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## Developing Fiduciary Culture in Vietnam

*Brian JM Quinn\**

### INTRODUCTION

This Article examines Vietnam's efforts during the past two and a half decades to build up its legal infrastructure during its transition from a centrally planned to a market economy. In particular, this Article will focus on the development of legal and regulatory infrastructure to support the development of the corporate sector and fiduciary culture in Vietnam. In thinking about corporate law, I do not intend to single out this particular area of law as somehow special in the context of transition. In fact, its commonness and generality are what makes the experience of the development of corporate law and corporate culture so useful in thinking about the rule of law, law and development, and the role of culture in the development of legal systems. This Article is written with some degree of humility; the source of this humility is a recognition that the legal and regulatory infrastructure at the center of the new rule of law movement is not an unbending prerequisite for successful development of the corporate sector, and that development of fiduciary culture requires more than law in books.

Following the collapse of the Soviet Bloc and Soviet-styled central planning beginning in the late 1980s, transition countries like Vietnam faced immediate and critical challenges to transition to new market-oriented models of organization.<sup>1</sup> Currently, this transition from central planning to markets is a decades-long project that remains incomplete. Central to all these transition efforts has been a near-wholesale reworking of the legal structures undergirding economic and social relationships.

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1. See Michael Haynes, *Eastern European Transition: Some Practical and Theoretical Problems*, 31 *ECON. & POL. WEEKLY* 467, 467, 472–73, 478 (1996). See generally JÁNOS KORNAI, *THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM* 383–395 (1992).

There is little doubt that the adoption of new legal rules governing business entities was an essential component in spurring the growth of the private sector in Vietnam. However, the shift from a restrictive regulatory environment to a more open, enabling one was, in part, hoped to create a fiduciary culture amongst managers and shareholders. A fiduciary culture is one in which typical fiduciary norms of care and loyalty are respected and enforced by shareholders. However, now almost two decades later, transition of the corporate sector to a fiduciary culture remains a work in progress. Although formal legal structures to support the creation of a market-oriented private sector are now in place, such structures remain insufficient for norm creation, and the development of a robust fiduciary culture remains far afield.

A principal source of deficiencies in corporate governance in Vietnam lies with still nascent acceptance of fiduciary norms as a vital component of the corporate law. Rather than rely on a bottom-up development of fiduciary norms by way of shareholder enforcement, there is evidence that regulators remain committed to a public enforcement approach to corporate governance.<sup>2</sup> Old habits die hard, as they say. Whether a top-down public enforcement approach to norm creation will be more efficacious than developing a shareholder-centric fiduciary culture remains an open question. Nevertheless, there are a number of other informal transmission vectors present in Vietnam, beyond the courts and formal legal structures, which make the development of a self-enforcing fiduciary culture possible, though not guaranteed.

This Article proceeds in the following manner. Part I of this Article places the development of Vietnam's new corporate governance structures in the context of the larger law and development movements since the late 1960s. Part II of this Article describes the new rule of law movement and the role of corporate law in that project. In Part III, this Article describes formal governance structures adopted as part of corporate law reform and identifies weaknesses in the development of fiduciary norms as a continuing weakness of Vietnam's corporate governance structures. Part IV evaluates informal transmission vectors, like trade agreements and foreign investment, that might support the development of fiduciary culture.

## I. THE LAW AND DEVELOPMENT MOVEMENTS

During the 1960s, many international aid agencies undertook efforts to engage in the development of legal systems to accompany their economic development activities. These law-oriented projects were

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2. See *infra* Part III.

undergirded by concepts of “legal liberalism.”<sup>3</sup> In its broadest sense, legal liberalism has a number of components. First, the state is the central organizing authority for societies. Second, the state acts through law. Third, laws are designed to achieve some socially valuable purpose through some sort of representative process. Fourth, these laws are applied equally for the purposes they were designed for. Fifth, courts are the central institution for the implementation of legal order; and finally, that society tends to conform to rules.<sup>4</sup>

Key to understanding the focus of attention of the law and development movement on formal legal institutions is the concept of legal liberalism and the power and centrality of the state, a centrality that was often as much assumed as it was reflective of reality. This view of law in the 1960s saw law and legal institutions as tools to be deployed to facilitate economic development and the development of civil society.<sup>5</sup> Ultimately, these highly formalistic, U.S.-centric approaches were met with a high degree of skepticism.<sup>6</sup> Few, if any, of the assumptions of legal liberalism survived arrival in the post-colonial, developing world. The developing world had little appetite to import U.S. legal institutions.<sup>7</sup>

Since the collapse of the law and development movements in the 1960s, two major milestones fueled a resurgence of interest in the question of law and its relationship to economic development. The first of these was the collapse of the former Soviet Bloc and economic reform in Asian Socialist economies starting in the late 1980s. The second motivation was the development of a global trading regime under the rubric of the World Trade Organization during the 1990s.<sup>8</sup>

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3. Marc Galanter & David M. Trubek, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1063 (1974) (“Legal development assistance was originally justified as a rational and effective method to protect individual freedom, expand citizen participation in decisionmaking, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life.”); see Brian Z. Tamanaha, *The Lessons of Law & Development Studies*, 89 AM. J. INT’L L. 470, 473 (1995) (describing the perpetual crisis afflicting law and development studies). See generally JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980) (arguing that foreign aid to the legal sector was thrust upon developing countries in the mistaken belief that American legal institutions would facilitate the rapid economic development as well as development of civil societies).

4. Galanter & Trubek, *supra* note 3, at 1070–72.

5. *Id.* at 1074.

6. See *id.*; GARDNER, *supra* note 3, at 9–11, 35–37; David M. Trubek, *Law and Development: 40 Years after Scholars in Self-Estrangement*, U. TORONTO L.J., May 2016, at 1, 22.

7. GARDNER, *supra* note 3, at 34.

8. See Binh Tran-Nam, *VIETNAM: Preparations for WTO Membership*, 2007 SOUTHEAST ASIAN AFF. 398, 399–402 (2007) (describing some of the legal reforms required for accession to WTO membership).

A new law and development movement arose in the wake of the beginning of the transition experience across Eastern Europe and Asia, notwithstanding resistance to its American-centric predecessor under the rubric of the “rule of law.”<sup>9</sup> The transition from central planning to market-oriented economies highlighted the importance of legal systems. Functioning markets require rules. Sometimes market rules are spontaneously developed, but mostly they are not.<sup>10</sup> Because the regulatory structures of Soviet-styled systems were wholly inappropriate for the market, a legal and regulatory vacuum accompanied every transition from planning to market. The regulatory and legal structures of the *ancien regime* were either going to be ignored or were going to be revamped to become more supportive of market activity.<sup>11</sup>

Soviet-styled legal regimes focused heavily on questions of criminal and family law to the exclusion of civil law.<sup>12</sup> This is, of course, is entirely understandable. In a Soviet-styled central plan, there were no civil, commercial relationships; rather, the central plan dictated all economic production.<sup>13</sup> To the extent there were disputes amongst economic units, with respect to production and fulfillment of the plan (e.g., how much of which type of product produced at what time), such disputes were resolved through bureaucratic processes and not the courts.<sup>14</sup>

When central planning melted away, there was an obvious void. Courts and the legal system, more used to prosecuting the guilty with criminal sanctions, were out of their depth and without much by way of guidance for navigating the new world of civil, commercial disputes. They would need a wholly new regulatory structure to quickly fill the void left

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9. See Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC. REV. 93, 93–94 (1998). Among others, see generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999); KATHARINA PISTOR, PHILIP A. WELLONS & JEFFREY SACHS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960–1995* (1999); *THE RULE OF LAW REVIVAL IN PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., 2006); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PENN. J. INT’L ECON. L. 179 (1999).

10. See, e.g., Brian JM Quinn & Anh T.T. Vu, *Farmers, Middlemen, and the New Rule of Law Movement*, 30 B.C. THIRD WORLD L.J., 273, 325 (2010) (highlighting the development of informal market rules in the absence of formal regulation).

11. See Trubek, *supra* note 6, at 10; THE WORLD BANK, *ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM* 279 (2005), <http://www1.worldbank.org/prem/lessons1990s/chaps/frontmatter.pdf> [<https://perma.cc/XRY6-UBFK>]. See generally John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT’L. & COMP. L. Q. 641 (2002).

12. See Brian JM Quinn, *Legal Reform and Its Context in Vietnam*, 15 COLUM. J. ASIAN L. 219, 222 (2002) (describing the nature of the formal legal structures in Vietnam).

13. See KORNAI, *supra* note 1, at 97–103, 121–24 (discussing bureaucratic and market coordination in socialist systems).

14. See *id.*

by the collapse of economic planning institutions. Carothers calls this focus on the laws “type 1 reforms” and the focus on strengthening legal institutions, like courts, “type 2 reforms.”<sup>15</sup> Of course, the new rule of law movement expanded well beyond the primary focus of rebuilding the regulatory infrastructure to support the development of markets (type 1 and type 2 reforms) as the countries of the former-Soviet Republics and Eastern Europe moved to develop new political systems. The new rule of law movement reached back to many of the same themes of democracy promotion hailed by the original law and development movement.<sup>16</sup>

Nevertheless, in Asian transition economies like Vietnam, where reform efforts were more gradual, the focus of rule of law efforts remained on dismantling and then rebuilding the outdated regulatory structure to support markets. Left largely untouched in Vietnam are what Carothers calls “type 3” reforms.<sup>17</sup> Type 3 reforms have deeper goals, including the development of a culture of compliance with the law by citizens as well as the government itself.<sup>18</sup> Included under the larger umbrella of type 3 reforms is the development of fiduciary culture in the corporate sector.

The new rule of law movement started, in part, from the assumption that strong legal rights are fundamental to a functioning market economy.<sup>19</sup> The theoretical basis for the movement is attractive. Where legal rights are strong (e.g., property and contract rights are protected), parties can engage in anonymous market transactions safe in the knowledge that private contractual promises are backed by a reasonably efficient public enforcement regime. Strong public enforcement institutions can provide a backdrop against which parties feel confident in engaging in transactions with strangers, often with many terms still left undefined.<sup>20</sup> Consequently, a system of strong legal rights working in the

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15. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., Mar.–Apr. 1998, at 99–100.

