE corporate governance following international practice, which requires fair treatment among shareholders.[21] However, progress is limited because government institutions still directly or indirectly run SOEs for their own

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OECD, 2011) 11; Working Party on State Ownership and Privatisation Practices, 'Competitive Neutrality: National Practices' (DAF/CA/SOPP(2011)9/FINAL, OECD, 2012) 70–4.

[19] See Chapter 5, Part I.

[20] Central Institute for Economic Management, 'Report 7. State-Owned Enterprises and Market Distortion' (Paper presented at the Workshop on Vietnam's Economic Institutional Reform for Integration and Development for the Period of 2015–2035, Ministry of Planning and Investment, Hanoi, 28 August 2015) 315–16. For example, in May 2014, the state lent the ADB USD320 million to restructure the financial status of three state-owned enterprises including the Song Da Corporation, the No 1 Construction Corporation, and the Vietnam Garment and Textile Group. Nguyen Dinh Cung and Nguyen Tu Anh (eds), *Monitoring and Evaluating the Implementation of the Master Plan on Economic Restructuring* (2015) 77, 128–9.

[21] This happened after two state conglomerates, Vinashin and Vinalines, collapsed. OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, 2015).

political objectives.[22] It remains to be seen whether such restructuring would reduce the irritation from oppression sections.

6.2.2 Structure of Lawmaking Process

The lawmaking processes that reformed Australia's oppression sections and Vietnam's litigation provisions share many similar functions. This result derives from Canada's assistance with the reforms of the *Vietnamese Law on Law*.[23] However, the substance of these processes varies greatly because such functions are broadly distributed in Australia, yet highly concentrated in Vietnam.

Australia has created an inclusive legislative process (Chapter 4) in which the inclusiveness is informed by the separation of primary functions. The sponsor ministry only performs policy instruction and public consultation via information disclosure, while regulatory impact assessment, legal drafting, Bill review and Bill debate are independently conducted.[24] The separation of these functions enables monitoring in lawmaking, consideration of interests and addressing of conflicts of interest more effectively. This sound legislative process deters the sponsor ministry and government from abusing powers, exerting complete control over law reforms and pandering to regulatory capture by interest groups.

In contrast, Vietnam still maintains a government-centric lawmaking process without necessary measures to address ineffective practices. This process concentrates all Bill preparation functions in the sponsor ministry, the MPI.[25] Consequently, the MPI usually undermines these functions, gathers other ministries to together capture the Bill, and co-opts

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[22] See Nguyen and Nguyen (eds), above n 20, 128–31.

[23] Vietnam's lawmaking process is regulated by the Law on Law (1996, 2008 and now 2015) ('*LOL*'). Vietnam added extra functions, such as separate business consultations, and two Bill reviews, by the Ministry of Justice and the National Assembly Economic Committee. For detailed discussions, see Chapter 4, Part II.

[24] The sponsor ministry was the Attorney General's Department until 1998 and the Treasury since then. Regulatory impact assessment is shown in the regulatory impact statement, compulsory from 2000, and conducted by the Office of Best Practice Regulation. This assessment hence did not apply to reforms of oppression sections 1983 and 1998. For detailed discussions, see Chapter 4, Part I.

[25] MPI performed policy instruction, public consultation, information disclosure, regulatory impact assessment and legal drafting. For detailed discussions, see Chapter 4, Part II.

Bill reviewers who also examine the MPI's use of powers. However, this process does not provide for legislative debate with the sponsor minister in the National Assembly, or allow for any public inquiry into the Bill on the basis of unconstitutionality. These deficiencies enable the MPI to assist the government to fully control law reforms because the government dominated the legislature.

The different substance of lawmaking processes in the two countries would negatively affect the transfer of Australia's oppression sections to Vietnam's litigation provisions. A major problem is that this transfer would have to go through the Vietnamese lawmaking process which gives excessive powers to the sponsor ministry and government, despite their great conflicts of interest in their control over SOEs (Chapter 4, Part II). This reality highlights the need to examine the qualities of the state institutions participating in this process because their qualities influence legal transfer. These qualities are considered next.

6.2.3 Qualities of Lawmaking Institutions

Lawmaking institutions include the government bodies that perform Bill-related functions and the legislature that determines the Bill. The qualities of these lawmaking institutions — such as independence, expertise, transparency and accountability — are more highly developed in Australia than in Vietnam.[26] This is because Vietnam, as noted above, regulates the concentrated functions in its lawmaking process to substitute the formation of dedicated specialised institutions with ad hoc bodies (created by the sponsor ministry) and a part-time legislature (controlled by the government).

These different institutional qualities are illustrated in the legal drafting of oppression sections and litigation provisions. Legal drafting is particularly important in Vietnam, where the part-time legislature's voting on Bills is a formality (Chapter 4). In Australia, the oppression sections are drafted by the Office of Parliamentary Counsel. This office has qualified legal

[26] See Chapter 4.

drafters with considerable expertise in plain-language legal drafting.[27] The mandatory separation of this demanding function from the sponsor ministry ensures the independence of drafters, even though they write Bills under the written instructions of this ministry. Regulatory guarantees and standardised drafting guidelines assist in a fruitful relationship that strengthens the roles of this office and informs the effective design of oppression sections.[28]

Unlike in Australia, the internal makeshift approach to the drafting of litigation provisions in Vietnam undermines the independence, expertise, transparency and accountability of drafters. Given the lack of specialised institutions, the sponsor MPI always uses its subordinate bureaucrats at the Central Institute of Economic Management (CIEM) to perform most Bill preparation functions, including legal drafting (Chapter 4). These bureaucrats rarely have the legal drafting training, -practice guidelines or expert enterprise law knowledge required to write sophisticated legal rules. Under the auspices of the MPI, together with the reform complexities, this has resulted in the formal legal compliance, poor treatment of insightful recommendations and substandard design of litigation provisions. These problems are ongoing.

6.2.4 Political Leadership in the Legislative Institution

Political leadership in the legislature contrasts sharply between Australia and Vietnam. As explained in Chapter 4, this leadership is informed by the politics in this legislative institution. The Australian legislature is effective because of the democratic politics, with a system of checks and balances. In this system, freedom of speech is guaranteed by parliamentary privilege. As a result, the government's proposed corporate legislation is tested through thorough both debate and informed voting with the Opposition and crossbenchers that

[27] See Office of Parliamentary Counsel, *Annual Report 2015–2016* (2016). For updates about this office, see http://www.opc.gov.au/about/index.htm. It is noted that the language of oppression sections was only improved in the redrafting in 1998.

[28] See Chapter 4, Section 4.2; *Parliamentary Counsel Act 1970* (Cth). OPC Drafting Manuals, Instruments Handbook and other guidelines can be found at http://www.opc.gov.au/about/documents.htm.

represent multiple interests. Corporate legal reforms are generally achieved through political consensus under the Prime Minister's (PM's) leadership.

In contrast, Vietnam's enterprise law reforms, including litigation provisions, are subject to the vigilant collective leadership of the Party leader, PM and president of the legislature.[29] They create a dominant government, without a substantive system of checks and balances in the National Assembly. Concurrently, the vigilant democratic centralism is used to control freedom of speech and parliamentary privilege in legislative discussions and voting.[30] These institutional arrangements cause difficulties for the legislature to oppose enterprise Bills captured by ministries because the leadership usually railroads these Bills.

To recap, there are substantial differences between the linking factors of the Australian oppression sections and the Vietnamese litigation provisions. An application of the legal transfer framework has shown that these sections would irritate the preference for SOEs, the government-centric lawmaking process, the low qualities of lawmaking institutions, and the hegemonic leadership over the legislature in Vietnam.

A common thread running through these factors is the consistent attempt across the party-state institutions to fine-tune corporate litigation reforms. This action is aimed at preventing SOEs and the government bodies controlling them from being held accountable for oppressive conduct in companies. Part II of Chapter 4 discussed that this attempt underpins the regulatory capture of these reforms by ministries (spearheaded by the sponsor ministry, the MPI) and the regulatory capture of judicial implementation by undue influences.[31] In

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[29] See Chapter 4, Section 4.9.

[30] The concomitant political and bureaucratic control over the legislature was informed by the membership arrangements through electoral vetting and by the operational principles of cooptation, cooperation and democratic centralism. See Chapter 4, Section 4.9.

[31] The logic is as follows. The government runs SOEs for the party-state. The party-state leaders gave the government control over the lawmaking process by allowing the government to use an ad hoc method in Bill preparation with the discretion of the sponsor ministry (MPI), control a part-time legislature and influence the judiciary. Accordingly, the government could mediate legal reforms to reduce adverse effects on SOEs. For example, MPI used its discretion to gather fellow ministries to capture the Bill under the auspices of the government. These practices have enabled the party-state leaders to conveniently push the Bill through the legislature.

contrast, such regulatory capture practices did not affect Australia's transformation of oppression sections in 1983 and the judicial implementation of these sections (Chapter 4, Part I). This means that these oppression sections, when transferred to the Vietnamese litigation provisions, would trigger regulatory capture practices and the resultant irritations in Vietnam.

6.3 Primary Irritations in the Legal Transfer of Oppression Sections from Australia to Vietnam

6.3.1 Irritations between Australia's Oppression Sections and Vietnamese Ministries' Regulatory Capture of Enterprise Lawmaking

The Australian oppression sections are designed to reinstate the interests of company members following the principle of fairness (Chapter 4, Part I). While majority shareholders and directors can use these sections, minority shareholders are the primary applicants because they are the most vulnerable to oppressive conduct. Importantly, these sections provide effective protection for minority shareholders from unfair conduct in a way that ensures the impartial treatment of all applicants. As a result, the oppression sections promote ethical business, corporate effectiveness, market wellbeing and public interests in Australia.

In contrast, the key drivers motivating ministries in Vietnam to capture enterprise lawmaking are the vested interests of Ministers and their SOEs (Chapters 3 and 4). They have statutory powers to provide detailed interpretations of enterprise law and control SOEs, which are majority shareholders and often hold directorship.[32] They can also act as de facto or shadow directors of SOEs, while often being large investors and having ties with private big businesses.[33] For these reasons, the enterprise law usually slowly amends ineffective litigation

[32] *Enterprise Law 2014* ch X gives the government power to regulate many general provisions. The government issues decrees, which are written by ministries according to their portfolios. Decrees further allow ministries to provide detailed explanations via decisions or circulars of ministers, notably the MPI and the Ministry of Finance. See, eg, Decree No 96/2015/NĐ-CP of 19 October 2015 of the government regulating in detail some sections of enterprise law; Decree No 86/2017/NĐ-CP of 25 July 2017 of the government regulating functions, obligations, powers and organisation of the MPI.

[33] See Chapter 3, Section 3.9.3.

provisions, yet retains unfair preferences for majority shareholders and directors at the expense of minority shareholders, company performance, market integrity and national interests.

Given these different interest objectives, if the oppression sections are transferred to Vietnam, they could irritate the vested interests of ministries. Ministers may react by capturing this transfer. The levels of such irritation and regulatory capture would depend on how the oppression sections affect their vested interests.

On one hand, the transfer of oppression sections would disadvantage Ministers. The sections would subject the Ministers' conduct to judicial review when they perform their business roles because the oppression sections cover these roles (Chapter 5, Part I). Moreover, the sections would require streamlining of the biased enterprise law because the principle of fairness in these sections is a constitutional requirement in Vietnam.[34] These changes would reduce the opportunities for Ministers to unduly obtain benefits from their positions. These transfer effects are equitable and desirable in the public interest ground.

On the other hand, the transfer of oppression sections would advantage high-ranking bureaucrats. Given that these sections are an essential catalyst for transforming the *Enterprise Law 2014* and minority shareholder protection,[35] this transfer would help Ministers discharge their primary political mandate. This mandate requires institutionalising the recent major policies of the Party and government on transforming the international rankings of legal protection for minority shareholders by 2020.[36] Moreover, the oppression sections would still

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[34] *Constitution 2013* preamble, ss 3, 31, 35, 50, 55. Cheffins also explained that the fairness principle underpinning oppression sections overpowered other prejudiced legislative designs. See Brian R Cheffins, 'An Economic Analysis of the Oppression Remedy: Working towards a More Coherent Picture of Corporate Law' (1990) 40 *University of Toronto Law Journal* 775.

[35] See Chapter 3, Section 3.9.

[36] These policies were included in Decision No 339/QĐ-TTg of 19 February 2013 of the Prime Minister ratifying a master plan on economic restructuring associated with shifting the growth model towards enhancing the quality, effectiveness and capacity of competition in the period 2013–2020; Resolution No 19-2016/NQ-CP of 28 April 2016 of the government on primary missions and solutions to improve the business environment and increase the national competitiveness capacity for the 2-year period 2016–2017, with orientation towards 2020.

allow Ministers to fairly pursue business interests, while better protecting their investments from corporate misconduct. Hence, this transfer would balance the rights and responsibilities that Ministers juggle. These advantages and disadvantages suggest a moderate irritation between the oppression sections and broad interests of ministries. The ministries would have incentives to both accept and sabotage the transfer of these sections.

A clear tendency has emerged that ministries slowly reduce the capture of litigation provisions in exchange for reinforcing their excessive statutory control of SOEs. Chapters 3 and 4 examined important instances in this regard. First, direct litigation replaced indirect litigation. Second, barriers to personal lawsuits against majority shareholders and directors were removed. Third, shareholder derivative lawsuit was fully transferred and greatly liberalised. These changes occurred partly because ministries can still influence the judiciary to protect SOEs and allied investors (Chapter 5).

