

# WHAT'S THE CONNECTION? VIETNAM, THE RULE OF LAW, HUMAN RIGHTS AND ANTITRUST

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I. INTRODUCTION

Foreign attempts to support advancing the rule of law<sup>1</sup> in Vietnam have taken many forms. In addition to focusing almost exclusively on economic law, existing legal assistance projects tend to concentrate on obvious targets such as the National Assembly, the courts, and human rights in general.<sup>2</sup> This essay proposes taking a different direction through the involvement of the United States in a somewhat unique domain for foreign legal aid: the introduction of an antitrust regime.

This article aims to create a specific model demonstrating the potential social benefits that adherence to the rule of law may deliver. It introduces a project design that with U.S. help will provide an antitrust system to Vietnam. The example proposed here requires, among other things, the drafting of country-specific antitrust legislation and the establishment of adequate enforcement mechanisms. The overall hope is that successful implementation of the outlined project will significantly promote the advancement of the rule of law and human rights in Vietnam. Possible improvements in U.S.-Vietnamese relations, as well as the enhancement of U.S. commercial interests in Vietnam, are also envisaged.

Part II briefly outlines the relevant political and legal background. Part III, forming the bulk of this essay,

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1. See BLACK'S LAW DICTIONARY 1332 (6th ed. 1990) (defining the rule of law, also called the "supremacy of law," as a principle providing that legal decisions should apply known legal principles or laws without the intervention of discretion in making the decision).

2. See Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC'Y REV. 93, 106 (1998) (explaining that Vietnam's "foreign legal assistance began with an exclusive focus on economic law," but has now branched out into other legal areas, including human rights).

discusses the rationale for a U.S.-backed antitrust project. Part IV considers in some detail the project's strategy and proposed implementation, and Part V describes a number of possible risks arising from it.

The general approach taken here is that utilization of extensive U.S. experience in the antitrust field can produce noticeable gains that will be felt by the Vietnamese society as a whole. At the same time, an antitrust project is not overly ambitious and avoids antagonizing the Vietnamese leadership.

## II. BACKGROUND

### A. General Background

Vietnam<sup>3</sup> has two main historical features. The first feature is constant wars.<sup>4</sup> The second feature is strong political influence by various foreign powers, including China, France, the former Soviet Union, and the United States.<sup>5</sup> Indeed, the effects of Confucianism, Colonialism, Communism, and local traditions are manifested in the legal system of today's Socialist Republic of Vietnam.<sup>6</sup> In 1986, pursuing economic prosperity, Vietnam embarked on a course of economic reform called *doi moi*, meaning renovation.<sup>7</sup> Despite many obstacles, the policy of *doi moi* continues today largely because the Vietnamese Communist

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3. Vietnam is located on the eastern side of Southeast Asia, south of China, northwest of the Philippines, and east of Laos. See Mark Sidel, *Vietnam: The Ambiguities of State-Directed Legal Reform*, in *ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 356, 356 (Poh-Ling Tan ed., 1997). The capital city of Hanoi was home to 3.5 million of the 75 million total population in 1996. See *id.* About 90% of the population is ethnic Kinh (Vietnamese), and Vietnamese is the official language. See *id.*

4. See MICHAEL C. WILLIAMS, *VIETNAM AT THE CROSSROADS* 5 (Council on Foreign Relations Press 1992) (1992). Paul Mus, famous French sociologist of Vietnam wrote, "Vietnam did not just happen: she occupied her territory only at the price of incessant wars." *Id.*

5. See *id.* at 5-17 (discussing the wars, occupation of Vietnam, and cultural influences exerted by these foreign nations).

6. See Sidel, *supra* note 3, at 360-63 (discussing the modern Vietnamese legal system that evolved as a result of these influences).