16. See CAROTHERS, *supra* note 9, at 41; THE WORLD BANK, *supra* note 11, at 279; Carothers, *supra* note 15, at 99–100.

17. Carothers, *supra* note 15, at 99.

18. *Id.*

19. Hernando de Soto is an eloquent proponent of the view that strong formal property rights are necessary for economic growth. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 18–28 (2003). De Soto, however, is not the only proponent of the importance of formal property rights. Among many others, see generally Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16 (1973). See also Katharina Pistor, Yoram Keinen, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 WORLD BANK RES. OBSERVER 89, 89–91 (2003); deLisle, *supra* note 9, at 180–82.

20. See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (studying informal contracting practices amongst businesses in the U.S.); see also Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1549 (2006) (noting that the vast majority of litigated civil cases in developed countries result in settlement before adjudication in the shadow of the formal law).

background can generate high levels of “generalized trusts,” even among strangers, and translates into a greater willingness of economic actors to make long-term investments and engage in complex transactions, thus facilitating economic development.<sup>21</sup>

In the context of post-Soviet transition economies, the new rule of law movement found a home, beginning in the 1990s.<sup>22</sup> Formal legal structures designed to support central planning systems found themselves hopelessly antiquated following the shift to markets. Formal structures and institutions were simply unable to manage, and generalized trust suffered. Consequently, economic transition provided an urgent impetus to rule of law activities that were missing during the height of the law and development movement. Such activities included a host of top-down efforts to rewrite legislation as well as efforts to reorient and train the judiciary, not unlike many of the efforts of the law and development movement of the past.<sup>23</sup> The challenge, especially in Vietnam, remains moving from type 1 and type 2 reforms to type 3 reforms (i.e., developing fiduciary culture). Developing things like fiduciary culture takes much more time, and thus, remains a work in progress.

## II. CORPORATE GOVERNANCE AND THE RULE OF LAW PROJECT

One of the first issues on the transition agenda was the reformation of economic relations and recognition of a role for the private sector; specifically, for the private corporate sector.<sup>24</sup> Certainly, there are many issues on the transition agenda, but for the former Soviet satellites in crisis and Asian socialist countries embarking on a reform agenda, the company law—for a time—took its place at the very front of the line. The 1990s were heady days for U.S. corporate governance.<sup>25</sup> Having shown its predominance over the less than optimal socialist model for economic organization, it was no surprise that legal and development specialists sought to export this model to economies desperate to restructure.

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21. Steven N. Durlauf & Marcel Fafchamps, *Social Capital*, in 1B HANDBOOK OF ECONOMIC GROWTH 1646 (Philippe Aghion & Steven N. Durlauf eds., 2005) (defining “generalized trust”).

22. CAROTHERS, *supra* note 9, at 40–42 (describing the rising importance of rule of law programs in the aftermath of the collapse of centrally-planned markets in Eastern Europe).

23. See generally THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM (2004), <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/18initiativesFinal.pdf> [<https://perma.cc/N48L-2ERU>] (cataloging various Vietnam based legal reform efforts).

24. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 102, 104–05 (1995).

25. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (arguing that corporate law had reached a high degree of uniformity across jurisdictions). This view was not, however, universal. See JOHN S. GILLESPIE, TRANSPLANTING COMMERCIAL LAW IN VIETNAM 4–6 (2006).

Although the early 1990s appeared to be the end of history for corporate law, it was more of a modest pause in its development. The corporate law, like all law, is not static, but it is constantly evolving in response to changing environments. The framework motivating our understanding of corporate governance can be traced to the important work of Adolf Berle and Gardiner Means. The impetus for Professors Berle and Means when they wrote *The Modern Corporation and Private Property* in 1932 was that the United States was itself in the midst of transition in terms of the structure of corporate ownership.<sup>26</sup> During the nineteenth and early twentieth centuries, the “era of finance capital,” most publicly-traded U.S. businesses were controlled entities, with financiers, entrepreneurs, and families controlling most of the country’s corporate assets.<sup>27</sup> Professors Berle and Means observed that by 1932, the corporate ownership structure of most publicly-traded corporations was made up of many shareholders with atomized holdings, the effect of which was that no individual or group of shareholders could control the corporation. Rather, their managers controlled the corporations. The structure of ownership uncovered by Professors Berle and Means led them to conclude that the central problem of the corporate law is understanding and then mitigating the power attributable to managers that results from the separation of ownership and control.<sup>28</sup>

However, at the time, there was a debate between the view offered by Professors Berle and Means and others, principally Professor E. Merrick Dodd, who espoused a more managerial view of the corporate law.<sup>29</sup> Professor Dodd argued that managers of the corporation held their position in a kind of trust.<sup>30</sup> As a result, their obligations were broad and included all sorts of constituencies like workers and the community, in addition to their stockholders.<sup>31</sup> Ultimately, Dodd’s view held sway for quite some time. It was not until the 1970s when Milton Friedman published his article, *The Social Responsibility of Business Is to Increase*

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26. See ADOLF A. BERLE JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 44 (1932).

27. See generally *id.*; Mark S. Mizruchi, *Berle and Means Revisited: The Governance and Power of Large U.S. Corporations*, 33 *THEORY & SOC’Y* 579, 582 (2004) (“The period in the U.S. between the mid-1890s and about 1920 is often referred to as the ‘era of finance capital.’ Many of the great trusts, combinations of large numbers of firms that were combined into huge corporations, were formed in the 1895–1904 period.”).

28. See BERLE & MEANS, *supra* note 26, at 123–25.

29. See generally Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 54 *HARV. L. REV.* 1145 (1931).

30. *Id.* at 1146.

31. *Id.* at 1152.

*Profits*, that the idea of shareholder primacy began to take hold.<sup>32</sup> During the 1980s and 1990s, legal scholars seconded this view and developed the vocabulary of agency costs that dealt with the problem of the separation of ownership and control observed by Professors Berle and Means.<sup>33</sup> By the time the transition took hold in formerly centrally planned systems, corporate law had reached its end: minimization of agency costs in firms with the atomized shareholding structures identified by Professors Berle and Means.

However, over the course of the twentieth and early into the twenty-first century, the structure of corporate ownership did not remain the same. Publicly traded corporations are no longer owned by stockholders with atomized holdings.<sup>34</sup> Rather, we have entered a new age of financial capitalism. With the rise of institutional investors over the past two decades, Berle and Mean's separation of ownership and control is no longer the default regime. Institutional holders with larger blocks are in a better position to advocate for themselves vis-a-vis managers, and agency problems are, if not mitigated, at least not of the same type identified by Berle and Means and academic economists of the 1980s. Institutional holders, due to the size of their holdings, have economic incentives to police managers. It is no surprise that by any objective measure we are now in a period where shareholders are able to assert their power over managers in ways that a century ago might not have been conceivable.<sup>35</sup>

As it turns out, the corporate ownership structure identified by Berle and Means may have been an outlier, rather than the rule.<sup>36</sup> Even before our current swing back toward controlling shareholders and institutional blockholding, controllers and blockholding were, and continue to be, the

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32. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32. This issue and the current debate on shareholder primacy is well described by Professor Lynn Stout. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

33. Among others, see generally Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

34. John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* (Harvard Public Law, Working Paper No. 19-07, 2019).

35. See Leo E. Strine, *Can We Do Better by Ordinary Investors: A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 454–55 (2014).

36. Indeed, even Berle and Means observed that the model of atomized shareholding that they observed was unexpected, a marked break from previous understandings of corporate shareholding, which was largely dominated by blockholding. See BERLE & MEANS, *supra* note 26, at 47–49 (1932) (characterizing the wide dispersion of stock ownership as a “fundamental change in the character of wealth”).

norm around the world.<sup>37</sup> The ubiquity of blockholding rather than atomized stockholding structures raises a question about the ultimate efficacy of the advice given by corporate governance experts to transition economies in the 1990s to adopt governance regimes modeled on the Berle–Means conception of separation of ownership and management. Rule of law proponents may have been assuming the efficiency and sustainability of U.S. corporate ownership structures while attempting to replicate what is actually an outlier corporate governance structure. The subsequent rise of controller dominated ownership structures in transition economies suggests the real limits of the path selected by adherents to the new rule of law project of the 1990s.<sup>38</sup>

### III. DEVELOPMENT OF FORMAL CORPORATE GOVERNANCE STRUCTURES IN VIETNAM

Vietnam began its economic transition (*Đổi Mới*) from central planning to market in earnest during the early 1990s. Early on in its reform process, Vietnam embarked on an ambitious effort to remake its formal legal structures from the top-down to support the development of the new market economy. While this effort has been aggressive in many respects, it has fallen short of a complete remake of Vietnam’s legal system and institutions. One area where Vietnam has given a high degree of focus is in the sphere of economic management. Early on, Vietnam’s technocratic elite realized that a wholesale reworking of the regulatory structure supporting enterprises was going to be critical to the long-term success or failure of the reform effort.

The legislative framework for the corporate sector in Vietnam has undergone revision multiple times since the early 1990s.<sup>39</sup> While later changes focused on increasing the variety and complexity of business forms available, the earliest revisions during the beginning of the reform process were perhaps most significant and more lasting. The most fundamental change to the corporate law occurred with the design of the initial revision. In the Enterprise Law of 1999, Vietnam shifted from a

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37. See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 472 (1999). It was obvious to some as early as 2011 that perhaps, even in the U.S., the Berle–Means framework was no longer justifiable given the change in shareholder demographics. See Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1121–22 (2011).

38. See Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3, 13–14 (2000) (suggesting concentration of control is more prevalent where corporate governance is weak).

39. Bui Xuan Hai, *Vietnamese Company Law: The Development and Corporate Governance Issues*, 18 BOND L. REV. 1, 29–30 (2006) (describing the various amendments and legal changes governing business entities in Vietnam from 1990 to 2005).