While this tendency suggests that most ministries may accept the whole oppression sections, this outcome is uncertain. While a few ministries will acknowledge the importance of oppression sections, many ministries that operate more SOEs will not do so. This is because oppression sections would diminish their opportunities to maintain vested interests under the existing biased enterprise legislation. Moreover, the maintenance of arbitrary restrictions on collective lawsuits against majority shareholders and directors in *Enterprise Law 2014* demonstrates that these litigation measures for enforcing their accountability are not yet strongly facilitated.[37]

It is predictable that their regulatory capture might continue, yet be less extreme. On this basis, the following important issues are considered: a lead player, its strategies together with assisting factors for such capture, and challenges to the capture.

[37] These arbitrary restrictions include a ten-plus-six condition and a one-plus-six condition. The ten-plus-six condition was imposed on many shareholder rights, such as access to financial reports, documents of boards, nomination of director candidates and litigation. For discussions on these conditions, see Chapter 5, Section 5.6.1.

- The sponsor MPI in charge of enterprise law reform is a lead player. The MPI's substandard practices have not changed since the enterprise law's inception in 1990. This is concerning because the MPI has extensive vested interests in the reform and discretionary functions in the legislative process.[38]

- The MPI's traditional collective strategies instigate and aggravate the regulatory capture by ministries (Chapter 4). The MPI usually uses different methods — such as side-lining independent legal experts, neutralising Bill reviewers, and appointing similar interested ministries that constitute the majority of the Cabinet — to approve the results of all Bill-related tasks performed by its subordinate CIEM. Doing so allows the MPI and CIEM to treat lightly information disclosure, public consultation and insightful recommendations from the legal community.

  These collective strategies give the MPI and fellow ministries considerable leverage to capture enterprise law reforms. Such strategies empower them to capitalise on a dominant government in the legislature because they are allied interest groups possessing extensive political, economic and regulatory powers (Chapter 3). By orchestrating joint actions, the MPI and like-minded ministries successfully exert undue influence on most reforms.[39] The inadequacies of legal and political accountability or high salaries as incentives for change would see these strategies continue because they are allowed by the Law on Law and tolerated by national leaders (the Party General Secretary and PM).

- Moreover, various factors may assist the MPI-led regulatory capture. Many directors, SOEs and private majority shareholders have incentives to dismiss the transfer of

[38] See Chapter 4, Section 4.5. The lawmaking practice in Vietnam is that government decrees provide a ministry that has the greatest interest in a particular law with power of a sponsor ministry in charge of reforming such law.

[39] See also Central Institute for Economic Management, 'Report 8. Renewing Thinking and Removing Institutional Bottlenecks to Transition Our Economy to a Full and Modern Market Economy' (Paper presented at the Workshop on Vietnam's Economic Institutional Reform for Integration and Development for the Period of 2015–2035, Ministry of Planning and Investment, Hanoi, 28 August 2015) 334–6.

oppression sections (which redress their unfair conduct) as regulatory interference in an internal corporate matter, or as disharmony with the existing enterprise law that favours them.[40] The Vietnam Chamber of Commerce and Industry might follow suit because this Party-led business organisation comprises big investors and has statutory representation in the MPI's assisting teams.[41] These arguments can become excuses for ministries.

- However, ministries face growing challenges if they capture the transfer of oppression sections. As noted above, they have to deal with external forces from trade partners, aid institutions, international banks and foreign business chambers, as well as internal pressures from a dynamic civil society and some reform-minded legislators. Increasingly, these stakeholders are calling for an overhaul of enterprise law, especially the corporate governance and litigation provisions, to address prevalent corporate misconduct and realise the party-state's commitments to the fair treatment for all investors. Moreover, the World Bank and EuroCham (which represents over 870 European businesses) have recently recommended ministries adopt oppression sections.[42]

- These multiple pressures have alleviated, yet not terminated, the regulatory capture by ministries. This effect can be seen in recent litigation reforms that relax, rather than remove, undue restrictions, as noted above. This means that these robust pressures remain inadequate to offset the extensive powers of ministries and the factors assisting

[40] Reaction against reform is not unique to Vietnam. It also occurred in Australia regarding oppression sections.

[41] For the conflicting roles of VCCI, see Chapter 4, Section 4.7.1.

[42] EuroCham recommended the MPI to consider oppression sections from Australia or Singapore. See European Chamber of Commerce in Vietnam, *Whitebook 2016: Trade/Investment Issues & Recommendations* (8th ed, 2016) 28; World Bank, 'Corporate Governance Country Assessment: Vietnam' (2013).

their regulatory capture. The lack of checks and balances in the legislature to hold Ministers accountable explains this result.[43]

In conclusion, the irritation between the transfer of oppression sections and the regulatory capture by ministries may prompt them to reuse these strategies to reduce the effects of this reform on the vested interests of themselves and SOEs. Such irritation effect renders full adoption of these sections difficult. Thus, examination of the legislative designs of these sections and litigation provisions is important and is considered next.

6.3.2 Irritations between Australia's Oppression Sections and Vietnam's Litigation Provisions

According to the legal transfer framework (Chapter 2), transferred rules become legal irritants to the receiving provisions if their legislative designs have substantial differences.[44] This necessitates examining the similarities and differences between the designs of oppression sections and litigation provisions. The similarities may facilitate the transfer of oppression sections to litigation provisions, while the differences may cause irritation between them, and hence constrain this transfer. This result is important to assess the extent of the transferability of these sections to Vietnam.

As demonstrated in Chapter 5, the designs of oppression sections and litigation provisions have different features. The oppression sections are written with simple structure, plain language, comprehensive scope and unbiased content. These designs are effective because the sections cover any unfair conduct of any actor. In contrast, the litigation provisions have a complicated structure, fuzzy language, narrower scope and prejudiced content because of a mix of personal and derivative actions, a prescriptive drafting approach and arbitrary

[43] As a single party state has not yet legalised the establishment of independent associations, lobby for reform that opposes vested interests of ministries is extremely difficult. For this issue, see, eg, Nguyen Chi Dung, '"Lobbying" in Global Lawmaking and the Trend in Vietnam' (2006) 9(83) *Legislative Study* 51, 51–7, 60.

[44] As discussed in Chapter 2, the legal transfer framework is a synthesis of Teubner's legal irritation theory and an empirical study of Berkowitz, Pistor and Richard on transplant effect in corporate law.

conditions.[45] Consequently, these ineffective designs are insufficient to regulate widespread misconduct.

The difference in their designs would cause the oppression sections to irritate the litigation provisions. The irritation caused by the discrepancies in structure and language could be overcome because the oppression sections only have four simple sections and the enterprise legal drafters were proficient in English.[46] In contrast, the irritation caused by the differences in the scope and content of the oppression sections and litigation provisions may constrain the wholesale transfer of these sections.[47] However, the duplication of foreign law may not be effective, while a customised approach enables adaptation to the ongoing economic, legal and social changes in Vietnam. Therefore, legal standing, litigable conduct, grounds for court orders, and available remedies examined specifically.

6.3.2.1 Legal Standing to Commence Litigation

Australia and Vietnam grant unconditional standing to current minority and majority shareholders for commencing personal lawsuits. This similarity allows for the transfer of this standing under the Australian oppression sections to the Vietnamese litigation provisions.[48]

However, standing for directors, former company members and people who the Australian Securities and Investments Commission consider appropriate (public interest litigation) under the Australian oppression sections is not recognised in the Vietnamese litigation provisions. To demonstrate the principle of fairness, Vietnam should give standing to directors and

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[45] These arbitrary restrictions include a ten-plus-six condition and a one-plus-six condition, which limit litigation rights. The ten-plus-six condition also applies to important shareholder rights, including access to financial reports and documents of boards. Litigation against general meeting resolutions can only be commenced within 90 days. For discussions on these conditions, see Chapter 5, Section 5.6.1.

[46] As common practice, key legal drafters of all enterprise legislation are senior research bureaucrats who graduated in English-speaking countries or are capable of using this language in their research. This practice also applied to the *Enterprise Law 2014*. See Chapter 4, Section 4.5.

[47] For instance, an open-ended design makes the scope and content of oppression sections much broader than the scope and content of litigation provisions.

[48] However, Vietnam uses the 90-day legal standing for lawsuits against general meeting resolutions of majority shareholders to create time obstacles for minority shareholders and reduce workload for courts. This unreasonable restriction should be repealed.

former company members, which would allow them to query the conduct of a company's affairs in court.[49] The transfer of standing in public interest litigation is not necessary because this is rare and ineffective, even in Australia.

6.3.2.2 Range of Litigable Conduct

Australia's oppression sections address *almost all* corporate affairs.[50] This broad range of litigable conduct completely covers the narrow scope of conduct that could be queried in a Vietnamese court. Vietnam's litigation provisions address *only some* corporate affairs in three circumstances: actual general meeting resolutions of majority shareholders, and actual acts or omissions of individual directors when exercising their duties.[51] This limited similarity would enable Vietnam to transfer oppression sections to regulate these three circumstances. However, the full transfer of all litigable conduct under the oppression sections to the Vietnamese litigation provisions would be more difficult, given ministries' regulatory capture of legal reforms, as noted above.

As the experience in Australia demonstrates, an extensive range of litigable conduct under oppression sections is useful. This ensures that almost all internal corporate conduct may be judicially reviewed. This eases the legal actions of minority shareholders, which reduces widespread oppressive practices to a controllable level.

The prevalence of similar oppressive practices in Vietnam justifies the extension of litigable conduct to all corporate affairs, if Australia's oppression sections are transferred. This would address oppressive conduct by majority shareholders and directors, yet also deter potential misuse of the gradually liberalised collective litigation rights by minority shareholders. This would create a reform that is fair for all. It is also important that all stakeholders be given

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[49] Australian court recognises that directors can be applicants under oppression sections because they may be collectively oppressed by shareholders, although this is rare. Former company members can be applicants if they were excluded oppressively. For detailed discussions, see Chapter 5, Section 5.1.

[50] See *Corporations Act 2001* (Cth) ss 232(a)–(c). For detailed discussions, see Chapter 5, Section 5.2.

[51] *Enterprise Law 2014* ss 147, 161.

adequate time — such as two years — to absorb this substantial reform before it comes into force.

6.3.2.3 Grounds for Court Orders

The oppression sections prescribe two grounds for court orders. One is based on the company interest damage, which Vietnam also adopted. Although this ground is transferable, the Australian experience indicates that it is seldom used because of trivial benefits for minority shareholders. The second ground is unfairness, which allows courts to make orders to redress unfair conduct.[52] Australia adopts this progressive ground to protect fairness impaired by such conduct. In other words, this ground is underpinned by the fairness principle, which forms the bedrock of the oppression sections.

In Vietnam, this same principle is a cornerstone of the Constitution, Party policies on socioeconomic developments and international trade commitments. Accordingly, the transfer of the unfairness ground for court orders to protect this principle is consistent with these well-established foundations. This is not affected by the failure of litigation provisions to ensure this principle because enterprise lawmaking must comply with these solid foundations.[53]

6.3.2.4 Available Remedies

Although Australia does not limit solutions for oppression, the oppression sections incorporate 10 common options.[54] As explicated in Chapter 5, most effective remedies include ordering share purchase, modifying or repealing corporate constitutions, restraining a person from engaging in specified conduct, requiring a person to undertake a specified act, and regulating the conduct of corporate affairs in the future.

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[52] See Chapter 5, Section 5.3.2.

[53] Such failure is unconstitutional, according to the *LOL* 2015.

[54] *Corporations Act 2001* (Cth) s 233 provides that the court can make any order that it considers appropriate. For detailed discussion on common remedies for oppressive conduct, see Chapter 5, Section 5.4.

These remedies are similar to various civil orders that the Vietnamese courts can determine under litigation provisions.[55] They are transferable and necessary because Vietnam's underdeveloped security market — with its concentration of ownership and corporate control — often exacerbates oppressive tactics and makes the market exit option suboptimal or unavailable.[56] These transfers would provide the remedial and preventive functions crucial for a healthier market. However, winding-up and derivative action remedies are unpopular and ineffective for this goal.

Moreover, the transfer of the Australian open legislative design, which allows courts to make any order it considers appropriate, appears compatible with recent judicial reforms. In July 2016, the judiciary was legally prohibited from denying the consideration of civil lawsuits on the ground of no law. Legal precedent has been binding since then.[57] In essence, these reforms demonstrated a predictable transition towards judicial discretion, which might not irritate the transfer of such an open legislative design. This result would empower the court to ensure remedies are always available for disputes.

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[55] Vietnamese courts may decide numerous civil remedies including requiring defaulters to stop misconduct, pay compensations, offer apologies, declare correction publicly and restore initial status. See, eg, *Civil Code 2015* (Vietnam) ss 11, 358, 360 (effective 1 January 2017). The court can cancel a part or a whole of a GM resolution as allowed under *Enterprise Law 2014* s 147.