7. See *id.* at 358. Vietnam attempted minor reforms in the early 1980s, but "hardline policies largely persisted" until *doi moi* was initiated in 1986. *Id.* Under *doi moi*, "[c]entral planning was eased, social life relaxed, agriculture returned rapidly to family farming, most prices freed, and a host of other reforms initiated." *Id.*

Party (VCP) appears to assume that its future is firmly pinned to continuing economic growth.<sup>8</sup>

### B. Political and Legal Reforms

Vietnam's movement toward a market-oriented economy is accompanied by economic legislation considered necessary for that purpose.<sup>9</sup> While the VCP seems determined to adapt the legal system to the needs of the changing economy,<sup>10</sup> Vietnam remains a one-party state under their leadership.<sup>11</sup>

Stemming from this political and economic state of affairs are a number of contentious issues including the suitability of the separation of powers doctrine, the need to restructure the central state apparatus, and the protection of human rights.<sup>12</sup> More specifically, legal reforms raise serious concerns about the independence of the judiciary, the legislative struggle for power, the role of the executive within the legal system, and the fundamental problem of conflicting legal construction models.<sup>13</sup> In summary, the role of the VCP

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8. See *id.* at 358–59 (describing the economic and legal reforms that Vietnam has undertaken). “The Vietnamese Communist Party has made it clear that it intends to retain political authority, while allowing significant measures of economic and social liberalisation.” *Id.*

9. See William A.W. Neilson, *Asia's Economic Crisis Poses Challenges for Vietnam as Doi Moi Enters Second Decade*, 20 E. ASIAN EXECUTIVE REP. 9 (1998), available in LEXIS, Intlaw Library, Eaisan File.

10. See Mark Sidel, *The Re-Emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163, 163–64 (1994). “[E]conomic legislation to accompany economic reform and the creation of a market-oriented economy has been a significant goal of the Vietnamese political and economic leadership.” *Id.*

11. See *id.* (explaining that legal discourse is just the beginning of a “transition through law from a centrally planned economic and political structure to a more diverse and pluralist . . . system, [but] the process . . . has been marked by continuing, harsh repression of certain individuals and groups”); see also HIEN PHAP [Constitution] preamble, art. IV (Vietnam) (1992) (mentioning the VCP as the only party to provide leadership and representation for the people of Vietnam since 1930).

12. See Carlyle A. Thayer, *Recent Political Development: Constitutional Change and the 1992 Elections*, in VIETNAM AND THE RULE OF LAW 50, 52–55 (Carlyle A. Thayer and David G. Marr eds., 1993) (reviewing these and other contentious issues revealed by public discussions conducted when Vietnam amended its constitution in 1992).

13. See Sidel, *supra* note 10, at 169–74; see also Mark Sidel, *Legislating the Boundaries of Power in Vietnam: Conflicts of Lawmaking, Policy and the Language of Law in a Transitional Socialist Society* 1–4 (1997) (unpublished manuscript, on file with the *Houston Journal of International Law*) (reviewing the impact of legislative drafting as part of legal reform in Vietnam and the roles of the various political functions in that drafting exercise); NATALIE LICHTENSTEIN, *A SURVEY OF VIET NAM'S LEGAL FRAMEWORK IN TRANSITION* 54–59 (World Bank Policy Research Working Paper No. 1291, 1994) (providing an

and the related issue of the rule of law are sources of continuing tension within Vietnam.

### III. PROJECT RATIONALE

#### A. Objectives

The objective of the scheme outlined here is to actively support the evolution of the rule of law in Vietnam while remaining aware of the interests of U.S. businesses and others.

##### 1. Primary Objective: Establishing the "Rule of Law."

Relying on the "Western" model as a yardstick for evaluation, the significant elements of the rule of law opposing governmental arbitrariness existed in traditional Vietnam.<sup>14</sup> Western standards of the rule of law consist of two broad components. The first component is substantive due process of law, which requires legal rules to be uniform, rational, fair, and clearly ascertainable. The second component is procedural due process of law, which requires an institutional arrangement composed of a system of hierarchical courts run by professionals, independent from the executive, with well-defined procedural rules.<sup>15</sup> The current talk in Vietnam of improving "state rule by law" should not be mistaken with the Western concept of the rule of law.<sup>16</sup> The former refers to technical improvements made by scrutinizing the overlap of laws issued over several decades, codifying them by subject area, and training legal specialists to carry them out.<sup>17</sup> In contrast, the latter

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overview of Vietnam's legislative and judicial institutions as well as a description of the legislative process including implementation and dispute resolution options).

14. See Ta Van Tai, Was There a Rule of Law in Ch'ing China (1644-1911) and Nguyen Vietnam (1802-1884) 4-6 (Dec. 14, 1994) (unpublished manuscript, on file with the *Houston Journal of International Law*) (explaining that there was uniformity and universality in the application of national laws in traditional Vietnam).