“prohibitive” to an “enabling” paradigm with attributes of self-enforcement by shareholders.<sup>40</sup>

#### A. Enabling Legislation

Early efforts at reform included the 1987 Foreign Investment Law, recognizing a role for private foreign investment.<sup>41</sup> In 1990, the government promulgated the Private Enterprise and Companies Laws, which recognized the private sector and permitted the creation of a private corporate sector for the first time.<sup>42</sup> During this period, government authorities attempted to maintain strict control over the operation of businesses by leaning heavily on the familiar, but outdated, doctrine of *ultra vires*.<sup>43</sup> During this period, government authorities took aggressive positions to attempt to control investment and business activities by both the foreign and domestic private sector. Often, this application of power was little more than arbitrary.<sup>44</sup>

The Enterprise Law of 1999 shifted the locus of decision-making and power in the establishment of new companies from the government to entrepreneurs. Under the previous petition system (*xin-cho*), the granting of a corporate charter or authorization was discretionary with local government authorities in a position to hold up applications for company charters.<sup>45</sup> There are at least two implications of the petition system. First, to the extent formal or informal government policy opposed the development of private enterprise generally or in specific sectors, the withholding or the granting of required authorizations to do business was a powerful level to direct or inhibit growth of commercial activity. Second, the petition system also had a pernicious effect. By consolidating discretionary power with a small number of authorities, the petition system

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40. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1930–37 (1996) (describing prohibitive as well as self-enforcing models of corporate law in post-Soviet transition).

41. Tang Thanh Trai Lê, *The Legal Aspects of Foreign Investment in Vietnam*, 1 INT'L TRADE & BUS. L.J. 41, 50–51 (1995).

42. See Gillespie, *supra* note 11, at 646–48; see also Trai Lê, *supra* note 41, at 51–52; Katriina Hakkala & Ari Kokko, *The State and Private Sector in Vietnam* 3 (Eur. Inst. of Japanese Stud., Working Paper No. 236, 2007) (on file with Seattle University Law Review).

43. John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 358–60 (1994).

44. See PHAM DUY NGHIA, VIETNAM BUSINESS LAW IN TRANSITION 56 (2002).

45. The observer will note the parallels between such a system and that which prevailed in the U.S. during the nineteenth century. It was only after the turn of the twentieth century that U.S. states began to adopt enabling statutes. See Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677, 681 (1989) (documenting New Jersey's path from a system of special incorporation charters to general enabling statutes).

gave rise to opportunities and incentives for corruption.<sup>46</sup> Not surprisingly, although the private sector was formally recognized, the top-down approach to managing development of the private sector inhibited its growth.

The single most important change in the 1999 Enterprise Law was the turning of the incorporation process on its head.<sup>47</sup> By moving from a petition system to one where incorporation becomes a statutory right, the law, as written, had two immediate effects. First, it reduced the discretionary authority of local officials to deny corporate registrations; and thus, reduced opportunities and incentives for corruption.<sup>48</sup> Second, by removing obstacles to registration and incorporation and thus enabling the private sector, the law unleashed commercial activity in the private sector.<sup>49</sup>

The 1999 Enterprise Law marks another important step: the shifting of regulation of corporate organization from public law to private law, at least on paper. This was a significant shift because rather than relying on government enforcement to regulate the internal organization of business organizations, the 1999 Enterprise Law moves that burden to private parties who have a greater incentive to order their own affairs as well as to monitor the actions of managers. This shift also reflects a more

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46. In reality, both of these implications are unremarkable. The granting and withholding of early corporate charters were the primary vehicle of commercial and early industrial policy in Europe and the United States. In the nineteenth century United States, where state legislatures were required to pass individual acts of incorporation in order to create a corporate charter, state legislatures were highly susceptible to corruption in large part due to rent seeking by legislators who could prevent the issuance of special charters. See John Joseph Wallis, *The Concept of Systemic Corruption in American History*, in CORRUPTION AND REFORM: LESSONS FROM AMERICAN HISTORY 23, 49–51 (Edward L. Glaeser & Claudia Goldin eds., 2004) [hereinafter Wallis, *The Concept of Systemic Corruption*]; John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 215 (2005); see also Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 3 COLUM. BUS. L. REV. 1017, 1086–87 (2017) (noting that the federal incorporation movement would reduce incentives for state legislators to engage in corrupt behavior).

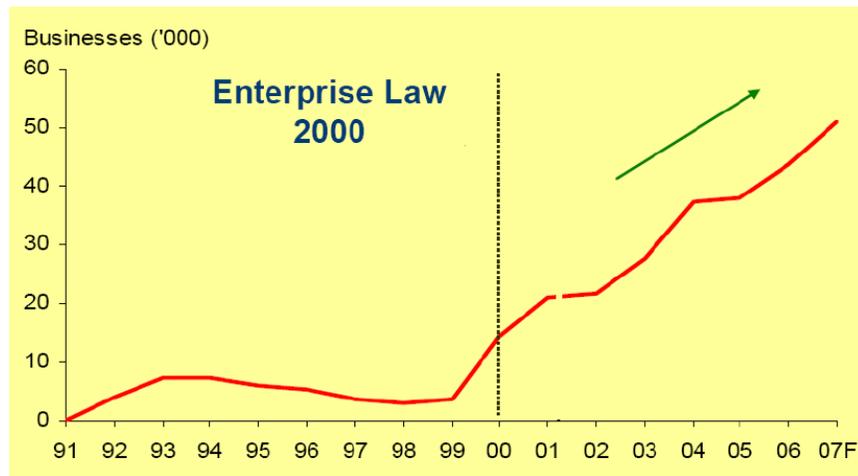
47. See LUẬT DOANH NGHIỆP [LAW ON ENTERPRISES] [No. 13/1999/QH10] art. 9 (1999) (Viet.).

48. Prior to the adoption enabling statutes in the United States, each corporate charter offered opportunities for corruption. During the “charter mongering” period, states, principally New Jersey, liberalized their state corporate laws and routinized the process of incorporation, in part to reduce incentives for corruption. Grandy, *supra* note 45, at 681. In that sense, the enabling structure was a gift of the Progressive Movement and not explicitly intended to reduce the costs associated with the separation of ownership and control. See Wallis, *The Concept of Systemic Corruption*, *supra* note 46, at 49–51 (explaining that states solved the paradox of corruption and the promotion of economic development by granting a corporate charter to anyone who wanted one, thereby reducing the incentive for legislative corruption).

49. See DWIGHT H. PERKINS & VU THANH TU ANH, HARVARD KENNEDY SCH.: ASH INST. FOR DEMOCRATIC GOVERNANCE AND INNOVATION, VIETNAM’S INDUSTRIAL POLICY: DESIGNING POLICIES FOR SUSTAINABLE DEVELOPMENT 25 (2008), [https://ash.harvard.edu/files/vietnams\\_industrial\\_policy.pdf](https://ash.harvard.edu/files/vietnams_industrial_policy.pdf) [<https://perma.cc/5QPQ-6RMW>].

fundamental policy view that the internal organization of business affairs is best accomplished through private ordering. The effect of this restructuring is stark. During the first five years following the adoption of the 1999 Enterprise Law, more than 136,400 formal private companies were registered in Vietnam, and importantly, the pace of new formations increased dramatically following the adoption of the 1999 Enterprise Law.<sup>50</sup> The pace of business formation has increased substantially since the implementation of the Enterprise Law. In just the first months of 2019, Vietnam's General Statistics Office reported 70,000 (net of closures/dissolutions) new enterprises registered nationwide.<sup>51</sup> By any measure, the transformation of the business incorporation process from a petition to a registration system can only be seen as a success made possible by the Enterprise Law.

Figure 1: Domestic Private Business Registration in Vietnam (1991–2006)<sup>52</sup>



50. EDMUND J. MALESKY, VIETNAM PROVINCIAL COMPETITIVENESS INDEX 1 (2005) (on file with Seattle University Law Review).

51. See *Social and Economic Situation in Eight Months of 2019*, VIET. GEN. STAT. OFF. (Aug. 15, 2019), [https://www.gso.gov.vn/default\\_en.aspx?tabid=622&ItemID=19340](https://www.gso.gov.vn/default_en.aspx?tabid=622&ItemID=19340) (last visited Jan. 22, 2020).

52. PERKINS & ANH, *supra* note 49, at 26. New business formations in the last few years have been as follows:

2015	94,800
2016	110,100
2017	126,859
2018	131,300

Later revisions to Vietnam's legal infrastructure have deepened and filled out many (though not all) of the gaps in the laws governing business organizations and corporate governance. By now, the legal infrastructure surrounding business organizations include a variety of structures for small as well as large corporate forms.<sup>53</sup> Vietnam has also opened two relatively large public stock exchanges (Ho Chi Minh City and Hanoi) to attract local as well as foreign capital.<sup>54</sup> Additionally, Vietnam has developed formal legal structures governing the regulation of foreign investment through laws, trade, and investment agreements.

Vietnam now has had more than two decades of experience with various corporate forms.<sup>55</sup> The prevailing corporate form for larger or publicly traded firms is the Joint Stock Company (JSC).<sup>56</sup> In most governance-related respects, the JSC—at least formally—looks like its U.S. publicly-traded counterparts. In fact, they share many of the same general governance mechanisms. One might conclude that since formal Vietnamese corporate governance structures closely resemble those of U.S. corporations, Vietnamese firms will have, over the past two decades, also adopted fiduciary cultures similar to those of U.S. firms; however, this has not been the case. The development of a fiduciary culture has not necessarily followed the adoption of formal governance structures.

### *B. Fiduciary Culture and Corporate Governance*

While the enabling nature of the 1999 Enterprise Law has had an almost immediate impact on the atmosphere surrounding business incorporation, it did little to encourage the development of internal corporate governance or a fiduciary culture amongst managers and shareholders.<sup>57</sup> Broadly defined, a fiduciary culture is one in which typical

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*Released Publications*, VIET. GEN. STAT. OFF., [https://www.gso.gov.vn/Default\\_en.aspx?tabid=515](https://www.gso.gov.vn/Default_en.aspx?tabid=515) (last visited Jan. 22, 2020).