[56] In Vietnam, common oppressive tactics through corporate self-regulations include the abuse of replaceable provisions in enterprise law to create unreasonable dividend policies, to restrict sale of shares and to give excessive remuneration to directors. For example, Techcombank announced that it would not pay dividends for 10 years, although it had sizeable profits and shareholders of a parent company still received dividends. See eg 'Shareholders of Techcombank and Other Banks Are "Denied" Dividends for Many Years', *Knowledge* (online), 4 May 2016 <http://kienthuc.net.vn/tien-vang/co-dong-techcombank-va-nhieu-ngan-hang-bi-quyt-co-tuc-tham-nien-675951.html>; Thanh Thanh Lan, 'Minority Shareholders Resent Dividend Matters', *VnExpress* (online), 23 April 2016 <http://kinhdoanh.vnexpress.net/tin-tuc/ebank/ngan-hang/co-dong-nho-techcombank-lai-am-uc-chuyen-co-tuc-3392019.html>; Thanh Thanh Lan, 'With VND2200 Billion in Profits, Techcombank Still Does Not Pay Dividends', *VnExpress* (online), 12 April 2016 <http://kinhdoanh.vnexpress.net/tin-tuc/ebank/ngan-hang/con-hon-2-200-ty-loi-nhuan-techcombank-van-khong-tra-co-tuc-3385466.html>.

[57] See *Civil Procedural Code 2015* (Vietnam) ss 4(2), 33, 43, 45. These sections came into force from 1 January 2017. See also Nguyen Le, 'Passing the Civil Procedural Code with a Big Change', *VnEconomy* (online), 25 November 2015 <http://vneconomy.vn/thoi-su/thong-qua-bo-luat-to-tung-dan-su-voi-mot-thay-doi-lon-20151125083441861.htm>.

6.3.3 Irritations between Australia's Oppression Sections and Vietnam's Judicial Institutions

Oppression sections and litigation provisions are judicially enforced. A comparison of the linking factors of the oppression sections and Australian judiciary with the linking factors of the litigation provisions and Vietnamese court helps explain the effectiveness level of legal transfers.

Chapter 5 found that oppression sections and litigation provisions are linked by different judicial factors. The effectiveness of oppression sections is informed by four main qualities of the Australian judiciary. The adjudication ensures independence, impartiality, expertise and transparency because it is not captured by powers and corruption.[58] These 'rule of law values' sustain the consistency, predictability and reliability in legal implementation. In contrast, the four qualities of the Vietnamese court in adjudication are inconsistent. It is captured by Party leadership (appointments and operations), bureaucratic influences and widespread corruption. Thus, consistent, predictable and reliable judgements are difficult to achieve. These considerable judicial discrepancies would make the oppression sections 'legal irritants' to the Vietnamese court. This gulf prevents the court from achieving a similar level of effective implementation as the Australian counterpart achieved.

The obstacle regarding judicial expertise is an example. Oppression lawsuits are at times so complex that Australian judges combined academic commentaries, judicial precedents and other resources across Anglo-Saxon jurisdictions in legal reasoning skills to develop unfairness tests and conduct equitable considerations of reasonable expectations of litigants. These are daunting tasks for Vietnamese judges who are unfamiliar with sophisticated legal reasoning. Moreover, the vulnerability to political leadership and bureaucratic influences would mean that judges are less likely to overcome the preference for SOEs by the Party and

[58] Another reason may be that jurisdictions over oppression sections are only given to higher-level courts such as the Supreme Courts of States or Territories, the Federal Court of Australia and the High Court. These judicial achievements in Australia depend on constitutional guarantees, merit-based appointments, high salaries and limited corruption. For detailed discussions, see Chapter 5, Section 5.5.2.

the government. Likewise, corruption may incentivise judges to corrode the fairness benchmark underlying the oppression sections, regardless of expertise and independence.

However, some factors may mitigate these irritation effects. Chapter 5 discovered that Australian judges have been able to decide a majority of cases just by applying the legislative design of oppression sections to the facts. This means that it is still possible for the existing Vietnamese judiciary to implement these sections, even though further improvements in judicial expertise may be necessary. In addition, the influences of higher-ranking authorities on judges are largely limited to SOEs. This influence also appears to become less serious over time because of social and trade pressures. Furthermore, judicial corruption does not exist in every trial. All these factors suggest that there remain opportunities for judicial functionality when applying oppression sections against non-SOEs.

New political mandates of the court could strengthen these opportunities. The Politburo's Resolution 49 on judicial reforms until 2020 requires judges to respect legal reasoning and deliver impartial judgements.[59] This makes disregard for fair trial obligations — under the Constitution and in trade agreements — more difficult to justify.

To assist with these political mandates, a binding legal precedent was adopted in 2016. This is based on the judicial capacity building of the Supreme People's Court, which has been assisted by the Australian Federal Court for 14 years. The precedent system is helpful in many ways. It may improve judicial expertise and independence, while also assisting lawyers to argue against corrupt judgements in the courtroom.[60] It can also be a platform to transfer well-established principles in precedents and academic commentaries about oppression sections, which have been refined in Australia over 50 years.

Moreover, the rising legal profession, press attention, widespread public criticism and market demands for fair judgements can induce changes in the way the judiciary in Vietnam currently

[59] Resolution No 49-NQ/TW of 2 June 2005 of the politburo on the strategies of judicial reforms until 2020.

[60] See detailed discussions in Chapter 5, Section 5.9.

operates. For example, legal arguments by prominent lawyers sometimes assist or convince the court to favour the rightness.[61]

On balance, the existing Vietnamese judiciary could implement oppression sections with a modest degree of effectiveness. This degree may increase over time because of constant pressures for change. Even so, while the judiciary may not effectively enforce laws against SOEs, it appears that they may be more functional in trying private lawsuits.

6.4 National Leaders' Management of Tensions in the Legal Transfer of Oppression Sections from Australia to Vietnam

Vietnam is attempting to develop a socialist-oriented market economy as a synthesis between a centrally planned economy and a market economy. The transition from a centrally planned economy has been underway since the economic crisis that precipitated the Renovation 1986. The strategic task for national leaders (the Party General Secretary and PM) is to learn lessons from the past, understand the problems of the present, and develop solutions for the future. For them, the task of nation building includes transforming the emerging market into a regional business hub that attracts domestic and foreign investors. Effective enterprise law reforms to curb the widespread oppressive corporate practices are integral to this national objective.

Following the macroeconomic instability that led to the *Master Plan on Economic Restructuring 2013–2020*, the national leaders are in a very difficult position. Although they want to create a healthy market that attracts investments, they usually condone the widespread misconduct of ministries and SOEs in business.[62] Likewise, the PM directs these reforms, while also controlling all 11 state-owned conglomerates. Moreover, the regulatory capture by

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[61] Ibid.

[62] These protracted problems were among major underlying causes for macroeconomic instabilities (2009–2013). For detailed discussions on widespread direct and indirect effects of these protracted problems on lawmaking and legal implementation, see Chapter 3, Part II; Chapter 4, Part II; and Chapter 5, Part II.

ministries coexists with the mounting pressure from private domestic and foreign stakeholders about transferring oppression sections and transforming enterprise law, as noted above. Thus, national leaders have to grapple with growing tensions because these conflicts of interest continue.

National leaders have to consider all interests when determining reforms. In this context, it is important that they have a balanced view of both the huge benefits to the market and considerable institutional obstacles that may be caused by the transfer of oppression sections.

- First, oppression sections would cover gaps in the current Vietnamese enterprise law. This law does not regulate the accountability of company members — especially majority shareholders and directors — for unfair conduct towards minority shareholders.[63] As the oppression sections are effective for remedying and deterring such conduct, this has positive domino effects on internal corporate behaviours, corporate governance, corporate performance and market efficiency (Chapters 3 and 5).[64] This means oppression sections can assist companies to become more effective and sustainable. This outcome benefits all company members, including majority shareholders and directors, whether in state-owned or private businesses.

- Second, the effective protection for minority shareholders by oppression sections benefits the party-state. As explained in Chapter 3, the party-state accrues interests mainly from the private sector, with a dominant number of minority investors. This sector provides the state with around 60% cent of revenues, while the SOE sector contributes about 40%, yet causes over 50% of debt among the total debts that exceed

[63] Minority shareholders were protected by specific statutory provisions and by fiduciary duties. Cheffins explained that this 'provided, at best, erratic protection for minority shareholders' if law does not regulate unfairness as grounds for legal action against oppressive conduct. See Cheffins, above n 34, 791.

[64] Australian experience showed that oppression sections have both remedial and deterrent functions, which have had positive effects on conduct of company members, particularly directors and majority shareholders. Moreover, these sections encouraged company members to pursue interests in accordance with the win–win principle of fairness. See Cheffins, above n 34; Paul Redmond, *Corporations and Financial Markets Law* (Thomson Reuters, 6th ed, 2013) 686–705. See also Chapter 5, Part I.

the gross domestic product (GDP).[65] This reality means that the better minority shareholders are protected, the greater interests the party-state may receive.

- Third, oppression sections are a catalyst for complementary comprehensive reforms to enhance market appeal. The fairness principle in these sections requires overhauling enterprise law and the state institutions responsible for legal reforms to deliver fairness and justice, which are limited at present. This would create an enabling environment for business activities and economic development. These outcomes resonate with the above expectations from civil society and foreign institutions, as well as suiting the commitments of the party-state to ensure the fair treatment that is not yet achieved. Hence, the adoption of oppression sections becomes an avenue for improving the tarnished credibility of such promises to mobilise public contributions towards upcoming reforms.

- Fourth, oppression sections and such complementary reforms could bring the international rankings of minority shareholder protection in Vietnam closer to those of its rival forerunners, such as Thailand, Malaysia, Indonesia and Singapore. In an effort to improve the poor rankings and attract quality investments, the party-state has adopted more Western corporate sections and litigation provisions.[66] However, success has not been achieved because Vietnam has not addressed widespread oppressive conduct, as have the other countries. Oppression sections could provide game-changing pathways in this regard.

- However, the transfer of oppression sections would encounter internal major challenges. Ministries may capture the transfer, as they have often done in the past, to lessen its effects on their vested interests in the problematic enterprise law. Moreover, the court may be captured by undue influences in law implementation. Judging from

[65] See Chapter 3, Section 3.9.3.

[66] See detailed discussions in Chapter 3, Sections 3.9.1, 3.9.2, 3.9.5. International rankings of minority shareholder protection rankings are assessed annually by the World Bank in its Doing Business reports.

the progress of the ongoing judicial reforms, the judiciary can still implement oppression sections with a certain level of effectiveness, which could increase over time, as discussed above. Thus, the regulatory capture by ministries is a greater obstacle because reforms have not yet tackled this problem.

In this context, the transfer of oppression sections becomes a litmus test for the national leaders. They would have to decide between honouring commitments and breaking promises, advantaging the vested interested ministries and benefiting the entire nation, and maintaining the privileges of SOE majority shareholders and creating fair opportunities for all investors. This decision will have long-term effects, as Vietnam is now at the crossroads of volatile growth with debts exceeding GDP, and sustainable development based on legal fairness.

There have been encouraging changes in the actions of the national leaders. Generally, they are becoming gradually more reasonable in considering public calls to protect minority shareholders for market interests because of global trade integration policies and the constant public criticism of the SOE problems.[67] Reform experiences over three decades have demonstrated that the combined pressure from party-state outsiders and from market problems have convinced the national leaders to accept some major legal changes.[68]

Chapters 4 and 5 provided typical examples of such changes. Public consultation and information disclosure in lawmaking were made compulsory to trim the excessive influence exerted by ministries. Stricter legal provisions on transparency regarding SOEs were introduced to help detect SOEs' misconduct earlier. Likewise, corporate wrongdoings led to a broadening and diversification of judicial reviews into internal corporate wrongdoing via

[67] See generally World Bank and Ministry of Planning and Investment of Vietnam, *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy* (World Bank, 2016). However, Section 3.9 of Chapter 3 demonstrated that the government (2006–2016) faced inertial and complacent problems after Vietnam achieved the long-waited goal of becoming a WTO member on 11 January 2007.

[68] For detailed discussions on such multiple pressures, various changes and the stronger tendency of reforms, see Chapter 3, Sections 3.7, 3.8, 3.9.

direct and derivative litigation. These evolving realities demonstrate that the national leaders have begun strengthening the accountability of wrongdoers.

Moreover, the political landscape has experienced important changes, especially after the macroeconomic instability reached its lowest point in 2013. High-ranking executives and policymakers, including the legislature's present leader, attended the annual leadership program in the United States (US). This flagship program provided structured research-based discussions with prominent international scholars, policy makers and business leaders about addressing the national policy challenges confronting Vietnam in a global trade context.[69] Especially in 2015, the Party General Secretary unprecedentedly visited the US to strengthen the 'comprehensive relationship'.[70] This was followed by frequent high-level visits to the US, including by the PM in 2017, as well as similar annual visits to Australia.[71]

These increasing interactions reveal that the Vietnamese leaders are surprisingly keen on working more closely with these democratic states, whether on political, economic or legal fronts. In exchange for this, these leaders reiterate the full implementation of commitments to fair reforms of laws and institutions under trade agreements with Australia, the US and the World Trade Organization (WTO).[72] The transfer of oppression sections from Australia —

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[69] This programme is the Vietnam Executive Leadership Program, which hosted approximately 20 Vietnamese senior policymakers. It is organised by the Ministry of Foreign Affairs, and the Vietnam Program at the Kennedy School's Ash Centre for Democratic Governance and Innovation, with support from the UNDP. For updates since 2012, see <http://www.fetp.edu.vn/en/initiative/vietnam-executive-leadership-program/what-is-velp/>.