15. See *id.* at 2.

16. DAVID G. MARR, VIETNAM STRIVES TO CATCH UP, ASIAN UPDATE 5, 13 (Asia Soc'y ed., Feb. 1995).

17. See *id.* at 13. Marr explains that the goal of this effort is to "create greater transparency in the legal process" because "former systems were often deliberately opaque." *Id.*

provides the foundation for a high degree of respect for human rights.<sup>18</sup>

In the Vietnamese sphere, “‘state rule by law’ reasserts the Confucian (and Marxist) principle that the good of society outweighs the good of the individual and all other self-interested entities, such as the family, the village, or the business enterprise.”<sup>19</sup> Thus, the discussion of the state rule by law in Vietnam generally boils down to “defining the ‘good of society.’”<sup>20</sup> On this reading, the creation of greater transparency in the Vietnamese legal process is a major challenge because the good of society is a vague term that is vulnerable to manipulation. So far, legislation has failed in resolving this and other underlying issues.<sup>21</sup> Indeed, the Vietnamese conception may be contrasted with the U.S. legal theory where individual rights are perceived as roughly equal to the rights of the state, and where the good of society is believed to be best served by safeguarding individual rights.<sup>22</sup>

## 2. *Secondary Objective: U.S. Investors’ Concerns*

The principal concerns of U.S. investors in Vietnam are red tape, corruption, domestic protectionism, and lackluster law enforcement, all of which tend to impede business.<sup>23</sup> In a

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18. See Tai, *supra* note 14, at 12.

19. MARR, *supra* note 16, at 13.

20. *Id.*

21. See *id.* (explaining that despite the effort toward legal transparency, there is still inconsistent application of the laws, and some laws recently passed reserve resolution on the issue of subsequent action); see also John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT’L L. 325, 336–38 (1994) (discussing the Vietnam perspective of commercial rights, saying that individual rights are protected typically only if they coincide with societal goals).

22. This legal theory is evidenced by the U.S. Constitution. See, e.g., U.S. CONST. amend. V (requiring that the private individual be compensated for the value of the property taken for public use, which shows that the individual and society exist on an equal plane); *id.* amend. XIV, § 1 (forbidding states from passing laws that “abridge the privileges or immunities” of individuals; “deprive any person of life, liberty, or property, without due process of law;” or deny any person “equal protection of the laws”).

23. See Reginald Chua, *Foreign Investors Impatient with Vietnam’s Rate of Change*, WALL ST. J. EUR., Nov. 26, 1996, at 9; see also MARR, *supra* note 16, at 17 (describing how foreign business representatives, when negotiating agreements, have to consider national and local requirements that often conflict). But see *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 2002–09 (1994) (discussing Vietnam’s 1987 Foreign Investment Law and the measures it puts in place to protect foreign investors, such as guarantees against foreign investment

speech given to the National Assembly, former Prime Minister Kiet stated that the Vietnamese “legal system fails to create an environment of security, transparency [and] a sense of long-term security among investors and businessmen.”<sup>24</sup>

*B. Special Considerations in Formulating the Project*

A number of factors must be considered in formulating the proposed project. The first consideration is the special nature of U.S.-Vietnamese relations. To be sure, the recent conflict between the two countries remains a potent factor and calls for extra care in any action taken by the United States.<sup>25</sup> Overall, the scheme proposed here will expedite the development of stronger U.S.-Vietnamese relations. Second, any proposed plan must respond to Vietnam’s genuine needs. In other words, it should address real shortages rather than mistaken or invented ones. Third, logic dictates that the project should embrace a legal field in which the United States can offer experience and models. Fourth, any field-specific U.S. effort must eventually serve, in one way or another, the broader objective of improving human rights conditions in Vietnam. Fifth, since any U.S. venture in Vietnam is closely watched at home and abroad, the program must be capable of clear explanation. Finally, since a number of existing foreign donors already operate to varying degrees in Vietnam,<sup>26</sup> any program seeking to have meaningful impact should avoid unnecessary duplication of effort and avoid the past mistakes of other foreign donors.

*C. Project Justification*

The natural tendency in approaching a rule of law project is to focus on goals such as strengthening the judiciary, the

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expropriation, protections against adverse changes in laws, and dispute resolution procedures).