53. See generally LUẬT DOANH NGHIỆP [LAW ON ENTERPRISES] [No. 68/2014/QH13] art. 1 (Viet.) (covering limited liability companies, joint-stock companies, partnerships, private companies, and enterprise groups).

54. Recent research by Cuong et al., confirms what appears obvious to the casual observer of Vietnam's stock market. Cuong et al. find that Vietnam's stock markets are subject to "noise trader risk," the effect of uninformed traders to move stock prices. See Phan Khoa Cuong, Tran Thi Bich Ngoc, Bui Thanh Cong & Vo Thi Quynh Chau, *Noise Trader Risk: Evidence from Vietnam's Stock Markets*, 128 HUE U. J. SCI. 5 (2019). Similarly, Vo and Phan find evidence of uninformed herd trading behavior in Vietnamese stock markets. See Xuan Vinh Vo & Dang Bao Anh Phan, *Further Evidence on the Herd Behavior in Vietnam Stock Market*, 13 J. BEHAV. & EXPERIMENTAL FIN. 33 (2017).

55. These various forms include multiple member LLC, single-member LLC, partnership, business cooperation contract, public-private partnership, and the joint stock company, among others.

56. See generally BAKER & MCKENZIE, LLP, FORMS OF DOING BUSINESS IN VIETNAM (2016), <https://www.bakermckenzie.com/-/media/files/insight/publications/2017/forms-of-doing-business-in-vietnam-2017.pdf?la=en> [<https://perma.cc/D2D4-GPNS>].

57. See *infra* pp. 595–96.

fiduciary norms of care and loyalty are respected and enforced by shareholders. The development of fiduciary culture in Vietnam has been long in the making.

The 2014 Enterprise Law addressed some of these issues for the first time.<sup>58</sup> Under Article 160 of the 2014 Enterprise Law, managers have statutory obligations of both care and loyalty with regards to their management of the company:

Art. 160. Responsibilities of managers of [the] company

1. Each member of the Board of Management, the director or general director and other manager [of a company] has the following responsibilities:

(a) To exercise his or her delegated powers and perform his or her delegated obligations strictly in accordance with this Law, in relevant laws, the charter of the company, and the resolutions of the General Meeting of Shareholders;

(b) To exercise his or her delegated powers and perform his or her delegated obligations honestly and prudently to their best ability in order to assure the maximum legitimate interests of the company;

(c) To be loyal to the interests of the company and shareholders; not to use information, know-how, business opportunities of the company, [not to abuse] his or her position and powers and not to use assets of the company for his or her own personal benefit or for the benefit of other organizations or individuals . . . .<sup>59</sup>

To the extent corporate law seeks to mitigate agency problems and foster the development of fiduciary culture, obligations of both care and loyalty by managers are a cornerstone.<sup>60</sup> However, the mere incantation of obligations without a mechanism for self-enforcement of these obligations does not accomplish a great deal.

The formal self-enforcing governance structures available in the 2014 Enterprise Law go well beyond even governance standards set by the

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58. The more common approach to fiduciary duties is through application of the criminal laws. For example, a manager of a state-owned enterprise can be charged with the crime of “waste” of corporate assets in the event the enterprise suffers losses under his or her management. *See, e.g., Former AVG Chairman Detained in Bribery Probe*, VIET NAM NEWS (Apr. 13, 2019), <https://vietnamnews.vn/politics-laws/518716/former-avg-chairman-detained-in-bribery-probe.html#uW1OjYWtM1g7ydVo.97> [<https://perma.cc/F39V-ZC6K>] (alleging “violations in the management and use of public investment capital causing serious consequences at MobiFone Telecommunications Corporation and relevant agencies”).

59. LAW ON ENTERPRISES [No. 68/2014/QH13] art. 160 (Viet.).

60. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1996).

Delaware corporate code.<sup>61</sup> Vietnam's 2014 Enterprise law builds on earlier iterations of Vietnam's enterprise law in that it is enabling and not prohibitive in nature.<sup>62</sup> The law also creates a framework for shareholders to engage in the private ordering of affairs of the corporation, to monitor the behavior of managers, and to intercede when they believe managers may have exceeded their authority or otherwise harmed the corporation.<sup>63</sup> To the extent the current enterprise law gives tools to shareholders to permit them to engage in self-help, one could also characterize Vietnam's current enterprise law as self-enforcing in nature. Among other things, it delegates power to the shareholders to do the following:

- Elect and remove directors;
- Adopt a corporate strategy;
- Approve related party transactions (similar to Delaware's § 144);
- Approve financial statements;
- Decide on redemption of 10% or more of company's stock; and
- Consider and decide breaches by the board.<sup>64</sup>

To facilitate private enforcement of the director's obligations, the 2014 Enterprise Law delegates the authority to shareholders to bring derivative actions against managers of the company who may have fallen short.<sup>65</sup> Shareholders have the right to seek books and records of the company for the purpose of evaluating managers' performance.<sup>66</sup> Shareholders also have the power to replace underperforming directors at the annual shareholder meeting.<sup>67</sup> These governance mechanisms are self-help tools typically relied on by shareholders to develop a fiduciary culture where shareholders, looking out for their own interests, can monitor managers.

Just as the presence of enabling laws does not necessarily result in the development of a fiduciary culture, neither does the presence of statutory self-enforcement mechanisms. Indeed, there is a lack of evidence that the legal duties of care and loyalty spelled out in the Enterprise Law have translated into a corresponding fiduciary culture.

Any self-enforcement regime requires disclosure in order to assure its efficacy. Notwithstanding requirements, corporate disclosure is in relatively short supply. The Securities Law as well as the Enterprise Law

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61. See LAW ON ENTERPRISES [No. 68/2014/QH13] (Viet.).

62. See LAW ON ENTERPRISES [No. 13/1999/QH10] (1999) (Viet.).

63. See *id.*

64. LAW ON ENTERPRISES [No. 68/2014/QH13] art. 114, 135 (Viet.); Hikari Oguchi et al., *Vietnam*, in GETTING THE DEAL THROUGH - CORPORATE GOVERNANCE 2013, at 286 (2013).

65. LAW ON ENTERPRISES [No. 68/2014/QH13] art. 161 (Viet.).

66. *Id.* at art. 162, 165.

67. *Id.* at art. 156.

require that listed companies disclose certain material information about the company, including information related to the company's governing documents, financials, and material events that occur on a corporate website.<sup>68</sup> Take, for example, Vinamilk, a listed Vietnamese joint stock company and one of Vietnam's largest and best regarded corporations. Vinamilk discloses its governing documents, its current financial information, and its press releases related to material events affecting the company on its own website.<sup>69</sup> The structure of disclosure requirements in the Securities Law is consistent with that which would be required to develop self-enforcing fiduciary norms. Compliance with the disclosure requirements under the Securities Law, however, is not uniform. Many listed firms do not post even the most basic corporate information required under the law to their public websites.<sup>70</sup> To the extent the law's requirement is intended to inform shareholders and facilitate self-enforcement via a distributed publishing requirement in lieu of a central public filing system (e.g., SEC's EDGAR), its distributed structure lacks efficacy.<sup>71</sup>

Notwithstanding the self-enforcement mechanisms built into both cornerstone laws governing the corporate sector in Vietnam, there is minimal evidence that shareholders rely on them. Shareholders have the power to bring lawsuits to enforce their legal rights against managers. Though at times abused, this power is a vital tool in corporate governance in the U.S. In the context of Vietnamese companies, there is little evidence that shareholders bring suits to police against manager opportunism. Litigation to police manager agency costs is permitted under the Enterprise Law, but it is rarely taken up.<sup>72</sup> A rare example of a shareholder bringing such a suit involved the divorce between Mr. Dang Le Nguyen Vu and his wife, Le Hoang Diep Thao. Mr. Vu is the founder of Trung Nguyen, a

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68. LUẬT CHỨNG KHOÁN [LAW OF STOCK] [No. 70/2006/QH11] art. 100–01 (Viet.).

69. See *Welcome to Vinamilk's Investor Relations Shareholders' Meeting*, VINAMILK (Sept. 4, 2019), <https://www.vinamilk.com.vn/en/shareholders-meeting> [<https://perma.cc/Y7K2-57U2>].

70. Compliance generally includes a corporate charter, resumes of directors, financial statements, and shareholder meeting information. See, e.g., VIETNAMOBILE, <http://vietnamobile.com.vn/> [<https://perma.cc/2VLN-SKJ8>]; VNG GROUP, <https://www.vng.com.vn> [<https://perma.cc/HT57-DVE3>]; VIETNAM RAILWAYS, <http://www.vr.com.vn/> [<https://perma.cc/9VW4-D643>].

71. See generally VINH NGUYEN, ANH TRAN & RICHARD J. ZECKHAUSER, INSIDER TRADING AND STOCK SPLITS (2012) (on file with Seattle University Law Review) (with respect to run of the mill corporate governance issues, the weakness of self-enforcement is not necessarily made up for by effective public enforcement of the enterprise law. From the opening of the stock exchange in Ho Chi Minh City until 2011, there was only one prosecution for violation of Vietnam's insider trading regulations).

72. E-mail from Baker & McKenzie Partner to Author in Ho Chi Minh City (Oct. 5, 2018) (confirming that shareholders rarely bring litigation) (on file with author).

large, private coffee company.<sup>73</sup> In addition to the joint assets owned with Mr. Vu, Ms. Thao was a ten-percent shareholder of Trung Nguyen.<sup>74</sup> She filed a lawsuit against her husband's decision to dismiss her from the company, claiming it prevented her from participating in running and managing the company as part of the divorce proceedings.<sup>75</sup> Ultimately, the court ordered Ms. Thao's shares appraised for fair value.<sup>76</sup>

The fact that few Vietnamese shareholders access the courts is no real surprise. The domestic courts have a long-standing reputation for corruption and reports of payments to judges for favorable rulings are commonplace.<sup>77</sup> In such a situation, it is not at all unusual that shareholders might view courts as anemic and unhelpful and thus not pursue a court remedy to assert fiduciary or other corporate governance claims.