[70] This trip occurred after territorial disputes between Vietnam and China escalated. Following this trip of the party leader, the Party Executive Secretary Dinh The Huynh visited the United States on 25 October 2016. See Lowy Institute for International Policy, 'South China Sea: Conflicting Claims and Tensions' (2016) <http://www.lowyinstitute.org/issues/south-china-sea>; Alexander L Vuving, 'Party Secretary General Trong Visiting the US: A Trip Opens New Contexts', *BBC Vietnamese* (online), 6 July 2015 <http://www.bbc.com/vietnamese/forum/2015/07/150706_forum_nguyenphutrong_us_visit_vuhonglam>.

[71] For updates, see <https://2009-2017.state.gov/p/eap/ci/vm/releases/index.htm>. Vietnam had six high-level visits by ministers and prime ministers to Australia in 2015 and three similar visits in 2016. For details and updates, see <http://dfat.gov.au/geo/vietnam/pages/vietnam-country-brief.aspx>.

[72] See FTA Joint Committee, 'ASEAN-Australia-New Zealand FTA (AANZFTA): AANZFTA Economic Cooperation Support Program (AECSP) Assessment' (3 July 2015); Department of Foreign Affairs and Trade, 'ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA): AANZFTA Fact Sheets (Consolidated)' (2009). For detailed discussions on Vietnam's commitments to US–Vietnam BTA and the WTO Agreement, see Chapter 3, Sections 3.8.5, 3.8.6.

which are underpinned by the fairness principle and are also present in the US — is important in this regard.

There are also other important political developments. PM Nguyen Tan Dung is ousted from the new Politburo (2016–2020) because of the reform complacency, giant debt-making SOE sector, devastating economic instability and growing corruption under his prime ministership.[73] Concurrently, the Party General Secretary takes responsibility away from the PM for the Central Steering Committee for Anti-Corruption, and chairs this committee.[74] This unprecedented move results in serious sanctions against breaches of high-profile government officials in managing SOEs or using powers.[75] These strong actions indicate an attempt to curb ineffective institutional practices that hinder legal reforms. The new government augments efforts to create and revise many laws correspondingly.[76]

Nevertheless, the national leaders have not yet shown determination to terminate the regulatory capture by ministries. The heightened actions of these leaders have mainly targeted law violations, whereas such regulatory capture is allowed under the Law on Law, and leads to legislative outcomes consistent with the gradual approach they prefer (Chapter 4). Moreover, the Party General Secretary emphasises economic and legal renewal,[77] yet overlooks the transformation of state institutions and their problematic conduct. The PM may

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[73] The new politburo (2016–2020) has nineteen members. See comments of Professor Nguyen Minh Thuyet, Dr Ha Hoang Hop, Dr Nguyen Van A, and journalist Tran Nhat Phong at the Round Table Discussion held by BBC, 'Prime Minister Dung "Exploited" All of His Talents?', *BBC Vietnamese* (online), 31 January 2016 <http://www.bbc.com/vietnamese/vietnam/2016/01/160130_why_pmdung_had_to_go>. See also comments of Le Kien Thanh, 'Have We Really Trusted the People?', *World Security* (online), 2 January 2016 <http://antgct.cand.com.vn/So-tay/Chung-ta-da-thuc-su-tin-nhan-dan-377799/>. Dr Le Kien Thanh is a son of former CPV Secretary General Le Duan.

[74] This committee still lacks independence, which is a concern. See Decision No 162/QĐ/TW of 1 February 2013 of the politburo establishing the central steering commission on preventing and counteracting corruption.

[75] Examples of actions taken in 2017 include dismissing Dinh La Thang (who was leading Ho Chi Minh City and a former chairman of PetroVietnam) from the politburo, disciplining former Trade Minister Vu Huy Hoang and his son Vu Quang Hai at Sabeco, and prosecuting Trinh Xuan Thanh, who was then Deputy Chairman of Hau Giang Provincial People's Committee and former head of PetroVietnam Construction Joint Stock Corporation.

[76] For updates, see the official gazette at <https://english.luatvietnam.vn>.

[77] In his long inaugural reselection speech of 10 242 words, the Party General Secretary Nguyen Phu Trong used the term 'party' 107 times with many formal slogans and mentioned 'corruption' 13 times, economic 'recession' 8 times and 'freedom' 2 times, with no mention of 'human rights'.

also face unrest from ministries if abruptly terminating their traditional regulatory capture. Therefore, although these leaders have powers and incentives to nullify the effects of this practice by approving the full oppression sections, a gradual transfer could be the case.

Australian experiences indicate that a gradual approach has made the oppression sections ineffective for over 20 years, until the political leaders dramatically expanded them in 1983.[78] It is useful for leaders in Vietnam to learn this lesson and avoid repeating the same trajectory. Although a Vietnamese centralised legal mindset seems more difficult to change than an Australian decentralised legal viewpoint, Milhaupt contends that change is possible, although it may be much slower.[79]

Unfair corporate practices are growing rapidly, as are the market and public demands for oppression sections. These forces will push their own timeline until the Vietnamese leaders have to overcome the regulatory capture, as seen in Australia. Given the long overdue commitments to legal fairness, there will not be a perfect time to transfer the oppression sections and amend the deficiencies of state institutions. Failure to address these issues is itself the greatest obstacle to these reforms. The sooner the national leaders take effective action, the better the outcomes will be for the future national development.

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[78] See, eg, McQueen, above n 5, 5, 28.

[79] See Curtis J Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy — Implications for Policy' (2009) 57 *American Journal of Comparative Law* 831.

Conclusion

The principle of fairness underpins Australian oppression sections. This principle is also Vietnam's commitment in the modern Constitution 2013 and in landmark trade agreements — such as the *US–Vietnam Bilateral Trade Agreement 2001* and the WTO agreement in 2007 — with which *Enterprise Law 2014* must comply. Such foundational harmony indicates that the oppression sections are suitable for transfer to litigation provisions in this law.

By applying the legal transfer framework, this chapter identified four facilitation factors and four irritation factors that will together determine the potential for this legal transfer and its effectiveness.

- The facilitation factors derive from the similarities between Australia and Vietnam concerning market problems, legal deficiencies, reform policies and an active civil society that inform the need for oppression sections, thereby assisting legal transfer.
- The irritation factors arise from differences between the two countries regarding the structure of lawmaking processes, qualities of lawmaking institutions, effectiveness of judicial institutions, and political leadership. A key impediment to legal transfer stemming from these differences is regulatory capture by vested interests within the Vietnamese party-state to maintain preference for SOEs.[80]

These mixed outcomes suggest that, although Australia's oppression sections are suitable for transfer to Vietnam's litigation provisions, a duplication of these sections is more difficult and less useful than a customised adoption of compatible elements. In both cases, the judicial vulnerability to various influences would make the implementation of oppression sections against privileged SOEs less effective than against private investors. Even so, this legal

[80] Chapter 7 below proposes 8 recommendations to address this key impediment in accordance with the fair and democratic principles stated in the Constitution 2013 Preamble, ss 3, 6, 8.

transfer still provides valuable opportunities for minority shareholders to counteract oppressive practices, especially when they contract experienced lawyers.

In substance, facilitation factors are contextual factors while irritation factors are institutional factors. This chapter demonstrated that maintaining and implementing foundational values, including fairness, that underpin oppression sections are more challenging for the party-state than adopting their legislative design. This requires the commitment, capacity and effective actions of political leaders and multiple party-state institutions, including the government and the judiciary. As such, the legal transfer of oppression sections needs the coherent institutional reform to mitigate regulatory capture (see Chapter 7). Fairness will be the key to guiding and assessing these complementary tasks.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

Introduction

Although Vietnam introduced reforms in *Enterprise Law 2014*, these reforms have not been effective in protecting minority shareholders from widespread oppressive conduct in companies. The Australian experience demonstrates that the legal transfer of oppression sections have been promoted for many reasons. The key reason is the goal of creating a fairer market, where minority shareholders can seek judicial remedies for oppressive conduct.

This thesis has examined how effective the legal transfer of the Australian oppression sections in *Corporations Act 2001* (Cth) to the Vietnamese litigation provisions in *Enterprise Law 2014* could be. The primary reasons for considering the Australian oppression sections include the enhancing comprehensive cooperation between the two countries (Chapter 2) and the effectiveness of these sections in redressing oppressive conduct (Chapter 5).

Teubner's legal irritation theory has been an influential tool in assessing legal transfer. An empirical study of Berkowitz, Pistor and Richard on corporate legal transfers provided proof that further supported this theory, both of which are applicable to Vietnam's context. Chapter 2 synthesised this theory and these empirical studies to develop a legal transfer framework used in this thesis.

This final chapter focuses on the thesis findings, recommendations for reforms and areas for further research.

7.1 Reflection on the Legal Transfer Framework for Assessing the Legal Transfer of Australia's Oppression Sections to Vietnam's Litigation Provisions

The legal transfer framework embodied important functions that guided the examination of this legal transfer. This framework assisted with exploring which major factors have informed Australia's oppression sections and Vietnam's litigation provisions. Moreover, it enabled the identification of which major factors have considerable similarities to become facilitation factors, and which major factors have substantial differences to become irritation factors in legal transfer. Furthermore, it facilitated the comparative evaluation of facilitation factors and irritation factors to assess the effectiveness of legal transfer.

The legal transfer framework had four sequential steps corresponding with four main chapters. Chapter 3 mapped the historical evolution of the oppression sections and litigation provisions within corporate law development. Chapter 4 considered the lawmaking processes that produced the most change in these statutory rules. Chapter 5 examined the legislative design of these statutory rules and the judicial qualities in implementing such design. Chapter 6 performed a comparative evaluation of the eight major factors that Chapters 3 to 5 found to have informed these statutory rules.

Chapter 6 found that four major factors are facilitation factors in legal transfer because of their considerable similarities between Australia and Vietnam. These factors are market problems, legal deficiencies, reform policies and the roles of civil society that led to the pressing need for oppression sections in both countries (Chapter 3).[1] However, the remaining four major factors are irritation factors in legal transfer because of their substantial differences between the two countries. Unlike Australia, Vietnam has a government-centric legislative process, limited quality lawmaking institutions, ineffectual judiciary in legal implementation

[1] The preference for state-owned enterprises, as an exception in the reform policies and the Constitution, might however negatively affect the legal transfer of oppression sections, as discussed further in Section 7.2 below.

and inertial hegemonic political leadership (Chapters 4 and 5). The systemic preference for state-owned enterprises (SOEs) underlies these factors.

On balance, Chapter 6 concluded that the effectiveness of the legal transfer of oppression sections to litigation provisions could be modest under the existing Vietnamese institutional system. However, the effectiveness may increase because of ongoing reforms. This legal transfer still provides some protection for minority shareholders from oppression.

These findings were informed by the practicality, adaptability, flexibility and extensiveness of the legal transfer framework (Chapter 2). Such complementary features were demonstrated through many aspects in the examination of oppression sections and litigation provisions. For example, this thesis discussed the historical evolution of these sections and provisions; the lawmaking process; the legislative design; the judicial qualities in legal implementation; and similarities and differences between Australia and Vietnam.[2] The discussion took into account the changing contexts in both countries to learn past lessons, understand present problems and develop future reforms. Thus, this framework was functional for examining oppression sections and litigation provisions both in books and in life.

Moreover, the functionality of the legal transfer framework proved a coherent synthesis of theory, its expansion and empirical studies. The focus on differences in this framework was drawn from the core of Teubner's legal irritation theory that was built on the legal–social connecting factors and provided an invaluable analytical tool. Meanwhile, the consideration of similarities was a sensible expansion of this theory by Chapter 2 because similarities also inform legal transfer. The important roles of the historical evolution, lawmaking process, legislative design and judicial qualities in implementing such design were gleaned from an empirical study of Berkowitz, Pistor and Richard.

[2] Chapters 3 to 6 discussed all these issues. The future reforms here do not include Australia's oppression sections because they were dramatically transformed, as discussed in Chapter 5. Although the roles of ASIC and the wording in these sections can be further finetuned, solutions for them fall outside the ambit of this thesis.

The examinations of both similarities and differences were effective for assessing the legal transfer of Australia's oppression sections to Vietnam's litigation provisions. Vietnam embodies an East–West synthesis because of Western colonialism legacies, the increasing international integration and the ongoing assistance from Australia (Chapter 3). This means that Australia and Vietnam have various similarities, rather than just differences (Chapter 6). Considering the similarities enabled confirmation of the facilitation factors and the present preconditions for legal transfer, while scrutinising the differences helped identify the irritation factors and the absent prerequisites in Vietnam.

These results assisted with finding impediments to this legal transfer and formulating recommendations on complementary reforms to address them (see Sections 7.2 and 7.3). The functionality of the legal transfer framework has informed more balanced discussions, realistic assessments and important findings on the underlying primary cause for such impediments — the inconsistencies between the principle of fairness and the preference for SOEs, in *Constitution 2013*, reform policies and practices of state institutions.

7.2 Findings on Main Impediments and Pathways to the Effective Legal Transfer of Oppression Sections

This thesis posed the question: how effective could the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions be? The answer is that, while the facilitation factors make this legal transfer a pragmatic reform, the irritation factors would render its effectiveness modest (Chapter 6, noted above). The irritation factors entail the four following main impediments to the legal transfer of oppression sections.