24. Chua, *supra* note 23, at 9.

25. See, e.g., Henry A. Kissinger, *Outrage Is Not a Policy*, NEWSWEEK, Nov. 10, 1997, at 47, 47 (reporting that the national security focus of President Clinton’s meeting with China’s President Jiang Zeman had human rights activists reacting with “outrage and snide commentaries,” but supporting a cooperative rather than confrontational approach). Kissinger stated that America “should have learned in Vietnam that national frustration can transform a crusade for democracy into an assault on the inadequacy of America’s moral concern for peace.” *Id.*

26. See Rose, *supra* note 2, at 108–20 (describing the various legal assistance programs sponsored by multilateral and bilateral governmental organizations as well as private foundation donors in Vietnam).

legislature, the relevant executive agencies, and the system of legal education. These important projects are founded on the expectation of an overall movement of the legal system toward the rule of law in its Western version. All the same, in view of the objectives and special considerations mentioned above, this project takes a different approach by focusing on one area of law: antitrust.

### 1. *Antitrust*

Antitrust law is concerned with control of economic power.<sup>27</sup> It is based on the idea that competition is the appropriate means to control the abuse of economic power.<sup>28</sup> In the United States, the main objective of antitrust law is to promote the optimal use of resources.<sup>29</sup> This efficiency-oriented approach is undertaken to effectively cater to consumer preference and consumer welfare.<sup>30</sup> To put it more simply, it is believed that competition enables consumer preference to determine the proper quantity of goods to be produced, which optimizes the use of available resources.<sup>31</sup> Socially-oriented values of competition are also encompassed within the philosophies of U.S. antitrust law and include the deconcentration of economic power, more equitable income distribution, protection of market access, opportunity to compete on the basis of merits and choice, control of unchecked economic power through maintenance of the

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27. See Harry First, *Antitrust Law*, in *FUNDAMENTALS OF AMERICAN LAW* 427, 432 (Alan B. Morrison ed., 1996) (stating that because the U.S. antitrust statutes state no purpose, courts and commentators have had the task of articulating their purpose, and two major schools of thought have emerged, each of which deal with control of economic power to accomplish different aims).

28. See *id.* at 427 (explaining that the Sherman Act specifically prohibits contracts, combinations and conspiracies in restraint of trade and also prohibits monopolies while the Clayton Act contains provisions dealing with “specific business practices about which Congress was concerned” such as mergers).

29. See *id.* at 432. Two schools of thought, the “Chicago School” and the “pluralists,” have developed under U.S. antitrust law. *Id.* Both schools agree that consumer welfare is advanced through allocative efficiency, which “refers to making optimal use of resources available . . . so that the ‘correct’ amount of goods are produced” based on consumer preference. *Id.* However, the pluralists argue that antitrust laws should also include political and social objectives, while the Chicago School believes “the antitrust laws have but one purpose, ‘efficiency.’” *Id.*

30. See *id.*

31. See *id.*

competitive market, promotion of consumer choice, and promotion of fairness in economic behavior.<sup>32</sup>

To achieve these ends, U.S. antitrust laws generally prohibit practices that restrict competition. Unlawful practices include monopolization, cartels, anticompetitive mergers, price discrimination, and other unfair practices.<sup>33</sup>

Unlike China, where efforts are currently under way to introduce an effective antitrust regime,<sup>34</sup> Vietnam refuses to open the door to competition in many areas.<sup>35</sup> There is little doubt that this policy results in inefficiency and artificially high prices that harm the Vietnamese economy. For example, sky-high long distance charges and extremely low quality Internet service are largely attributed to the lack of effective competition.<sup>36</sup> Vietnam's resistance to competition in aviation brings about similar results.<sup>37</sup> Clearly, the lack of competition adversely affects the Vietnamese government's stated goals of having an export-oriented economy and improving social welfare.<sup>38</sup>

## 2. *Primary Objective: Development of the Rule of Law*

The development of an antitrust law and enforcement system from scratch can provide a mini-model and set an example for the proper application of the rule of law for the

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32. See *id.*; PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 24–27 (5th ed. 1997). These principles are the political and social objectives of antitrust law espoused by the pluralists. See First, *supra* note 27, at 457.