### 1. Corruption as a Fiduciary Claim

In the absence of actual fiduciary duty litigation brought by shareholders, one can look for proxies for evidence of fiduciary culture. Professor Sung Hui Kim has argued that corporate corruption is essentially a subset of the fiduciary problem.<sup>78</sup> In that sense, corporate corruption including bribes and secret commissions, corporate opportunities, renewals and reversions, misappropriation of confidential information, and other conflicts of interest are all examples of fiduciary violations.<sup>79</sup>

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73. See Ky Hoa, *Vietnam's Coffee Queen Checkmates King in One Court Case*, VNEXPRESS (Sept. 21, 2018), <https://e.vnexpress.net/news/business/companies/vietnam-s-coffee-queen-check-mates-king-in-one-court-case-3812946.html> [<https://perma.cc/85A4-ENVH>].

74. *Id.*

75. *Id.*

76. *Id.* (it should be noted that appraisal is not statutorily available given the facts in this particular case. Nevertheless, the court decided to proceed with an appraisal rather than a judicial dissolution or other statutory remedy); see also Đặng Lê Nguyễn Vũ và câu nói 'như xát muối' vào tim Lê Hoàng Diệp Thảo, TIN MOI (Apr. 28, 2019), <https://www.tinmoi.vn/dang-le-nguyen-vu-va-cau-noi-nhu-xat-muoi-vao-tim-le-hoang-diep-thao-011517224.html> [<https://perma.cc/7JUJ-9NK4>].

77. See *Conference Tackles Judicial Corruption*, VIET. NEWS (Feb. 4, 2015), <https://vietnamnews.vn/society/266075/conference-tackles-judicial-corruption.html#7HKZPaHDOyP18hIU.97> [<https://perma.cc/QV8F-CNY4>].

Nguyen Duc Chinh, Deputy Justice Minister, stated, "Corrupt officials make up a big proportion of the judicial office and it is hard for the public to trust the judicial system." *Id.* Nguyen Van Hau, Deputy Chairman of the HCM City Lawyers Association, admitted that "a lot of lawyers pay bribes [to get a favorable verdict] because judicial officials demand them." *Id.* See generally *Transformation Index BTI Report: Vietnam Country Report*, BERTELSMANN STIFTUNG (2016), <https://www.bti-project.org/en/reports/country-reports/detail/itc/vnm/ity/2016/itr/aso/> [<https://perma.cc/Y75L-P8AF>] (discussing Vietnam's corruption in the private sector).

78. See Sung Hui Kim, *Fiduciary Law's Anti-Corruption Norm*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 117 (Andrew S. Gold & D. Gordon Smith eds., 2018).

79. *Id.* at 118.

It is no secret that corruption in Vietnamese companies is endemic.<sup>80</sup> For example, a 2018 study on corporate corruption sponsored by the Vietnamese Communist Party found more than fifty-four percent of 11,000 firms that responded made informal payments.<sup>81</sup> Seven percent of enterprises responding to the same survey reported they had to spend over ten percent of their revenue on informal costs.<sup>82</sup> However, private enforcement of conflicts of interest remains weak and other forms of corporate corruption are also common. It has been noted that “[a]mong a significant number of local [Vietnamese] companies, the perception of bribery as a part of the Vietnamese ‘business culture’ and as ‘unavoidable’ has led to an acceptance of informal payments in daily business transactions.”<sup>83</sup>

A recent government decision requires board members and managers of publicly traded companies to disclose conflicts of interest and requires recusal, as well as imposes duties on controlling shareholders.<sup>84</sup> Nevertheless, compliance remains relatively low. For example, sixty-eight percent of firms from the previous survey “have general written policies and procedures to identify, monitor and manage conflicts of interest.”<sup>85</sup> “However, only 45% [of survey respondents] have written rules or procedures, whereby their officers and management personnel must declare any conflicts of interest in transaction[s] with third parties.”<sup>86</sup> Furthermore, “the number of firms having written rules or procedures on staff to declare any outside [conflicts of] interests is even lower (23%).”<sup>87</sup>

A survey of forty-five of Vietnam’s largest companies regarding corporate corruption revealed that more than half of the companies surveyed (24/45) do not make any public disclosure of their anti-

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80. See, e.g., Thuy Thu Nguyen & Mathijs A. van Dijk, *Corruption, Growth, and Governance: Private vs. State-Owned Firms in Vietnam*, 36 J. BANKING & FIN. 2935, 2936 (2012); Vietnam, TRANSPARENCY INT’L, <https://www.transparency.org/country/VNM> [<https://perma.cc/DFS3-286R>] (ranking Vietnam’s corruption perception index as 117/180).

81. *Vietnam’s Business Environment Continues to Improve, PCI Report Shows*, NHÂN DÂN (Apr. 24, 2019), <https://en.nhandan.org.vn/business/economy/item/7397202-vietnam%E2%80%99s-business-environment-continues-to-improve-pci-report-shows.html> [<https://perma.cc/33YE-GT7M>].

82. *Id.*

83. LIEN NGUYEN, CHRISTIAN LEVON & LINH NGUYEN, TOWARDS TRANSPARENCY, BUSINESS INTEGRITY IN HIGH TECH PARKS IN VIETNAM: A SURVEY REPORT 3 (2018).

84. See NGHỊ ĐỊNH HƯỚNG DẪN VỀ QUẢN TRỊ DOANH NGHIỆP CỦA CÔNG TY ĐẠI CHÚNG [DECREE GUIDELINES ON CORPORATE GOVERNANCE OF PUBLIC COMPANIES] [No. 71/2017/ND/CP] art. 25, 26, 35 (Viet.) (QĐ71 makes violations of the disclosure of conflicts and related party transactions civil infractions); *New Regulations to Prevent Conflicts of Interest in Corporate Governance*, VIETNAM L. & LEGAL F. MAG. (June 16, 2017), <http://vietnamlawmagazine.vn/new-regulations-to-prevent-conflicts-of-interest-in-corporate-governance-5896.html> [<https://perma.cc/2K29-BV5E>].

85. NGUYEN, LEVON & NGUYEN, *supra* note 83, at 10.

86. *Id.*

87. *Id.*

corruption programs, and almost no companies (3/45) disclose any information to shareholders regarding policies prohibiting facilitation payments.<sup>88</sup>

Absent evidence of shareholders actually availing themselves of the governance tools provided by the Enterprise Law, one can only conclude that the self-enforcing nature of the current corporate law has not led to the development of fiduciary norms during the twenty years since the Enterprise Law was first adopted.

### C. Preference for Public Enforcement

In 2018, Vietnamese prosecutors charged executives of Mobifone, a large mobile telephone company, over a botched acquisition.<sup>89</sup> The former director general of Mobifone, Cao Duy Hai, and deputy director general, Pham Thi Phuong Anh, were charged by the state with “violating regulations on managing and using public investment capital.”<sup>90</sup> The government alleged the officers caused Mobifone to overpay for AVG, the company Mobifone was acquiring.<sup>91</sup> In the context of U.S. corporate governance, “corporate waste” is at most a civil claim by shareholders against directors and officers and is rarely successful.<sup>92</sup> However, such charges are not uncommon in Vietnamese businesses where the state maintains a shareholding position.<sup>93</sup>

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88. LIEN NGUYEN, CHRISTIAN LEVON & LINH NGUYEN, TOWARDS TRANSPARENCY, TRANSPARENCY IN CORPORATE REPORTING: ASSESSING THE 45 LARGEST COMPANIES 6–9 (2018) [hereinafter NGUYEN, LEVON & NGUYEN, 45 LARGEST COMPANIES].

89. Agence France-Presse, *Vietnam’s Top Telecom Bosses Face Arrest Over Loss-Making TV Deal Amid Corruption Crackdown*, S. CHINA MORNING POST (Nov. 14, 2018), <https://www.scmp.com/news/asia/southeast-asia/article/2173261/vietnams-top-telecom-bosses-face-arrest-over-loss-making-tv> [https://perma.cc/JA75-VFVE].

90. *Id.*

91. *Id.*

92. See generally Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239 (2017) (surveying waste doctrine).

93. See, e.g., *Anti-Corruption Committee Looks to Ramp Up Efforts in Key Cases*, NHAN DAN (May 21, 2019), <https://en.nhandan.com.vn/politics/domestic/item/7491802-anti-corruption-committee-looks-to-ramp-up-efforts-in-key-cases.html> [https://perma.cc/CJ4H-V6KZ] (noting a series of open corruption cases against the following businesses: Vietnam Social Security, Hai Thanh Co., MobiFone Telecommunications Corp., PetroVietnam Biofuels JSC, Phuong Nam (Southern) Bank, and Saigon Beer-Alcohol-Beverage Corp. (Sabeco) among others); Kham Nguyen, *Vietnam Court Sentences to Death PetroVietnam Ex-Chairman in Mass Trial*, REUTERS (Sept. 28, 2017), <https://www.reuters.com/article/us-vietnam-security/vietnam-court-sentences-to-death-petrovietnam-ex-chairman-in-mass-trial-idUSKCN1C40KW> [https://perma.cc/5GVP-LKE6]; Viet Tuan, *Vietnam to Put Corrupt Top Ex Officials in the Dock*, VN EXPRESS (May 21, 2019), <https://e.vnexpress.net/news/news/vietnam-to-put-corrupt-top-ex-officials-in-the-dock-3927087.html> [https://perma.cc/K6WJ-8P9J] (noting a case in which mismanagement of public land and state assets caused losses at Hai Thanh Company); *Vietnam Fraud Trial: Death Penalty for Ex-Head of OceanBank*, BBC NEWS (Sept. 29, 2017), <https://www.bbc.com/news/world-asia-41439866> [https://

The Mobifone prosecution is an example of an expression of a policy preference in favor of public enforcement over a self-enforcing model of corporate governance. In this public enforcement model, the state uses wars and corruption as the hooks to justify state policing of violations of the duties of care and loyalty. Where the targets of the public enforcement are corporations with state investment, criminal sanctions for mismanagement by corporate officers at least might be rationalized. However, effective January 1, 2018, amendments to the Penal Code as well as the Anti-Corruption Law now include private business corruption as criminal offenses.<sup>94</sup> The revised Anti-Corruption Law now criminalizes conflicts of interest in private businesses, including banning managers from signing contracts with businesses run by their relatives (notwithstanding the existence of interested director and manager safe harbor provisions in the Enterprise Law), among other restrictions on conflict transactions and relationships.<sup>95</sup>

In addition to deployment of the Anti-Corruption Law to monitor conflicts of interest in the business sector, in 2017 the Government Office adopted new regulations related to corporate governance in publicly traded companies.<sup>96</sup> In addition to laying out additional governance requirements for publicly traded companies, such as separation of CEO from the Chairman position, reiterating the right of shareholders to have access to books and records of the corporation, and a prohibition against tunneling, among other things, the decree reinforced the public enforcement aspect of corporate governance.<sup>97</sup> Violations of new public company governance are subject to inspection by the State Securities Commission and administrative fines in the event of discovery of violations.<sup>98</sup>

Perhaps in response to the difficulty in relying on corporate governance devices to instill a fiduciary culture, Vietnam has recently

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perma.cc/S4UP-WQVV] (former general director of OceanBank Nguyen Xuan Son was convicted of embezzlement, abuse of power, and economic mismanagement and sentenced to death).