First, the facilitation factors are outweighed by the irritation factors. The facilitation factors mainly involve market and social contexts, whereas the irritation factors originate from party-state institutions that could generate direct negative effects on legal transfer. These effects

might diminish because of the gradual reforms, but would not disappear. The bottom line is that the irritation factors are bottlenecks in the legal transfer of oppression sections.

Second, the Ministry of Planning and Investment (MPI) gathered fellow ministries to capture enterprise lawmaking. This regulatory capture stemmed from the interrelated problems of the legislative process, state institutions and political leadership. For example, there were no independent bodies performing legal drafting and regulatory impact assessment (RIA). Moreover, the government-centric legislative process provided the MPI with discretion over all Bill-related functions, without legislative debate or public inquiry by the legislature. Furthermore, as this ineffectual legislature could not provide checks and balances over the single Party and its government, political leaders exploited the regulatory capture by their inferiors to deflect reform pressures. Consequently, enterprise legislation has not accommodated the principle of fairness.

Third, the judiciary could not always ensure the principle of fairness for all litigants. The existing institutional arrangements render this institution susceptible to regulatory capture in legal implementation by political control, bureaucratic influence and financial corruption. Judicial qualities appear unpredictable when these regulatory capture tactics, SOEs or shareholders with political ties are present. Although recent judicial reforms — such as binding court precedents and regional High Courts — may gradually improve the adjudication of disputes between private shareholders, it remains to be seen how far this will improve the rule of law.

Fourth, these impediments are rooted in the widespread preference for SOEs, which account for 40% of the market investments (Chapters 3–5). Strict political vetting ensured that the government, National Assembly and judiciary comprise mainly Party members loyal to the single-party-state leaders. These inextricable arrangements induce and enable such state institutions to protect SOEs as these leaders see fit. Accordingly, the Constitution recognises the principle of fairness, but also the leading role of the inefficient SOE sector. Likewise, the

government-centric legislative process has meant that the preference for SOEs often prevails. This preference underlies the above regulatory capture of lawmaking and legal implementation.

Overall, the impediments to the legal transfer of oppression sections stem from the inconsistencies between the principle of fairness and preference for SOEs across the party-state system. This dualistic approach explains the ongoing poor legal protection for minority shareholders, despite extensive technical and financial assistance from Australia and other donors for all enterprise laws. Therefore, the pathway to the effective legal transfer of the oppression sections involves comprehensive reforms aimed at implementing the principle of fairness, as recommended below.

7.3 Recommendations for Reforms and Realities

Widespread problems in creating and implementing enterprise laws call for systemic changes. This requirement accords with the party-state's four major goals, which include boosting the international rankings of minority shareholder protection to create a market conductive to business by 2020; becoming a basic modern industrial country with 1 million effective enterprises by 2020; achieving sustainable development by 2030; and attaining 'prosperity, creativity, equity, and democracy' by 2035.[3] However, realistically, these ambitions will require much more time and reform to realise.

The following recommendations focus on key reforms that could spur the national dynamic and provide an initial important step towards these goals. Although these reforms are complementary, they cannot be realised at the same rapid pace. Some reforms — such as streamlining the legislative process and cumbersome state institutions — are cost-effective,

[3] See, eg, Resolution No 19-2016/NQ-CP Dated 28 April 2016 of the Government on Primary Missions and Solutions to Improve the Business Environment and Increase the National Competitiveness Capacity for two years 2016-2017, with orientation towards 2020; Communist Party of Vietnam, *Socioeconomic Development Strategy 2011-2020 by the Communist Party of Vietnam*. Vietnam also adopted United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015), which has 17 specific targets. World Bank and Ministry of Planning and Investment of Vietnam, 'Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy' (2016).

while others need major changes.[4] Those reforms that are more fundamental and achievable should take priority to build momentum for greater change. This would also facilitate the legal transfer of oppression sections, underpinned by the principle of fairness.

Therefore, the recommendations begin with: (1) ensuring fairness as a key principle for all reforms, (2) creating an inclusive legislative process, (3) increasing social inclusiveness in legislative practice, (4) transforming lawmaking institutions, (5) renewing judicial institutions, (6) reforming enterprise law, (7) overhauling the inefficient SOE sector and (8) adjusting political leadership.

7.3.1 Recommendation 1: Ensuring Fairness as the Key Principle for All Reforms

Although Vietnam has gradually adjusted its economic policies and enterprise legislation, these changes have not sufficiently accommodated the principle of fairness. While the lack of fairness has undermined previous reforms, it also underlies the impediments to legal transfers aimed at protecting minority shareholders to create an enabling business environment (Chapters 3–6). The Vietnamese party-state should base all upcoming reforms on the principle of fairness to achieve a reasonable balance between interests involving such reforms. This approach would better facilitate the above four major goals that the party-state is pursuing.

Accommodating the principle of fairness in legal reform should ensure fairness in substance. This goes beyond the same treatment or different treatment in legislation. For instance, the same rights for majority and minority shareholders regarding corporate information may be fair, while different rights in this situation may not be fair. However, the same reporting requirements for listed and non-listed companies may be not fair because their different structures and resources would impact their ability to comply with such requirements, while

[4] Eg, the recommended reduction of 50% of excessive seats in the legislature would save expenditure to reform its committees. The rearrangement of functions in the legislative process could also make law reforms more efficient and effective.

different reporting requirements in this case may be fair. These examples demonstrate that such fairness depends on particular circumstances, needs thorough deliberation and is indispensable for effective reform.

Moreover, differentiated provisions should be cross-checked by a public interest test. Legislation should not include such provisions, unless their benefits to the investor community as a whole outweigh the costs, and the legislative objectives can only be achieved by such provisions. This test can be conducted through RIA.

The implementation of the fairness principle in legal reform needs opportune complementary changes in state institutions. Chapters 3 to 5 found that the lack of such changes undermines the inclusion of fairness in legislation and legal implementation. For example, specialised institutions are not established to perform the primary functions of legal drafting and compulsory RIA since *Law on Law 2008* (*LOL*), while the legislature remains a part-time body. This enables the sponsor ministry to conduct all Bill-related functions, and the government to control lawmaking, as they see fit. Recommendations are suggested below to address all these impediments to the fairness principle.

7.3.2 Recommendation 2: Creating an Inclusive Legislative Process to Assist the Creation of Fair Legislation

An inclusive lawmaking process needs the adequacy and distribution of important functions, including public consultation, legal drafting, legislative debates and public inquiry (Chapter 4, Part I). These requirements enable due consideration of broad interests in legislation and thorough examination of its merits.

The Vietnamese Government-centric lawmaking in *LOL* is defective in many aspects (Chapter 4, Part II).[5] *LOL* concentrates all functions for Bill preparation on the sponsor

[5] Vietnam enacted the *Law on the Making of Legal Instruments 2015 (Vietnam)* (called 'LOL', effective on 1 July 2016) to replace *LOL 2008*. However, *LOL 2015* did not address major problems in *LOL 2008* because the problematic legislative process in *LOL 2008* was used to create *LOL 2015*. This is a 'catch-22' problem.

ministry, yet lacks necessary measures for double-checking the merits of Bills, reviewing the constitutionality of statutes, and addressing the widespread conflicts of interest involving the government–SOE nexus. These defects have facilitated the regulatory capture spearheaded by the sponsor ministry, which has made lawmaking inefficient and ineffective.

The party-state should take the following measures to address these problems:

- Separating RIA, legal drafting and Bill reviews from each other and from the sponsor ministry to improve independence, professionalism, transparency and reliability in performing these functions.
- Retaining only policy instruction and public consultation for this ministry to refocus its attentions on these complementary functions.[6] Requiring this ministry to ensure the credibility of public consultation by preparing background papers together with consultation questions, and disclosing public submissions together with government responses to them.
- Substituting the formal legislative discussion with legislative debate with this ministry and the government by erudite legislators; institutionalising the piloted public inquiry by National Assembly Committees; and allowing private litigation against the passed Bills on constitutional grounds.[7]

These measures would convert the existing legislative process with its ad hoc nature into an inclusive legislative process informed by professionalism. Inclusiveness assists the party-state to mobilise more contributions to legal reforms from the untapped private intellectuals. Public–private cooperation and professionalism are more favourable for the productivity,

[6] Section 4.7 of Chapter 4 found that the online public consultation by the sponsor ministry's Central Institute of Economic Management was less effective than the business community consultation by the Vietnam Chamber of Commerce and Industry (VCCI). Moreover, the legislative process should remove the separate consultations of the VCCI and government institutions through the circulation of Bills because the mandatory online public consultation has ensured such opportunities and the VCCI is a statutory member of drafting bodies.

[7] The United Nations has provided technical and financial support for piloting public hearings by National Assembly Committees from 2008 to 2011. See United Nations in Vietnam, 'Cooperation Between the United Nations and the National Assembly of Vietnam' (July 2011 Update).

efficiency and efficacy of reforms. This renewed legislative process may improve the performance, efficiency and transparency of state institutions operating this process, thereby alleviating the inadequacy of expertise and the regulatory capture in lawmaking.

These measures are achievable because they mainly involve distributing the concentrated functions of the sponsor ministry. This would reduce its workload, yet also diminish its control over Bills for the government. This is a reasonable trade-off that the party-state should accept to realise its legal reform goals above.

7.3.3 Recommendation 3: Increasing Social Inclusiveness in Legislative Practice to Support the Creation of Fair Legislation

This recommendation focuses on the existing practice in executing Bill-related functions. The social inclusiveness in legislative practice requires guaranteeing public consultation, duly considering its results in legal drafting, and engaging independent professional stakeholders to conduct technical functions.

Such social inclusiveness has not been achieved. Although the mandatory online public consultation has enabled all stakeholders to express opinions, the sponsor ministry (the MPI) and the government has heeded the ideas of state institutions and large-scale investors, as the MPI has used its discretion by not sharing technical functions with academics and lawyers outside its network (Chapter 4).[8] The social inclusiveness in legislative practice and fair consideration of external viewpoints should be ensured because this approach would encourage knowledge contribution from the dynamic civil society and help detect or forewarn interest groups and vested oligarchy. This would improve the fairness and effectiveness of legislation.

Such social inclusiveness could be improved with the following measures:

[8] This is also partly due to the electoral vetting practice that has resulted in many large-scale investors concurrently becoming legislators.

- Promptly adopting good practices in lawmaking, such as engaging eminent academics and prominent lawyers who support legal fairness to prepare background papers, review laws or perform tasks for which state institutions are lacking appropriate expertise.
- Neutrally responding to recommendations based on how they improve legislation, rather than on who suggested them. The MPI should avoid overusing selective consultation meetings to justify the maintenance of controversial legal provisions, such as differential rights for majority shareholders.[9] Public inquiry should instead be held.
- Fully implementing the constitutionalised political rights by improving and passing the Bills on referendum, demonstration and association.[10] This is important to increase social order in demonstrations, including peaceful protests outside the legislature when it passes biased Bills or outside courts during trials to support fairness.[11] Moreover, this allows the establishment of independent minority shareholder associations to raise and join debates on fairer legal reform.
- Responsively handling requests for state-held information under *Law on Access to Information 2015* (Vietnam) by the media and residents. This helps uncover poor practice in legal reforms and assists the party-state to contain reputational damage from it.

A social inclusive approach, combined with a broad representative legislature, as suggested below, would help the party-state improve deliberative democracy, public trust and an

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[9] This common practice recurred in the making of *Enterprise Law 2014* and caused the last Bill to be much worse than earlier Bills: Chapter 4, Section 4.9.

[10] For example, sections 6 and 25 of the Constitution 2013 provided for freedom of speech; freedom of the press; the right to access information; and freedom to assemble, associate and demonstrate. For the Bill on Demonstration and the Bill on Association, see http://duthaoonline.quochoi.vn; UNDP, 'Policy Recommendation on the Referendum Bill (Scheduled to Be Passed at Session 10, the National Assembly XIII)' (2015).

[11] The European Union Parliament recommended Vietnam to abolish regulations banning peaceful demonstrations outside courts during trials and abolish specific sections in the criminal code, which are used to restrict freedom of expression: European Parliament Resolution of 9 June 2016 on Vietnam (2016/2755(RSP)).

international image. Therefore, the party-state leaders should rapidly implement their constitutional words through practical actions to reap these benefits.

7.3.4 Recommendation 4: Transforming Lawmaking Institutions to Implement the Principles of Fairness

The recommended inclusive legislative process requires the complementary changes of lawmaking institutions. The absent dedicated institutions and ineffectual legislature have impeded the implementation of the principle of fairness in legal reform, as noted above. Creating new institutions and overhauling this legislative body are essential preconditions for effective reform.

Four separate institutions should be established to conduct socioeconomic policies, reform initiatives, RIA and legal drafting. These new institutions should be independent from ministries because these functions demand distinct technical expertise. Moreover, this criterion harmonises with the emerging practices of reducing workload for state institutions.[12] With this background, the following measures are recommended:

- Reintroducing the Prime Minister's (PM's) effective Research Commission as the National Policy Advisory Council. This council should streamline the unbalanced socioeconomic policies that prioritise vested interests (Chapter 3). It should formulate fair and inclusive policies to drive change towards sustainable national development.
- Creating a Law and Institution Reform Commission, whose mandate should include coordinating fragmented reforms to remove inconsistencies in these domains (Chapters 4 and 5). It should prepare logical long-term reform initiatives aimed at shifting from the existing reactive piecemeal lawmaking — which relies on legal advice from aid donors — towards the proactive coherent legal transfer.