33. See First, *supra* note 27, at 457.

34. See Douglas Eakeley, *China is Showing an Interest in the Rule of Law*, NAT'L L.J., Nov. 10, 1997, at A23.

35. See, e.g., Samantha Marshall, *Vietnam: While Most of Asia Begins Opening the Doors to Competition, Hanoi Stands Firm*, ASIAN WALL ST. J., June 10, 1997, at S20 (reporting that one area where the Vietnam government "is keeping a tight grip on its monopoly" is the telecommunications industry "[w]hile the rest of the region gives in to the technology boom and opens up" to allow private licenses in this area).

36. See *id.*

37. See *Up in the Air in Asia*, WALL ST. J. EUR., Jan. 23, 1997, at 10 (editorial) (reporting that Japan, China, and Australia also deny competition in aviation).

38. See LICHTENSTEIN, *supra* note 13, at 36 (arguing that a set of competition laws is an important missing part of the transition to a market economy in Vietnam, and prospective competition laws in Vietnam should prevent unfair competition; regulate monopolies, including enterprises that remain in state hands; and protect consumers against cartel-like behavior).

general good.<sup>39</sup> If successful, the antitrust system will demonstrate for all to see the operation of substantive as well as procedural due process. The U.S. antitrust laws appear to be compatible with the substantive and procedural rule of law standards present in traditional Vietnam discussed earlier.

Substantively, the antitrust provisions attained in this model can be made universal, rational, fair, and clearly ascertainable.<sup>40</sup> Procedurally, antitrust laws provide a clear hierarchical institutional arrangement, independent from the executive, and run by professionals under regular and well-defined rules.<sup>41</sup>

### 3. *Secondary Objective: Addressing Foreign Investors' Concerns*

"Some Vietnamese officials still speak of restricting competition further to prevent 'disorder' in the market."<sup>42</sup> Thus, antitrust laws will provide foreign investors with a legal tool to fight domestic protectionism.<sup>43</sup> In that respect, a new antitrust system can be constructive within its limits, helping to adequately address concerns regarding corruption, red tape, lackluster law, and lack of transparency in the Vietnamese legal system.<sup>44</sup>

### 4. *Special Nature of U.S.-Vietnamese Relations*

Arguably, the creation of a new, politically neutral, professionally oriented, and specialized legal system, circumvents the mine fields that confront direct U.S.

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39. See Tai, *supra* note 14, at 1-2 (explaining that using a Western rule of law model for comparison would produce "rewarding findings" and allow development of an "East Asian rule of law equivalent" that would serve the purpose of "curbing governmental arbitrariness by certain legal rules and institutional arrangements").

40. See *id.* at 2 (explaining that these elements comprise the Western concept of the substantive rule of law).

41. See *id.*

42. Chua, *supra* note 23, at 9.

43. See *id.* An example of domestic protectionism in Vietnam occurred when the inefficient state-owned Southern Steel Corporation ran into financial trouble, and the solution was to shut down a foreign competitor operating in Vietnam. See *id.* Similarly, the Vietnamese government is "consolidating scores of state-owned companies into large single-industry conglomerates, undermining what little domestic competition now exists." *Id.*

44. See *id.*

involvement at the heart of the Vietnamese establishment.<sup>45</sup> Active participation by the United States in projects involving the VCP-dominated National Assembly, broader education and the like, may be counterproductive.<sup>46</sup> Simply put, establishing a focus on antitrust law avoids tinkering with overly sensitive issues that risk inciting a violent reaction.

At the same time, the antitrust system can cautiously and positively influence these institutions.<sup>47</sup> It will affect the National Assembly through specialized antitrust legislation, the courts through appeal from administrative decisions, the Executive through the creation of a professionally-oriented enforcement agency, and educational facilities such as universities. To reiterate, the antitrust system can effect change without being too intrusive.<sup>48</sup>

### 5. Responding to Vietnam's Real Needs

Vietnam's most important needs include the following: First, protectionist policies, corruption, and lack of workable competition appear to undermine the Vietnamese government's stated aim of promoting export-led growth articulated in the 1992 constitution.<sup>49</sup> Accordingly, the establishment of an antitrust regime tackling those problems may well appeal to the Vietnamese leadership.