94. LUẬT PHÒNG, CHỐNG THAM NHŨNG [ANTI-CORRUPTION LAW] [No. 36/2018/QH14] (Viet.); BỘ LUẬT HÌNH SỰ [PENAL CODE] [No. 100/2015/QH13] (Viet.); see John Frangos & Thomas J. Treutler, *New Penal Code Brings New Risks to Businesses in Vietnam*, BRINK (Mar. 12, 2018), <https://www.brinknews.com/new-penal-code-brings-new-risks-to-businesses-in-vietnam/> [<https://perma.cc/89C8-EPY6>]; see also *Extending Anti-Corruption Fight to Private Sector Enables Fair Business Environment*, VIET. NEWS (Dec. 7, 2018), <https://vietnamnews.vn/politics-laws/481583/extending-anti-corruption-fight-to-private-sector-enables-fair-business-environment.html> [<https://perma.cc/4S6H-NLJE>].

95. *Extending Anti-Corruption Fight to Private Sector Enables Fair Business Environment*, VIET. NEWS (Dec. 7, 2018), <https://vietnamnews.vn/politics-laws/481583/extending-anti-corruption-fight-to-private-sector-enables-fair-business-environment.html> [<https://perma.cc/4S6H-NLJE>].

96. See NGHỊ ĐỊNH HƯỚNG DẪN VỀ QUẢN TRỊ DOANH NGHIỆP CỦA CÔNG TY ĐẠI CHỨNG [DECREE GUIDELINES ON CORPORATE GOVERNANCE OF PUBLIC COMPANIES] [No. 71/2017/ND/CP] (Viet.).

97. See generally *id.*

98. See *id.* art. 34.

taken this new, more aggressive tact. This shift to public enforcement suggests that going forward one might not expect self-enforcing mechanisms of the Enterprise Law to be the source of fiduciary norms. Rather, the source of fiduciary norms, should they develop, may well be found in public enforcement of anti-corruption statutes. Such a result would be consistent with the view that the efficacy of rule of law projects in Vietnam's *Đổi Mới*, such as the investments made in rewriting the corporate law, are mixed at best.<sup>99</sup> It also reveals a policy preference for public enforcement rather than self-enforcement, consistent with political ambivalence that can surround the embrace of the market system in countries that, like Vietnam, do not concurrently adopt political reforms.

#### IV. THE ROLE OF INFORMAL TRANSMISSION VECTORS

As is clear from Part III, the mere fact that the formal legal structure of the corporate law is self-enforcing on paper is not sufficient for it to be self-enforcing in real life. Moving from formal legal structures on paper to formal legal structures in reality requires the development of a legal culture that seeks to enforce these rights.<sup>100</sup> Relying on external vectors to promote the transmission of fiduciary culture may provide an alternative to relying on domestic self or public enforcement. External vectors for the transmission of fiduciary culture might include foreign direct investment, trade agreements, and external dispute resolution mechanisms (including private arbitration).<sup>101</sup>

##### *A. Trading Relationships*

Since the end of World War II, the rapid development of an international trading order with the WTO at its center also gave impetus to renewed attention to the issues of the legal and regulatory infrastructure necessary for global trading to expand.<sup>102</sup> Global trade is, of course, not a new discovery. However, prior to its most recent incarnation, trade was constrained in part by a lack of formal regulatory mechanisms to permit

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99. See MARK SIDEL, *LAW AND SOCIETY IN VIETNAM* 199–222 (2008).

100. See Stijn Claessens & B. Burcin Yurtoglu, *Corporate Governance in Emerging Markets: A Survey*, 15 *EMERGING MKTS. REV.* 1, 24 (2013) (some evidence suggests voluntary corporate governance mechanisms have more effect where a country's governance system is weak. However, in the context of weak corporate governance institutions, there is an upper limit on the effect of voluntary governance mechanisms).

101. GILLESPIE, *supra* note 25, at 280 (Gillespie observes that demand for corporate governance is variable and that certain sectors, like the foreign invested sector, are amongst the strongest advocates for stronger governance and rule of law).

102. See generally Philip Abbott, Jeanet Bentzen & Finn Tarp, *Trade and Development: Lessons from Vietnam's Past Trade Agreements*, 37 *WORLD DEV.* 341 (2009) (addressing market imperfections through institutional reform was central to bringing output and trade expansion).

scale, relying mostly on reputation and other informal commitment mechanisms.<sup>103</sup> The new global trading order began a process of harmonizing the regulatory structures that govern trade and investment across the globe. Businesses seeking to be a part of the modern global trading system must comport with the system's regulatory structure and, to their benefit, may also avail themselves of that same structure. The new, more liberalized trading regime has successfully led to a rapid growth in volume of trade and interconnectedness of the global supply chain by engendering more fluid trade relations.<sup>104</sup>

Unlike the U.S., Vietnam is a small, open economy. It relies on its external relationships to provide its economy with much of the impetus it requires for growth. Consequently, external relationships, including the foreign invested sector and international trading relationships, may be critically important in transmitting important messages about legal culture that firms may, over time, adopt.

Dispute resolution systems play a central role in international trading relationships. The Transpacific Partnership (TPP) for its part includes a controversial Investor-State Dispute Resolution clause that permits international investors to sue states for infringements under the trading arrangement.<sup>105</sup> In addition, bilateral agreements often include provisions for alternate dispute resolution systems, including either domestic or international commercial arbitration. Outsourcing dispute resolution outside the home state (Vietnam) signals a lack of confidence in local institutions that is often justifiable. However, the scope of such arrangements remains focused on interfirm relationships or firm-government relationships and does not typically extend further into the *internal affairs* of domestic firms. Commercial arbitration is generally not available for the resolution of internal corporate disputes.<sup>106</sup> For the most part, commercial arbitration is restricted to contractual disputes between business entities. Consequently, any effect international vectors may have on the development of internal governance norms and fiduciary culture through the development of local courts and other self-enforcement mechanisms is, at best, a bankshot.

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103. Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *ECON. & POL.* 1 (1990); see Janet Tai Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 *J. LEG. STUD.* 349 (1981).

104. See WTO, *WORLD TRADE REPORT* 21–23 (2013) (since 1990, the value of global exports has more than tripled).

105. See generally Luke Nottage, *The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia* (ISEAS Economics, Working Paper No. 2017-2, 2017) (on file with Seattle University Law Review).

106. Le Cong Dinh, *Arbitration in Vietnam*, 11 *WORLD ARB. & MEDIATION REV.* 164, 168 (2000).

*B. Foreign Direct Investment*

Foreign direct investment is another possible vector that an open economy such as Vietnam may use to transfer fiduciary culture. To the extent that foreign invested firms act as examples of fiduciary culture, foreign direct investment may result in the long-term development of fiduciary norms. For example, although corruption is common, foreign invested firms in Vietnam generally do a better job of creating and disclosing internal processes to combat corruption and conflict of interest. In a recent study, more than half of Vietnam's forty-five largest companies disclosed that they utilized no internal processes to combat corruption or conflict of interest.<sup>107</sup> On the other hand, foreign invested companies outperform Vietnamese private companies in transparency related to combatting business corruption.<sup>108</sup> Vietnamese private companies outperform state-owned enterprises on the same score.<sup>109</sup> Though they score less than a hundred percent, large multinational subsidiaries score higher than all other types of businesses with regard to disclosure of their anti-corruption programs.<sup>110</sup>

As Professor Gillespie observes, foreign investors have been among the strongest advocates for strengthened rule of law in Vietnam.<sup>111</sup> Given their advocacy for a strengthened rule of law and attention to internal anti-corruption programs, one might expect foreign investors to provide momentum for the development of fiduciary culture. However, there is reason to suspect that these claims are limited, particularly those that suggest external mechanisms, like trade agreements or foreign investment, will have direct effects on internal governance of Vietnamese corporations.<sup>112</sup>

Foreign investment in the earliest years was largely dominated by foreign-domestic joint venture structures.<sup>113</sup> The joint venture structure provides a potentially excellent vehicle for transmission of cultural norms necessary for the development of fiduciary culture.<sup>114</sup> However, the

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107. NGUYEN, LEVON & NGUYEN, 45 LARGEST COMPANIES, *supra* note 88, at 12–13.

108. *Id.*

109. *Id.*

110. *Id.*

111. GILLESPIE, *supra* note 25, at 280.

112. See generally Tu-Anh Vu-Thanh, *Does WTO Accession Help Domestic Reform? The Political Economy of SOE Reform Backsliding in Vietnam*, 16 WORLD TRADE REV. 85 (2017) (arguing that rather than induce domestic reform, trade agreements may be counterproductive from a reform point of view).