[12] The party-state has gradually given more administrative services to the private sector, including notary service and service of civil process, as part of the so-called administrative reform.

- Forming the RIA Office, whose roles should include screening and conducting RIAs. RIA should prioritise cost–benefit analysis to assist the legislature in determining effective legal changes.[13] This ensures lawmaking is fit for purpose and responsive to evolving economic needs.
- Constituting the Legal Drafting Office, whose functions should comprise developing guidelines to produce legislation that is clear, consistent and comprehensible to lay people. In doing so, legal drafters must be qualified lawyers who are well trained with modern drafting techniques and proficient in legal English.[14] This office should also have plain-language legal experts to proofread Bills. These solutions would replace the ad hoc drafting practices with professional legislative design, and address profound expertise requirements in legal transfer to improve legal harmonisation with the Organisation for Economic Co-operation and Development (OECD) Corporate Governance Principles.
- Renewing the National Assembly to ensure checks and balances. Although the National Assembly has a gradually stronger voice, the inability to restrain the executive power turns it into a rubber stamp for the government.[15] This legislature is ineffectual because the representativeness, professionalism, expertise, independence, transparency and accountability of legislators are all limited under the triple electoral vetting regime (Chapter 4). The following measures are needed to address these inextricable problems:

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[13] This cost–benefit analysis was limited in the making of *Enterprise Law 2014:* Chapter 4, Section 4.6. This problem led to underregulation (such as half-baked litigation provisions), overregulation (such as excessive restrictions on minority shareholder rights) and unregulation (such as no provisions to provide remedies for oppressive conduct). These were problems of both enterprise law and many other areas. See, generally, European Chamber of Commerce in Vietnam, *Whitebook 2016: Trade/Investment Issues & Recommendations* (8th ed, 2016); European Chamber of Commerce in Vietnam, *Whitebook 2017: Trade & Investment Issues and Recommendations* (2017).

[14] The key enterprise legal drafter in Vietnam is usually proficient in legal English: Chapter 4, Section 4.5.

[15] Since 2010, because of the increasing activeness of committees, the National Assembly has gradually raised public issues and criticised government policies. However, while *Enterprise Bill 2014* was unfair, this National Assembly still passed it.

- Fixing operational defects would require establishing a legislature working full-time, rather than three months per annum; providing legislators with attractive salaries, adequate facilities and dedicated offices with staff assistance to ensure prompt support for electorates; implementing parliamentary immunity to guarantee freedom of speech and protect dissenting lawmakers from political retribution; and ensuring systemic online disclosure of detailed parliamentary records (especially voting) to inform electorates about the true performance of their representatives.
- Empowering the National Assembly's committees with the authority to conduct public inquiries to involve more civil voices into legislative debates.[16] The Law Committee should hold inquiries into the widespread regulatory capture of legal reforms by ministries. The effectiveness of these committees plays a decisive role in reinforcing legislative functions.
- Introducing a fairer electoral mechanism by using merits-based criteria for selecting candidates to facilitate self-nomination, adopting an equal quota for Party and non-Party candidates to reduce the 70% ratio of parliamentarians coming from the executive branch to broaden representation from private domains, and trimming the excessive number of 500 parliamentarians to redirect budgets into other activities.[17] It would be a historic milestone if independent competitive election were adopted.

These measures would create an inclusive representative legislature that might provide checks and balances for the executive power. This legislature would be independent or functionally independent, as the then PM Nguyen Tan Dung emphasised in his 2014 New Year Message to

[16] For this topic, see also Legislative Studies Institute, Legislative Studies Journal and Institute of Policy and Law, *Scientific Conference Proceedings "Organising the State Apparatus Following the Constitution 2013",* (Hanoi, 6 May 2014), 17–31.

[17] 'Large in number, but only few of them work full-time as people representatives.' See Vu Thanh Tu Anh et al, 'Institutional Reform: From Vision to Reality' (A Policy Discussion Paper Prepared for the Vietnam Executive Leadership Program, sponsored by the Harvard Kennedy School, the Government of Vietnam, and the United Nations Development Programme, April 2015) 18–19; World Bank and Ministry of Planning and Investment of Vietnam, above n 3, 69. Another example is that the United States (US) has a total of 535 parliamentarians, although it has the world's largest economy and a population over three times higher than that of Vietnam.

people.[18] Such a legislature would be capable of holding its politicians accountable to the public under the constitutionalised principles — namely, the rules-based state 'of the People, by the People and for the People'.[19] Clearly, empowering the National Assembly requires far-reaching long-term political reform and the full implementation of the 2013 Constitution.

7.3.5 Recommendation 5: Renewing Judicial Institutions to Uphold the Principle of Fairness

The increasing need for judicial access in an emerging economy led to noticeable judicial changes, such as binding court precedents and three new regional High Courts. However, these changes remain insufficient to build judicial resilience to overcome political control, bureaucratic pressures and corrupt temptations (Chapter 5). A primary reason is the limited judicial independence, with international rankings below those of regional peers.[20]

Forthcoming reforms should seek to transform the independence, transparency, impartiality, expertise and accountability of the judiciary so that it can enforce the principle of fairness. People, judges, aid institutions and party-state leaders support these goals because they suit the national interests, minority shareholder protection, the Constitution and international commitments.[21] This effective judiciary is central to upholding the rule of law for all. Actions towards creating an effective judiciary require:

- Building a neutral meritocratic judiciary on the advice from a disinterested expert panel. This mission requires retraining or relocating ineffectual judges. New appointments should follow skill and character tests. Candidates must have established

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[18] See Prime Minister Nguyen Tan Dung, Perfecting Institutions, Enhancing the Mastery of People, Successfully Implementing Missions in 2014, and Creating the Foundations for Rapid and Sustainable Development (1 January 2014) Government Newspaper <http://baochinhphu.vn/Utilities/PrintView.aspx?distributionid=189949>.

[19] *Constitution 2013* (Vietnam) s 2. Vietnam adopted these principles from Abraham Lincoln's Gettysburg Address (19 Nov 1863).

[20] In the World Economic Forum's *Annual Global Competitiveness Reports 2012–2016*, Vietnam constantly ranked low, with limited progress, on both the judicial independence and the efficiency of the legal framework in settling disputes. The regional peers include Malaysia, China, Indonesia and Thailand. See also World Economic Forum, *The Global Competitiveness Report 2014-2015* (2014).

[21] See Chapters 3 and 5; European Chamber of Commerce in Vietnam, Whitebook 2016, above n 13, 48–54; European Chamber of Commerce in Vietnam, Whitebook 2017, above n 13, 52–7.

expertise and integrity, while self-nomination from lawyers and academics should be allowed and facilitated. Judicial tenure should be the highest paid and life-long to attract the talents. All judges should be apolitical or renounce Party membership. Depoliticising judicial appointments should be a foremost priority, as the life of a judge always involves making ethical decisions.

- Redesigning judicial jurisdiction. The judiciary should have the authority to make any appropriate decision to address needs for shareholder dispute resolution.[22] The Supreme People's Court should hear private lawsuits that challenge the constitutionality of biased enterprise legislation, with the power to suspend or nullify the legislation to make lawmaking fairer.[23] However, judicial power to mediate between litigants, seek evidence from police in civil cases, or interact with litigants outside trial sessions should be repealed to reduce corruption opportunities. In contrast, the courts should be obliged to implement the constitutional provisions where relevant, including the right to adversarial litigation that facilitates an active role of lawyers.[24] Judges should be impartial adjudicators, rather than participants in lawsuits.
- Streamlining judicial operation to enhance transparency and accountability in exchange for heightened autonomy. Immediate measures should be ensuring adequate budgets; providing the public with online access to judgements, court calendars and case progress; discontinuing the practices of seeking opinions from court leaders or consensus among adjudicators when deciding cases; and removing any role of local

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[22] This reform would align with the binding judicial precedent effective from 1 July 2016 and would improve consistency with the increase of judicial power to grant remedies under *Civil Code 2015*. Moreover, Australia's *Corporations Act 2001* (Cth) s 233 enables the Court to make "any" appropriate order. Such wide judicial power is essential to its effective decisions on oppression claims, as discussed in Chapter 5, Section 5.4 at 245–247. This thesis examines the legal transfer of s 233 to Vietnam, thereby necessitating the use of "any" appropriate decision to empower the court.

[23] For this topic, see, eg, Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30(3) *Journal of Law, Economics, and Organization* 587; Chief Justice Robert French, AC, 'Constitutional Review of Executive Decisions - Australia's US Legacy' (September 2010) 35(1) *University of Western Australia Law Review* 35.

[24] *Constitution 2013* (Vietnam) s 103(5); *Law on Court Organisation 2014* (Vietnam) s 13. The judiciary has never invoked the Constitution to make decisions.

authorities and Party members in judicial issues (as the then PM Nguyen Tan Dung stated in his 2014 New Year Message to people).[25]

These measures are important to the future of the court. They would facilitate ethical judicial practice, counter undue influences on judges, and strengthen the judges' roles in promoting a fairer market. If judges' independence is ensured, as enunciated in the 2013 Constitution, this would be a milestone in judicial reform.

7.3.6 Recommendation 6: Reforming Enterprise Law to Harmonise with the Principle of Fairness Underpinning Oppression Sections

A major impediment to the legal transfer of oppression sections is prevalent flaws in the *Enterprise Law 2014*. Shareholder litigation provisions and corporate governance provisions embody biased, convoluted and narrow designs (Chapter 5). Moreover, this law occasionally used the term fairness but still contained many unreasonably discriminatory provisions. This means fairness is recognised in form rather than in substance. The following measures should be taken to make these provisions compatible with the fair, clear and broad design of oppression sections to facilitate their legal transfer.

- Clarifying and broadening the legal standing, litigable conduct, ground for court order and available remedies in litigation provisions to address the need for judicial access.[26] These reforms can be achieved by combining the prescriptive legislative design with the principle-based legislative design to improve clarity, brevity and comprehensiveness. Such results would assist applicants and lawyers, while enabling domestic innovation in legal application by judges and also foreign legal transfer.

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[25] The Supreme People's Court only occasionally published non-classified information on its website and past Cassation Decisions in hardcopies. See Supreme People' Court, *Cassation Decisions of the Justice Council of the Supreme People' Court 2006* (Hanoi, 2008). See Prime Minister Nguyen Tan Dung, above n 18.

[26] For example, a ninety day time limit in legal standing against general meeting resolutions should be repealed. For discussions of unreasonable restrictions in the existing litigation provisions, see Chapter 5, Section 5.6.

- Ensuring the principle of fairness in all legislative designs to make them more credible, following the public interest test discussed in Recommendation 1. This principle requires repealing the 10-plus-six and one-plus-six conditions that unduly limit rights of minority shareholders (Chapter 5). These conditions are neither constitutionally nor economically sound. Moreover, director duties should include the fair treatment of all shareholders, while ground for court order should include lack of fairness in the conduct of corporate affairs. However, vexatious litigation provisions are needed to deter the abuse of judicial process. Promoting fairness is the most effective approach to legal intervention.
- Overhauling corporate governance provisions to complement oppression sections. Corporate governance reforms should focus on enhancing reporting, disclosure, minority shareholder protection (via general meetings and market exit through sale of shares), guarantees for whistle-blowers, and strict penalties for breaches of director duties to improve corporate transparency and accountability.[27] Such penalties should equally apply to de facto and shadow directors.[28] As these reforms make misconduct more difficult to hide or justify, this might assist the application of oppression sections, discourage oppressive practices towards minority shareholders, and facilitate the transition towards a fairer corporate culture.

Minority shareholder protection requires more than just the legal transfer of oppression sections. A broader solution is a complete overhaul of *Enterprise Law 2014* following the criteria of fairness, clarity and sufficiency to avoid patchy amendments. This law also needs

[27] For example, increasing the period of general meeting (GM) notice to 28 days, publishing GM outcomes within 48 hours, fully disclosing all related party transactions before and after GMs, publishing annual financial statements, and disclosing online any major breaches of director duties. A variety of effective measures to hold directors accountable for misconduct may improve their decision-making. Vietnam could also consult Australia's protection for whistle-blowers. See Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (September 2017).

[28] Shadow directors are generally understood as those (possibly shareholders) whose instructions or directions are often followed by the company management personnel. De facto directors are those who act as directors without formally being appointed to this position. The lack of liabilities for these informal directors has distorted corporate governance practices in Vietnam. European Chamber of Commerce in Vietnam, Whitebook 2017, above n 13, 28.

regular reviews to address rapid change in the market. Moreover, a sophisticated code of conduct and private institute of directors should be created to promote good practices and provide training for directors. Likewise, private minority shareholder associations, as suggested in Recommendation 3, should compile a manual for shareholders and assist them to protect their interests.

Being better informed means taking better action. The prevention of misconduct is as important as the treatment of it. A combination of these dynamics will harness the risk in doing business, while helping balance protection for minority shareholder and facilitation of corporate operations.