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45. See Rose, *supra* note 2, at 94–95. Tensions created by the potential for political as well as economic change associated with legal assistance projects, explain why “the Vietnamese government has welcomed international legal cooperation, particularly in the areas of trade and investment law,” yet remains hostile toward legal assistance in “areas of direct legal-political reform.” *Id.*

46. See *id.* at 95. Vietnamese officials temper enthusiasm for legal assistance projects with concern that the United States wants to overthrow the VCP and free Vietnam. See *id.*

47. See *id.* at 99–101 (showing that legal and economic liberalization has resulted from *doi moi* with the VCP leading the reform process and without direct foreign pressure).

48. See *id.* at 95.

49. See HIEN PHAP arts. III, XV, XVI. Cynicism aside, the objectives of the Vietnamese leadership are plainly stated in the 1992 constitution. For instance, Article III provides that the state “builds the country prosperous and strong, and achieves social justice for everyone to enjoy a life of plenty, freedom, and happiness.” *Id.* art. III. Article XV provides that the state “develops the multisectoral commodity economy in accordance with the market mechanism.” *Id.* art. XV. Article XVI provides that “[i]t is the goal of state economic policy to make the country prosperous and the country strong . . . by promoting expanded economic and scientific-technical cooperation and exchanges with the world market.” *Id.* art. XVI; see also MINISTRY OF PLANNING AND INV., A GUIDE FOR THE FOREIGN INVESTOR 5 (1997) (stating that the goal of *doi moi* is to limit government interference with business and encourage foreign investment).

Second, because antitrust is essentially a state-intervention mechanism, it reinforces rather than weakens the state's "management" of the market-oriented economy in accordance with Article 15 of the 1992 constitution.<sup>50</sup>

Third, antitrust law encourages social values which are, at a minimum, in harmony with the "social justice" demanded by Article 3 of the 1992 constitution.<sup>51</sup> Indeed, competition allows for a more equitable distribution of income;<sup>52</sup> protects market access and provides an opportunity to prosper on one's merits;<sup>53</sup> controls the social power acquired by big business;<sup>54</sup> promotes fairness by improving consumer choice, "considering price, quality, and service;" fights unfair practices such as predatory and discriminatory pricing by maintaining competitive markets; and potentially contributes to economic stabilization.<sup>55</sup>

#### 6. *Useful U.S. Experience and Models*

The U.S. antitrust regime began with the broad provisions of the Sherman and Clayton Acts at the turn of the century, and over the years has been molded through judge-made law into the modern system,<sup>56</sup> making it perhaps the most developed of its kind. Hence, the United States can

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50. See HIEN PHAP art. XV (stating that the multisectoral economic structure is "based on state management and socialist orientations").

51. *Id.* art. III.

52. See AREEDA & KAPLOW, *supra* note 32, at 24–25 (arguing that equitable distribution occurs in a competitive economy because the perfect competitor earns no profits above that return necessary to stay in business due to competitive forces keeping profits down, whereas the beneficiaries of imperfect competition are the "firms' owners . . . , input suppliers (including labor union members), and the tax collector").

53. See First, *supra* note 27, at 432.

54. See *id.* Big business can be controlled through the deconcentration of economic power and the maintenance of competitive markets. See *id.*

55. *Id.* One common theory about the cause of unemployment asserts that monopolies and oligopolies are contributors because these industries are less flexible in terms of lowering the price of their goods to reflect lower production costs, which contributes to unemployment in a depression. See AREEDA & KAPLOW, *supra* note 32, at 27.

56. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–70 (1982). Antitrust law began with provisions of the Sherman and Clayton Acts which contain "the kernel of antitrust law" in broadly phrased language that is "almost constitutional in quality." *Id.* at 662–63. The judiciary has since provided "more comprehensive answers to the basic questions . . . as more cases are decided," creating the antitrust system in place today. *Id.* at 665.

provide valuable experience, expertise, and well-tested models.<sup>57</sup>

### 7. *Human rights*

The introduction of an antitrust regime can positively affect human rights in a number of ways. First, the rule of law model summarized here aims to significantly influence the cause of developing the rule of law in general.<sup>58</sup> Second, providing safeguards against arbitrary decisions affecting individuals in fields that are subject to the antitrust regime will impact human rights.<sup>59</sup> Third, the opportunity to prosper based on one's merits is a meaningful aspect of human liberty,<sup>60</sup> and in the Vietnamese context may affect the rights of women in particular.<sup>61</sup>

Finally, so much emphasis is placed on freedom of speech that other important human rights are overlooked, especially those associated with economic prosperity. These include the right to life, healthcare, employment, and education—all of which are closely associated with economic prosperity. As demonstrated by the U.S. experience, the contribution of antitrust laws cannot be overstated. These

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57. See Joseph P. Griffen, *United States Antitrust Laws and Transnational Business Transactions: An Introduction*, 21 INT'L LAW. 307, 307–17 (1987) (detailing the basic premise and objectives of U.S. antitrust laws, including relevant statutes; describing the enforcement agencies and their functions; and discussing models of statutory exemptions Congress created to resolve “conflicts between economic or social policies and free and fair competition”).