113. Ha Thanh Nguyen & Klaus E. Meyer, *Managing Partnerships with State-Owned Joint Venture Companies: Experience from Vietnam*, 15 BUS. STRAT. REV. 39, 40 (2004) (observing nearly half of foreign investments were made via the joint venture mechanism in a 2001/2002 survey).

114. See generally Eric W.K. Tsang, Duc Tri Nguyen & M. Krishna Erramilli, *Knowledge Acquisition and Performance of International Joint Ventures in the Transition Economy of*

impetus for the development of the joint ownership structure was land access, not business expertise. Foreign investors in need of land to build factories or other facilities had to join with local ventures to access this land. Vietnamese partners in such joint ventures were almost exclusively state-owned enterprises and often had little subject matter expertise to bring to the table.<sup>115</sup> As a result, the joint venture structure was largely a product of regulatory arbitrage rather than a desire to transfer knowledge or corporate culture. Following the implementation of the U.S.–Vietnam Trade Agreement in 2001 and other market opening moves, joint ventures mostly gave way to wholly-owned foreign enterprises as foreign-invested firms were granted greater access to land without engaging with local enterprises.<sup>116</sup> While wholly foreign-owned firms may still be vehicles for transferring fiduciary culture, the process for doing so would be a longer process than under joint-venture structures.

In recent years, especially since the development of Vietnam's capital market and the implementation of the TPP, foreign investors have begun to more easily access the Vietnamese market via financial investments rather than using more traditional direct investment paths.<sup>117</sup> Implementation of the TPP permits foreign investors to control as much as fifty percent of a domestic entity without needing to seek special approval or license as a foreign investment.<sup>118</sup> Financial investments in publicly-traded Vietnamese companies provide an opportunity to jump start the development of fiduciary culture, especially where foreign financial investments are accompanied by board representation.

In some cases, however, entry via financial investments has not been smooth. ThaiBev, a Thai beer producer, is an example of this challenge. In December 2017, ThaiBev purchased 53.58% of SABECO, a

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*Vietnam*, 12 J. INT'L MARKETING 82 (2004) (developing a theory of knowledge acquisition and transfer through joint venture structures).

115. Prema-chandra Athukorala & Tran Quang Tien, *Foreign Direct Investment in Industrial Transition: The Experience of Vietnam*, 17 J. ASIA PAC. ECON. 446, 448 (2012) (notwithstanding liberalization of the formal investment structures, joint ventures with SOEs continued to remain the prime mode of FDI entry permitted in investment approval into the 2000s).

116. There is evidence that foreign investors investing in domestic private enterprises via the capital markets (stock exchanges) have a positive effect on stock prices. This leaves open the possibility that foreign capital flows through the securities markets may have the ability to affect the development of fiduciary culture and internal governance. See Xuan Vinh Vo, *Do Foreign Investors Improve Stock Price Informativeness in Emerging Equity Markets? Evidence from Vietnam*, 42 RES. INT'L BUS. & FIN. 986 (2017).

117. An Thai, *The Effect of Foreign Ownership on Capital Structure in Vietnam*, 8 REV. INTEGRATIVE BUS. & ECON. RES. 20, 21 (2017) (showing increase in foreign ownership in the Ho Chi Minh City Stock Exchange).

118. See Le Hong Hiep, *The TPP's Impact on Vietnam: A Preliminary Assessment*, ISEAS PERSPECTIVE, Nov. 4, 2015, at 1, 8.

state-owned beer producer, as part of Vietnam's privatization program.<sup>119</sup> Consistent with the Enterprise Law, ThaiBev then sought to take control of the seven person board.<sup>120</sup> However, the incumbent directors refused to seat ThaiBev's representatives.<sup>121</sup> Rather than take advantage of their rights under the Enterprise Law to seek an order from a court enforcing their rights as controlling shareholders of SABECO, ThaiBev sought the intervention of the Office of the Prime Minister to order its directors be seated.<sup>122</sup> ThaiBev took effective control of the company in April 2018, after the government (but importantly, not a court) ordered its directors be seated.<sup>123</sup>

Although financial investments offer a vector to transmit fiduciary culture, fiduciary culture remains very much a work in progress. Nevertheless, Essa et al. report evidence that the presence of foreign investors or significant state ownership discourages opportunistic behavior by controlling shareholders.<sup>124</sup> For example, when minority investors arrive at the table with base expectations of fiduciary culture, the presence of foreign investors can deter their opportunism and serve as a vector for transmission of fiduciary culture over time. The presence of state ownership, on the other hand, likely reflects the fact that the state continues to carry a big stick and that the threat of public enforcement through criminal prosecution is not without effect.<sup>125</sup>

### 1. Blockholding

Perhaps one obstacle to the development of fiduciary culture within business organizations is that Vietnam's largest corporations are

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119. *ThaiBev Files Complaint Over Saigon Beer Board*, NIKKEI ASIAN REV. (Mar. 29, 2018), <https://asia.nikkei.com/Business/Companies/ThaiBev-files-complaint-against-Saigon-Beer-following-48-acquisition> [<https://perma.cc/ECM8-U87K>]; see also Khanh Vu, *SABECO Adds Representatives of Major Shareholder ThaiBev to Board*, REUTERS (Apr. 23, 2018) <https://www.reuters.com/article/us-sabeco-thai-beverage-board/sabeco-adds-representatives-of-major-shareholder-thai-bev-to-board-idUSKBN1HU11W> [<https://perma.cc/F9MX-JRA3>]; *ThaiBev Joins SABECO Board After Govt Steps In*, VIET. NEWS (Apr. 24, 2018), <https://vietnamnews.vn/economy/426838/thaibe-joins-sabeco-board-after-govt-stepsin.html#hz5CYb0ckiOvbU41.97> [<https://perma.cc/CLC3-ZA8S>].

120. *ThaiBev Files Complaint Over Saigon Beer Board*, NIKKEI ASIAN REV. (Mar. 29, 2018), <https://asia.nikkei.com/Business/Companies/ThaiBev-files-complaint-against-Saigon-Beer-following-48-acquisition> [<https://perma.cc/ECM8-U87K>].

121. *Id.*

122. *Id.*

123. *Id.*

124. See generally SAMY ESSA, REZUAL KABIR & HUY TUAN NGUYEN, UNIV. OF TWENTE (NETHERLANDS), DOES CORPORATE GOVERNANCE AFFECT EARNINGS MANAGEMENT? EVIDENCE FROM VIETNAM (2016).

125. Prosecutions for misuse of state assets remain common in Vietnam. See, e.g., Mai Nguyen, *Vietnam Arrests Two Ex-Ministers Suspected of Mismanaging Public Investment*, REUTERS (Feb. 23, 2019), <https://www.reuters.com/article/us-vietnam-security/vietnam-arrests-two-ex-ministers-suspected-of-mismanaging-public-investment-idUSKCN1QC082> [<https://perma.cc/D9CY-7V7Q>].

dominated by blockholding structures rather than by Berle–Means corporations. The statutory framework for corporate governance in Vietnam takes its root from the lessons of Berle and Means and relies heavily on self-enforcement by shareholders. However, to the extent that Vietnamese corporations are more susceptible to controller agency problems than they are to manager agency problems, the corporate governance tools available to stockholders may not be up to the task of constraining controller opportunism.

Vietnam is still dominated by private companies, most of which are family-owned businesses. In such companies, the focus of fiduciary culture allows shareholders to use the tools of corporate law to mitigate management agency costs. This focus seems inappropriate because in family-owned firms, the separation of ownership and control are attenuated.<sup>126</sup> Indeed, Gillespie observes that corporate law in all its aspects is at least a second order issue in family-controlled private companies in Vietnam.<sup>127</sup>

If law is going to matter, then it will matter to Vietnamese public companies, where manager agency costs will ostensibly be more important. However, as it turns out, public companies in Vietnam are not traditional Berle–Means corporations. Rather than seeing a separation of ownership and control, insiders control large blocks of stock. Le and Le found that the average blockholding size in their sample of publicly-traded Vietnamese firms was forty percent in 2013.<sup>128</sup> The State is the largest blockholder in Vietnamese public companies, holding control blocks in seventy-one percent of the companies with blockholders in 2013.<sup>129</sup> During the period of 2009–2013, the average blockholding size remained relatively constant.<sup>130</sup> However, the composition of the blockholding has been slightly shifting with private domestic shareholders increasing their positions at the expense of state control as the government privatized its positions in firms.<sup>131</sup> Managers and foreign investors do not appear to be benefitting from this shifting of control. The government’s policy of privatizing state stock positions in publicly-traded positions is not creating

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126. GILLESPIE, *supra* note 25, at 281 (arguing that there is less demand for corporate law in family owned companies).

127. *See id.*

128. Trinh Vinh Le & Trang Huyen Le, *Ownership and Identity of Largest Shareholders and Dividend Policy: Evidence from Vietnam*, 8 ORGS. & MKTS. EMERGING ECONS. 86, 94–95 (2017).

129. *Id.*

130. *Id.*

131. *See id.*

Berle–Means corporations but rather transferring control from the state to private controllers.<sup>132</sup>

	Identity of Blockholders (percentage) <sup>133</sup>				
	2009	2010	2011	2012	2013
Manager	6%	4%	4%	4%	3%
State	78%	75%	73%	72%	71%
Local Private	14%	18%	19%	20%	22%
Foreign	3%	3%	4%	4%	4%
Total	100%	100%	100%	100%	100%

Corporate structures in Vietnam are characterized by a high degree of concentrated control, similarly to those in many other developing countries and the United States during the period before the Berle and Means study.<sup>134</sup> Whereas the typical Berle–Means corporation may be subject to managerial agency costs, Shleifer and Vishny observed that highly concentrated ownership is also subject to controller agency costs.<sup>135</sup> Controllers have incentives and the means to siphon private benefits of control at the expense of minority shareholders. Shleifer and Vishny also argue that the economic entrenchment of elites can bias capital allocation, slow capital market development, and obstruct outsiders from entering markets.<sup>136</sup> VinGroup, the largest private corporate business group in Vietnam, is an excellent example of a controlled Vietnamese corporation.<sup>137</sup> VinGroup is controlled by Mr. Pham Nhat Vuong, Vietnam’s first billionaire.<sup>138</sup> The VinGroup corporate business organization has adopted a familiar pyramid structure with control over a

132. This “oligarch effect” is not all that dissimilar to what happened in Eastern Europe after their rapid transition to markets, but in Vietnam, this transition is happening more slowly, but with the same basic result: more and more state assets are being transferred to the hands of private controlling interests rather than being shared widely through the economy. Cf. Sergei Guriev & Andrei Rachinsky, *The Role of Oligarchs in Russian Capitalism*, 19 J. ECON. PERSP. 131 (2005) (observing the dominance of oligarch controlled corporations in the Russian economy).