7.3.7 Recommendation 7: Overhauling the Inefficient State-Owned Enterprise Sector and its Granted Leading Role to Develop a Fairer Market

Vietnam's economy has been experiencing its worst downtrend since the 1986 Renovation.[29] The pervasive preference for the massive SOE sector arising from the self-serving symbiosis with ministries has incentivised ministries to capture enterprise legislative reform to shield SOEs from accountability (Chapters 3–5). The SOE restructuring policies in the *Master Plan on Economic Restructuring 2013–2020* provide only partial solutions to such entrenched preference. The ongoing transition towards a market-based economy requires overhauling the SOE sector and containing its adverse effects on upcoming reforms. The following measures may assist with this direction:

- Removing the granted leading role of the inefficient SOE sector in policies and the Constitution to reinforce the constitutional principle of fairness. This action would unequivocally remind state institutions to end the preference for this sector in practice. This action is a precondition for building a fairer legal system for majority

[29] Serious economic instability precipitated the *Master Plan on Economic Restructuring 2013–2020.* Pham Duy Nghia, 'People's Ownership of Land and State-owned Enterprises: Some Policy Priorities in the Economic Restructuring' (2012) (on file with author) 1. See Chapter 3.

shareholders and minority shareholders in the state-owned, private and foreign sectors because they all contribute to socioeconomic development.

- Ceasing the direct control of SOEs by ministries and other government bodies to reduce the conflicts of interest in exercising their state powers. This measure is essential to disincentivise ministries from continuing to sabotage legal reform.[30]
- Establishing a dedicated national committee to exercise systemic oversight of SOEs, appoint their directors, and advise the government about reforms.[31] This committee should administer the entire SOE sector, which has plunged into debt because of connection and misconduct (Chapter 3). For effective functioning, this committee should not have regulatory power or intervene in SOE operation. It should publish annual reports online and table them in the National Assembly for consideration. There are new political and legal foundations for fast-tracking these measures.[32]
- Renewing the operation of the SOE sector to improve efficacy and realise trade commitments. This requires adopting OECD principles to strengthen SOE corporate governance and hold directors accountable because they often act like mandarins, with limited respect for law.[33] SOE directors should not be Party members, and Party cells in SOEs should be dissolved to convert SOEs from political economic organisations to independent business entities. Moreover, the government should retain only a few dozen SOEs sufficient to provide utilities or public services, and should privatise most

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[30] This measure requires higher salaries to compensate bureaucrats for loss of rents and the creation of a accountable meritocratic bureaucracy. For costs of the commercialisation of state institutions through SOEs, see World Bank and Ministry of Planning and Investment of Vietnam, above n 3, 65.

[31] For such a committee, Vietnam may consult experience in developed markets: see generally OECD, *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing, 2005).

[32] *Law on the Government Organisation 2015* (Vietnam) s 39; *Resolution of the XII National Congress of Representatives of the Communist Party of Vietnam 2016*; Ministry of Planning and Investment, *Draft Submission of Draft Decree of the Government on the Exercise of Rights and Obligations by Bodies Representing State Ownership 2016*.

[33] Eg, OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, 2015). Empirical studies of Tran Van Tho, 'Vietnam in the Last 40 Years and Upcoming Years: Need A Market Economy to Orient Development' (2015) 33 *New Age Journal* 13, 29, 45. See also Nguyen Dinh Cung et al, 'State-Owned Enterprises and Market Distortion' (Central Institute for Economic Management, 2015).

of the 949 SOEs to pay off their massive debts and increase business freedom.[34] SOEs should also be listed on stock exchanges to face private competition and market discipline, which might help deter their misconduct.

These measures would redefine the roles of the government in the market, while separating business from administration. The government should change from a dominant investor to an effective regulator by focusing on building market institutions and enforcing fair competition, while leaving production and business mainly to the private sectors. Despite the huge benefits from overhauling the SOE sector, the reality that the Party and government have used this sector for political purposes, as discussed in Chapter 3, presents a challenge to rapid reform.

7.3.8 Recommendation 8: Adjusting Political Leadership to Growing Socioeconomic Needs for Fairness

Although the above recommended reforms require the collective efforts of the party-state, the political leadership is a key engine that can propel or hinder progress. The inertial and complacent political leadership after World Trade Organization (WTO) accession in 2007 has rendered reform unable to address the needs for fairness in the emerging market and dynamic civil society (Chapter 3).[35] Since this milestone, the market has been changing more rapidly, while civil society has become more active because people are better informed and express their views both online and offline.[36]

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[34] Until 2035, about 20 'parent' SOEs seemed reasonable to focus on strategic sectors: World Bank and Ministry of Planning and Investment of Vietnam, above n 3, 75. See also OECD, 'Size and Composition of the SOE Sector in OECD Countries' (OECD Corporate Governance Working Papers, No5, 2011). In the meantime, state investments should be quickly reduced and transferred to the State Capital Investment Corporation as a designated state shareholder. See Chapter 3, Section 3.9.3 for debts of SOEs.

[35] Vietnam had positive adaptive politics under PM Vo Van Kiet and PM Phan Van Khai (to a lesser extent) until the WTO accession in January 2007. However, inertia and complacency returned after this achievement. See Chapter 3, Section 3.8.2.1; Ruchir Sharma, *Breakout Nations: In Pursuit of the Next Economic Miracles* (Penguin, 2013), 35, 143, 177–81; Thomas J. Vallely, Remarks on the Occasion of his Acceptance of the 2014 Phan Chau Trinh Award, Ho Chi Minh City, 24 March 2014), 3; World Bank in Vietnam and Vietnam Chamber of Commerce and Industry, *Changing Attitudes to the Market and the State (CAMS) 2011* (Hanoi, 2012).

[36] Vu Thanh Tu Anh et al, above n 17, 21; Chapter 3, Section 3.8.2.2.

The gloomier existing socioeconomic contexts have prompted political leaders to act. The public debt crisis risk within the next decade, ongoing economic volatility and disquiet inside the party-state about these problems, alongside commitments to the WTO due in 2018, new generation trade agreements and the aspiration to become a regional trade centre,[37] have disallowed further complacency. Moreover, academics, lawyers and the press have called for more change, while the foreign donors that are trade partners, including Australia and the European Union, have reiterated the technical and financial assistance with reforms towards the rule of law.[38] Thus, the newly elected political leaders (2016–2020) have started accelerating changes that were incubated for years.

These political leaders should take the following measures to strengthen the reform momentum to address the exponential downtrend in socioeconomic outlook:

- Turning clear commitments into robust actions, as investors and civilians expect effective leadership from an active party-state. The traditional dogmatism[39] and tokenism should be replaced with pragmatism in leadership to overcome the inertia and complacency of reform, given that plain commitments to substantial reform, constitutional foundations, feasible ideas, social resources and pressing economic restructuring needs are in place. Leadership actions should consider the long-term vision for the market.
- Commanding an inclusive approach to reform and development to unleash the domestic resources and reduce dependence on foreign aid. This approach requires leaders to be more responsive and facilitative to academic advice and public voice, and

[37] For these issues, see Chapter 3, Sections 3.8, 3.9. For the economic rankings of Vietnam in 2017 and 2021, see International Monetary Fund, *World Economic Outlook: Subdued Demand: Symptoms and Remedies* (Washington, October 2016), 232.

[38] Such foreign aid also reduces financial challenge in reform. See *Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam 2016*; European Chamber of Commerce in Vietnam, Whitebook 2016, above n 13; European Chamber of Commerce in Vietnam, Whitebook 2017, above n 13; Department of Foreign Affairs and Trade, 'Aid Investment Plan: Vietnam 2015–16 to 2019–20' (2015); Australian Government Department of Foreign Affairs and Trade, 'Aid Program Performance Report 2014–15' (2015). See also Chapter 3, Sections 3.9.4, 3.9.5.

[39] See Tran Van Tho, above n 33.

less reliant on bureaucratic propositions,[40] in order to avoid ill-informed decisions. This change might better harmonise the party-state interests with the national interests.

- Complying with the constitutional principles of fairness, freedom and democracy.[41] Political leaders should release the legislature and judicature from the vigilant control, while strengthening political discipline towards ministries to alleviate their capture of the reform and implementation of legislation. The above recommendations about institutional reforms are important to improve leadership accountability in this regard.
- Conforming with the rule of law to discontinue the 'exceptionalism' for state actors.[42] It would be a danger to invoke the authoritarianism of a single party to disregard this principle that underpins the civilisation in advanced states worldwide. Rule of law is a bulwark of fair and ethical conduct; thus, attempts at reforms while neglecting this intangible element of excellence are unlikely to produce the desired results. Compliance with the rule of law by political leaders and their inferiors should be a paramount priority. This is an effective way to attain the development goals of the party-state, restore public confidence in the party-state and ensure social stability.

Socioeconomic contexts have been the main drivers of change in the last three decades and will remain the case in upcoming years.[43] Vietnam has reached a point at which the transformation of political leadership is the most important factor for the future of the nation and Party. The political leaders should change from reactiveness to proactiveness in directing

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[40] Inclusiveness means enlarging the participation of broader society into political life, such as via competitive election, frequent public hearings, easy access to information and an easy approach to Members of Parliament under freedoms in Constitution 2013, ss 6, 15. Vietnam ranks 25th on the Inclusive Development Index. Its performance has deteriorated slightly over the last five years and remains far behind Malaysia and Thailand. See World Economic Forum, 'Inclusive Growth and Development Report' (2017) 69.

[41] These principles are stated in the 2013 Constitution: See Chapter 1, Section 1.2 at page 24.

[42] As discussed in Chapters 3 to 5, problems of exception are so widespread in party resolutions and institutional practices that there is a term for this — 'Vietnamese exceptionalism', as used in Vallely, above n 35, 3.

[43] See Chapter 3, Sections 3.7, 3.8, 3.9. Despite the party-state's reiteration of fully realising commitments, people may need to wait until the next generation of open-minded leaders who are not imbued with war-time economic thinking to implement major changes. More action thus can be expected in coming years, yet rapid and substantial changes remain to be seen.

ongoing reforms. The net benefits from this choice will lead to a brighter future for all, including minority shareholders.

7.4 Areas for Further Research

The thesis has focused on assessing how effective the legal transfer of the Australian oppression sections in *Corporations Act 2001* (Cth) to the Vietnamese litigation provisions in *Enterprise Law 2014* could be. The purpose is to assist minority shareholders in seeking judicial remedies for oppressive practices.

This thesis has offered coherent insights into the underlying causes for oppressive practices. Moreover, it has suggested eight recommendations on the necessary reforms to facilitate this legal transfer. To achieve further understanding of the dynamics of minority shareholder protection from oppressive practices, the following three areas are suggested for further research.

The first area is complementary studies on the eight recommendations. These recommendations flowed from the thesis findings and are a pragmatic response to the national development goals until 2035. Additional useful studies may include assessing how these recommendations can be given effect, finding supportive institutions and non-governmental organisations that can become advocates for SOE reform, and linking such reform to programs of multilateral donor institutions (such as AusAID, the World Bank and the WTO).

The second area is shareholder class action and the resultant vexatious litigation provisions. Class action enables litigants to commence representative lawsuits with sharing cost and legal advice;[44] thus, it complements oppression sections, which allows for personal lawsuits.

[44] Vietnam could develop the collective shareholder litigation measure in *Enterprise Law 2014* into class action. Class action enables the sharing of legal advice and litigation cost. Class action is regulated in Anglo-Saxon countries, European Union developed states and many developing economies (India and Chile). Part IVA of the *Federal Court of Australia Act 1976* (Cth) also contains the class action provisions, effective on 5 March 1992. See, eg, Justice Bernard Murphy, 'Operation of the Australian Class Action Regime' [2013] *Federal Judicial Scholarship* 43; Vince Morabito, 'Clashing Classes Down Under-Evaluating Australia's Competing Class Actions Through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal*

Together, they strengthen minority shareholder protection. This may trigger destructive collective shareholder activism; thus, vexatious litigation provisions are essential to deter the abuse of court access. Overall, effective protection for minority shareholders requires a variety and balance of measures.

The third area is how the binding precedents may change the quality of legal implementation. As seen in Australia, an important guardian of a healthy dynamic market is an effective court system with the capacity to create sophisticated precedents. Although the binding precedents are a significant reform in Vietnam's civil law tradition, this reform came into effect on 1 June 2016 and is still a work in progress (Chapter 5). As time goes by, more precedents will become available to analyse the initial effects on the judicial performance. A realistic assessment could be conducted between the next five and 10 years.

The legal transfer framework (Chapter 2) may be useful for testing the transferability of foreign legal provisions associated with these suggested studies. As demonstrated in this thesis, this framework is adaptable to particular legal transfers and their complex contextual connections. In turn, such studies will help further test and confirm the flexibility of this framework.

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of International Law 205; Damian Grave, Ken Adams and Jason Betts, *Class actions in Australia* (2nd ed, Thomson Reuters, 2012).

Conclusion

The strategic purpose of transferring oppression sections is to integrate the principle of fairness into the formulation of Vietnam's enterprise law to improve minority shareholder protection. This goal requires complementary reforms to SOEs, state institutions and political leadership in accordance with the principle of fairness within the rule of law.

Legal transfers between different societies can work effectively when the underlying principle of law transcends the individual society. This means that, while the formal design of the oppression sections can change to suit Vietnam's society, the principle of fairness underlying these sections must remain constant. This is because the principle of fairness is applicable to any society, regardless of individual preference, political system or national culture.

This thesis has elucidated significant socioeconomic incentives for Vietnam to learn and benefit from Australia's success in protecting minority shareholders from oppression through the legal transfer of the Australian oppression sections to the Vietnamese litigation provisions.