133. Le & Le, *supra* note 128, at 95.

134. See, e.g., BERLE & MEANS, *supra* note 26, at 64–65.

135. Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 739 (1997).

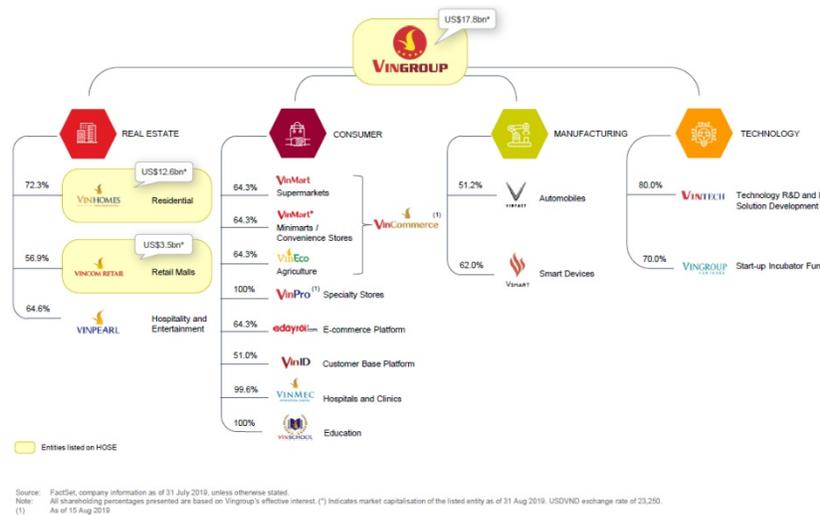
136. *Id.*

137. Estimated net worth of \$7.8 billion puts Mr. Vuong at #239 on the Forbes list. #239 *Pham Nhat Vuong*, FORBES (Sept. 13, 2019), <https://www.forbes.com/profile/pham-nhat-vuong/#503b2608382e> [https://perma.cc/25EX-LC49]; see also John Reed, *The Rise and Rise of a Vietnamese Corporate Empire*, FIN. TIMES (June 26, 2019), <https://www.ft.com/content/84323c32-9799-11e9-9573-ee5cbb98ed36> [https://perma.cc/C2ED-W5Q6].

138. #239 *Pham Nhat Vuong*, FORBES (Sept. 13, 2019), <https://www.forbes.com/profile/pham-nhat-vuong/#503b2608382e> [https://perma.cc/25EX-LC49].

series of subsidiaries held at the holding company level.<sup>139</sup> Pyramid structures, like the one used by VinGroup, are common in developing countries.<sup>140</sup> Such structures make extracting private benefits of control easier for controlling shareholders by permitting controllers to maintain control over the group, while also reducing the equity committed to the controlled group.<sup>141</sup>

Figure 2 VinGroup Corporate Structure: Evidence of Pyramid<sup>142</sup>



Blockholding affords different challenges than those that appear where manager agency costs are the focus. For example, the presence of controlling shareholders and pyramid structures suggests that tunneling or expropriation of private benefits by controlling shareholders may be a governance problem in Vietnamese companies.<sup>143</sup> In fact, Toan and Tran provide evidence that suggests that controllers engage in tunneling and expropriating private benefits by way of excess receivables in controlled

139. See Reed, *supra* note 137 (describing the corporate group as a Vietnamese chaebol).

140. La Porta et al., *supra* note 37, at 473; see also Lucian Aye Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights* (NBER, Working Paper No. 6951, 1999). In addition, the diversified conglomerate structure that such firms adopt is consistent with inefficient deployment of capital. See Duc Nam Phung & Anil V. Mishra, *Corporation Diversification and Firm Performance: Evidence from Vietnamese Listed Firms*, 55 AUSTL. ECON. PAPERS 386 (2016).

141. See *supra* note 140.

142. Vincom Retail, Corporate Presentation 9 (Sept. 2019) (unpublished presentation) (on file with Seattle University Law Review).

143. Tunneling refers to the transfer of resources out of a company to its controlling shareholder. See Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. 22, 22 (2000).

entities.<sup>144</sup> The pernicious effect of pyramid structures that accompany blockholding is well-known and is no doubt one reason why the Vietnamese government adopted 71/2017 ND-CP, which placed such transactions under greater scrutiny.<sup>145</sup> Absent workable tools for minority shareholders to constrain opportunism by controllers, blockholding works against the development of fiduciary culture. However, Toan and Tran find that tunneling activity is constrained when firms increase their reliance on bank financing.<sup>146</sup> As firms with blockholders increase their reliance on outside bank financing, they reduce their tunneling activity.<sup>147</sup> This suggests a role for banks, as third parties looking over the shoulders of blockholders, to help improve fiduciary culture.<sup>148</sup> Of course, reliance on bank financing is no guarantee against poor corporate governance, especially when bankers themselves are also open to corruption.<sup>149</sup>

#### CONCLUSION

The concept of the law and development movement and its successor, the new rule of law movement, is that it began with a belief, sometimes justified, that merely changing the formal legal and regulatory structures would affect development of legal culture. Legal culture, however, is embedded in a larger social context.<sup>150</sup> Merely changing legal rules will not necessarily result in changes to legal norms and legal culture.

The example of corporate governance in Vietnam is a case in point. One might agree that proper corporate governance exists to minimize the agency costs associated with the separation of ownership of capital from control that is exemplified by the management of most modern businesses. Efficient corporate governance structures are those, like the self-

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144. See generally Toan Luu Duc Huynh & Tran Bao Kieu Cong, *Bank Financing and Corporate Governance: Empirical Evidence from Vietnam*, 7 *ASIAN ECON. & FIN. REV.* 1055 (2017).

145. NGHỊ ĐỊNH HƯỚNG DẪN VỀ QUẢN TRỊ DOANH NGHIỆP CỦA CÔNG TY ĐẠI CHỨNG [DECREE GUIDELINES ON CORPORATE GOVERNANCE OF PUBLIC COMPANIES] [No. 71-2017-ND-CP] art. 24 (Viet.) (requiring prior approval of any transaction with a controller to be approved by both the shareholders at a general meeting and by the board of directors).

146. Huynh & Cong, *supra* note 144, at 1172.

147. *Id.*

148. *Id.*

149. See, e.g., Mai Nguyen, *Vietnam Prosecutes Bank Officials in Corruption Crackdown*, REUTERS (Nov. 23, 2017), <https://www.reuters.com/article/us-vietnam-security/vietnam-prosecutes-bank-officials-in-corruption-crackdown-idUSKBN1D00EB> [<https://perma.cc/HCF2-STEL>]; Khanh Vu, *Vietnam Jails 'Aluminum Vu' at Center of Corruption Scandal*, REUTERS (Dec. 20, 2018), <https://www.reuters.com/article/us-vietnam-security-trials/vietnam-jails-tycoon-aluminium-vu-at-center-of-corruption-scandal-idUSKCN10J118> [<https://perma.cc/MD3X-FWPL>]; *Vietnam Banker Gets \$937 Million Fine, 30-Year Jail Term for Embezzlement*, STRAITS TIMES (June 1, 2018), <https://www.straitstimes.com/asia/se-asia/vietnam-banker-gets-937-million-fine-30-year-jail-term-for-embezzlement> (last visited Jan. 22, 2020).

150. See Lawrence Friedman, *Legal Culture and Social Development*, 4 *L. & SOC'Y. REV.* 29 (1969).

enforcement regimes described earlier in this Article, that minimize incentives for managers to engage in self-dealing behavior while placing incentives on outside shareholders to engage in oversight. However, creation of self-enforcement mechanisms will not necessarily result in the development of fiduciary culture, especially when the problems faced by firms can be attributable in part to controller agency costs.

After Vietnam's now more than thirty years of experience developing its corporate governance, the results have been decidedly mixed. On the one hand, by removing obstacles to incorporation through shifting to a registration system, Vietnam has enjoyed an explosion in the growth of private enterprise since 2000. On the other hand, this rapid growth in the establishment of private businesses has not translated into the development of fiduciary culture. Rather than seeing a self-enforcing fiduciary culture, Vietnam has circled back to public enforcement of fiduciary principles. Under the guise of anti-corruption and anti-waste efforts, authorities are policing violations of the fiduciary duty of loyalty, violations that under self-enforcing structures like the current Enterprise Law should be policed by shareholders. This approach signals a policy preference to develop fiduciary culture enforced through public, rather than private, mechanisms—this notwithstanding the content of self-enforcing corporate law that the country adopted in recent years. Despite this policy preference, fiduciary culture may still develop endogenously through the influence of foreign financial investors with board representation as well as through the oversight of banks providing financing to the businesses.

It should be clear, given the past three decades experience of economic reform and transition in Vietnam, that the development of fiduciary culture and corporate governance is generally an organic process that responds to conditions specific to the cultural background against which they play out over time rather than to changes in the statute. This distinction is a lesson from the law and development movement that is learned once and again. As markets and corporate ownership structures develop and mature, there may well be internal pressures to take advantage of the tools offered by the corporate law and to develop robust governance structures. Perhaps those structures will resemble the self-enforcing fiduciary culture readily identifiable by American legal scholars, or perhaps not.