While the challenges are significant because of the limited functionality of Vietnam's state institutions, the second wave of reforms from 2016 signals the potential to reduce this institutional impediment.[45] This brings hope that Vietnam can learn the lessons from the past, remedy the widespread oppressive practices in the present, and transform minority shareholder protection for the future.

[45] In May 2016, the new PM Nguyen Xuan Phuc boosted educational ties with the United Kingdom and US in light of the already strong cooperation with Australia. Education is the bedrock of development and innovation.

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APPENDIX 1: MEETINGS WITH AUTHORITIES AND SCHOLARS IN AUSTRALIA AND VIETNAM

Group	Number of persons	Main topics
Members of the 2014 Vietnamese Enterprise Bill Editing Group	2 Vietnamese	The Enterprise Bill Project's activities, including legal drafting, regulatory impact assessment and public consultation
Senior judges	2 Vietnamese	Enterprise law implementation
Judicial managers	2 Australians 1 Vietnamese	Cooperation between Australian and Vietnamese courts
Legal research experts	1 Australian 2 Vietnamese	Australian assistance with reforms of enterprise law and institutions

Notes:

- There were 12 meetings which occurred between 1 March 2013 and 15 February 2014 in Vietnam and Australia.
- Although these meetings focused on the collection of diverse internal materials, informal discussions on the above topics also happened.
- The meetings were made possible thanks to effective support from supervisor and state bodies in both countries.

APPENDIX 2: FEDERAL COURT OF AUSTRALIA'S WORK IN VIETNAM — SUMMARY

1999 Onwards

Since 1999 the FCA has been involved in judicial development activities with the Supreme Peoples' Court of Vietnam (SPCV). During this time the FCA has participated in and conducted various training programs conducted in both Australia and Vietnam.

2004–2006 Judicial Benchbook Development

During 2004–2006, the SPCV, with assistance from the FCA, developed the first official judicial benchbook in Vietnam. This Bench book was launched in 2006.

2008–2010 Revision of the Judicial Benchbook

As part of the Benchbook Revision Program the FCA assisted with the revision of the nation's first official judicial Benchbook. Following significant legislative developments, Justice Moore managed the project between 2008 and 2010. During this period four missions to Vietnam were undertaken under which FCA judges and staff worked with Vietnamese officials to revise, evaluate and update the Benchbook, as well as conduct judicial training. The Benchbook has since been published and made available in hard-copy, CD-ROM and online formats to all courts across the country and has provided a central training tool for key judicial training institutions in Vietnam.

2008 October: Visit by Judicial Delegation from Vietnam

The FCA hosted a delegation of 15 Vietnamese Judges from the SPCV and other provincial courts of Vietnam. The aim of the visit was to strengthen their capacity to resolve commercial disputes, especially those of an international nature, build their knowledge of international commercial law and develop skills for judicial and out of court settlement. This course was coordinated by the Asia-Pacific regional office of the International Development Law Organisation (IDLO).

2009 September: Memorandum of Understanding

Testament to the success of relations between the courts, a five year MOU for ongoing cooperation was signed in September 2009. The MOU was designed to promote further

understanding of each country's laws and judicial cultures, common international legal standards, regional developments, and relevant emerging issues, while enhancing the capacity of the SPCV to fulfil its functions and duties in accordance with the Constitution and other legislation of Vietnam. An Annex to the MOU was signed in December 2009 in Melbourne. The Annex outlined a judicial assistance program that provides assistance with the development of strategic policies on education and training, and identifies areas requiring specialist training, as well as a number of management and implementation arrangements.

2009 Judicial Training Visit

Funded by the Danish International Development Agency (DANIDA), two FCA Judges visited Vietnam in 2009 to conduct judicial training on the assessment of evidence in international trade disputes in several locations across the country.

2010 May–December: Memorandum of Understanding Activities

A seven month capacity building program was designed to improve the professional and practical skills of the judiciary in court proceedings and the efficiency and effectiveness of the SPCV's administrative functions. The program aimed to support the Vietnamese judiciary to build its knowledge about Intellectual Property Law, Maritime Law and how Courts can be efficiently and effectively managed including the use of IT.

In September two FCA Judges delivered a series of workshops on intellectual property law and admiralty law.

In October the FCA hosted six representatives of the SPCV in an information technology program aimed at increasing knowledge and understanding about how courts can utilise information technology to efficiently and effectively manage their

court systems. Many FCA representatives presented seminars on CaseTrack; eServices; eTrials, eDiscovery & eAppeals; IT Infrastructure; Publication of Information and Legal Research tools; and IT in the Registry, facilitated by His Honour Justice Michael Moore.

2011 October: Visit by Judicial Delegation from Vietnam

Former Chief Justice Keane hosted a delegation of senior officials visiting the FCA to discuss how Australian courts are constituted, how judges are appointed, selected and trained and how an appropriate system of precedent can be structured within Vietnam's civil law tradition. The Hon Truong Hoa Binh, Chief Justice of the Supreme People's Court of Vietnam

and a delegation of senior officials visited the FCA, the Family Court, the Federal Magistrates Court, the Supreme Court of New South Wales and the NSW Land and Environment Court.

2012-2013 Pacific Public Sector Linkages Program

FCA Judges are currently involved in improving judicial reform in Vietnam under the Judicial Capacity Building Program (JCBPV), an AusAID-funded Pacific Public Sector Linkages Program (PSLP). Workshops have been designed on matters dealing with environmental law, precedent development, decision-making and judgment writing.

2012 April: Precedent Development Workshop and Visit

As part of the JCBPV the SPCV hosted two FCA Judges in Hanoi to deliver a workshop and discuss the development of a system of precedent appropriate for a civil law tradition.

2012 May: Environmental Law Workshops

Also under the JCBPV, Justice Cowdroy delivered three workshops on environmental law in Danang, Vung Tau City and Hanoi addressing the resolution of environmental law cases in Australia, focussing evaluation of damages, determination of compensation and management of collective cases at the courts. The materials from all workshops will be refined for inclusion in the SPCV's Benchbook.

2012 September: Seminars on Labour Law Disputes in Hanoi, Danang and Ho Chi Minh City

Also under the JCBPV, Justice Bromberg conducted a series of seminars in September to train judicial officers on the ways of approaching and handing labour law disputes. Activities comprised a series of discussions in Vietnam about the form, scope and content of a system of cases precedent appropriate for Vietnam's civil law tradition.

2012 December: Visit by Delegation from the Vietnam Military Court

Two FCA Judges hosted a delegation including the Deputy Chief Justice of the SPCV and Chief Justice of the Central Military Court at the Principal Registry. The delegates later travelled to the Department of Defence in Canberra.

2013 May: Environmental Law

A follow up workshop on environmental law was conducted by Justices Cowdroy and Katzmann in Hanoi in May 2013. The workshop was attended by over 50 judicial officers from numerous People's Courts throughout Vietnam.

2013 June: Vietnam Precedent and Decision-Making Workshop

Two FCA Judges facilitated a series of meetings to continue discussions with the SPCV about developing a system of precedent. Following this, their Honours conducted a three-day Decision Making and Judgement Writing Workshop in Hanoi. The purpose of the workshop was to begin to prepare Vietnamese judges with the fundamental skills and knowledge required to render decisions when a system of precedent is implemented. The workshop for most was their first foray into the art of articulating legal reasoning, as Vietnam's system currently does not require judges to provide reasons for their decisions.

2013 August: Visit by Vietnam Judiciary (VIC)

The SPC is in the process of implementing a comprehensive suite of reforms to the structure of its judiciary and is embarking on a proactive amendment of the associated legislative and regulatory regimes. As part of this reform process, the VIC Registry hosted a five-member delegation of the SPC, headed by Deputy Chief Justice Bui Ngoc Ho. The visit featured discussions on Australia's procedural laws, regulations and practices particularly on appeals, management of cash flows, judicial time and effort. As part of the visit, the Deputy Chief also attended the two-day International Commercial Law Conference held in Sydney from 22-23 August and discussed the role of courts in dealing with commercial disputes.

2013 September: Visit by Vietnam Judicial Reform Steering Committee of Vietnam (VIC)

On 12 September a delegation from the Judicial Reform Steering Committee of Vietnam visited the Victorian Registry; they received an hour-long presentation from District Registrar Sia Lago on the jurisdiction of the FCA, Court functions and systems, and the roles of responsibilities of Court staff and judges.

Note: This summary and relevant materials have been obtained from the Federal Court of Australia and the Supreme People's Court of Vietnam

APPENDIX 3: MEMBERS OF THE DRAFTING COMMITTEE AND THE EDITING GROUP OF ENTERPRISE BILL 2014

No	Names	Positions in State Institutions	Ad hoc Positions in Drafting Committee
1	Mr Bui Quang Vinh	Minister, Ministry of Planning and Investment (MPI)	Head
2	Mr Dang Huy Đong	Deputy Minister, MPI	Deputy Head
3	Mr Nguyen Dinh Cung	Vice President, Central Institute of Economic Management (CIEM), MPI	Secretary
4	Mr Bui Van Thach	Deputy Chief, Central Party Office	Member
5	Mr Nguyen Van Phuc	Deputy Chief, National Assembly Economic Committee	Member
6	Mr Kieu Dinh Thu	Deputy Chief, Government Office	Member
7	Mr Dinh Trung Tung	Deputy Minister, Ministry of Justice	Member
8	Mr Le Duong Quang	Deputy Minister, Ministry of Industry and Trade	Member
9	Mr Nguyen Viet Tien	Deputy Minister, Ministry of Health	Member
10	Mr Tran Van Hieu	Deputy Minister, Ministry of Finance	Member
11	Mr Tuong Duy Luong	Deputy Chief Justice, Supreme People's Court	Member
12	Ms Nguyen Thi Thuy Khiem	Deputy Prosecutor General, Supreme People's Procuracy	Member
13	Mr Hoang Van Dung	Vice President, Vietnam Chamber of Commerce and Industry (VCCI)	Member
14	Ms Nguyen Tuyet Duong	Deputy Chief, Legal Department of State Bank	Member
15	Mr Mai Duc Thien	Deputy Chief, Legal Department of Ministry of Labour, War Invalids and Social Affairs	Member
16	Mr Bui Hong Quang	Deputy Chief, Planning Department of Ministry of Education and Training	Member

17	Mr Tran Huu Huynh	President, Vietnam International Arbitration Centre at VCCI	Member
18	Mr Le Dang Doanh	Economic Expert, Former President of CIEM	Member

No	Names	Positions in State Institutions	Ad hoc Positions in Editing Group
1	Mr Nguyen Dinh Cung	Vice President, CIEM, MPI	Head
2	Mr Phan Duc Hieu	Deputy Chief, Business Environment and Competitiveness Department, CIEM, MPI	Secretary
3	Mr Le Thanh Tung	Deputy Chief, Administration Office, CIEM, MPI	Member
4	Mr Nguyen Duc Trung	Deputy Chief, Enterprises' Reform and Development Department, CIEM, MPI	Member
5	Mr Bui Anh Tuan	Deputy Chief, Business Management Registration Department, MPI	Member
6	Mr Do Tien Thinh	Deputy Head, Business Registration Office, Business Management Registration Department, MPI	Member
7	Mr Quach Tuan Ngoc	Deputy Chief, Legal Department, MPI	Member
8	Ms Nguyen Thi Bich Ngoc	Deputy Chief, Foreign Investment Department, MPI	Member
9	Mr Trinh Huu Van	Deputy Chief, Enterprise Development Department, MPI	Member
10	Mr Le Hoang Hai	Deputy Chief, Enterprise Finance Department, Ministry of Finance	Member
11	Ms Tran Thi Thanh Hong	Deputy Chief, Economic Department, Central Party Office	Member
12	Ms Phan Thi Thu Ha		Member
13	Mr Pham Ngoc Lam	Deputy Chief, Economic Department, National Assembly Economic Committee	Member

14	Ms Duong Thuy Dung	Official, Economic Department, National Assembly Economic Committee	Member
15	Mr Pham Thanh Ngoc	Official, Legal Department of State Bank	Member
16	Mr Cao Dang Vinh	Head, General Economic Law Office, Civil Law Department of Ministry of Justice	Member
17	Ms Phuong Huu Oanh	Chief, Supreme People's Procuracy (Department 12)	Member
18	Mr Dau Anh Tuan	Deputy Chief, Legal Department, VCCI	Member
19	Mr Nguyen Hai Trung	Deputy Chief, Planning Department, Ministry of Commerce and Trade	Member
20	Mr Do Gia Thang	Officer, Legal Department, Ministry of Labour, War Invalids and Social Affairs	Member
21	Ms Nguyen Thi Van	Officer, Legal Department, Ministry of Labour, War Invalids and Social Affairs	Member
22	Mr Nguyen Quang An	Deputy Chief, Finance and Planning Department, Ministry of Health	Member
23	Ms Nguyen Thi Kieu Oanh	Officer, Finance and Planning Department, Ministry of Education and Training	Member

Noticeable features:

- The Drafting Committee and the Editing Group were established following the Decision 1173/QD-BKHDT Dated 25 December 2012 of Minister of Planning and Investment.
- MPI is the sponsor ministry in charge of drafting *Enterprise Bill 2014*.
- MPI took all important seats, with three in the Drafting Committee and nine in the Editing Group.
- Representatives of Ministries occupied 11 out of 18 seats in the Drafting Committee and 16 out of 23 seats in the Editing Group.

THE END