58. See *supra* notes 38–40 and accompanying text.

59. See *supra* notes 48–56 and accompanying text.

60. See AREEDA & KAPLOW, *supra* note 32, at 25–26 (stressing competition and economic opportunity as important social values that enhance individual liberty and maximize opportunity for producers and consumers).

61. In a competitive environment, one is less likely to have the luxury of recruiting and promoting personnel on a basis other than merit. “Merit and innovation must rise above status and personal relationships.” Sharon Hom & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815, 831 (1994). Markets can empower the disenfranchised and disempowered because markets “have a built-in mechanism for instability and the challenging of the status quo.” *Id.* at 835. “[W]hile competition in itself does not ensure any particular outcome, it nonetheless enchances [sic] the process by which creativity, social progress, and human rights can be advanced.” *Id.* at 837. More specifically related to women in Vietnam, the primary goal is for women to acquire more opportunities to work in commercial activities rather than in production and agriculture, which are labor intensive and provide low incomes. See Le Thi, *Women's Labour and Socio-Economic Status in a Market-Oriented Economy*, in VIETNAM IN A CHANGING WORLD 207, 214–15 (Irene Nørhund et al. eds., 1995).

include enhancing human liberty<sup>62</sup> and benefiting the consumer's economic position.<sup>63</sup>

8. *Activities and Experience of Prior and Existing Foreign Donors*

It has been argued that “[m]ost present-day legal assistance projects are designed to assist developing countries cope with this seemingly inevitable process of global economic integration in the post-Cold War era.”<sup>64</sup> In its early stages, foreign legal assistance to Vietnam almost exclusively focused on economic law.<sup>65</sup> However, legal assistance projects expanded to areas such as labor law, environmental law, family law, and human rights.<sup>66</sup> These projects include, among other things, legal training, institutional capacity building, and dissemination of legal information by multilateral,<sup>67</sup> bilateral<sup>68</sup> and other actors.<sup>69</sup>

The expansion of the size and scope of foreign legal assistance testifies to its success.<sup>70</sup> Countries perceived as

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62. See AREEDA & KAPLOW, *supra* note 32, at 25–26 (observing that by enhancing competition and economic opportunity, antitrust laws serve important social functions related to individual liberty).

63. In the United States, largely due to the influence of the Chicago School, modern antitrust adjudication is almost exclusively concerned with maximization of consumer welfare. This means that a competitive market caters to consumer needs in the sense that products are produced and sold under conditions most favorable to consumers. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 90–91 (1978). “The law’s mission is to preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers.” *Id.* at 91.

64. Rose, *supra* note 2, at 94.

65. See *id.* at 105–06.

66. See *id.* at 106.

67. See *id.* at 108–10 (discussing the work performed by the United Nations Development Programme (UNDP), “the dominant multilateral donor working on legal reform in Vietnam”).

68. See *id.* at 110–18 (describing in detail the financial support and scope of assistance projects conducted by bilateral partners Denmark, Sweden, Canada Australia, France, Japan, and the United States, with Denmark being the largest bilateral donor in the way of legal assistance).

69. See *id.* at 119 (detailing the Ford Foundation’s support of research on the social implications of economic reform); see also Mark Sidel, *Corporate Philanthropy in Viet Nam: Initial Data and Initial Problems*, in *NORTH VIET NAM NOW: FICTION AND ESSAYS FROM HA NOI* 246, 246 (Dan Duffy ed., 1996) (pointing out that the American, European, and Japanese companies investing in Vietnam are seeking to be an active part of the economy for years to come).

70. See Rose, *supra* note 2, at 108–18 (noting the legal reform efforts of a growing list of organizations and countries and the effectiveness of their assistance).

politically neutral, such as Sweden, participate in more politically sensitive projects including those involving human rights, family law, and criminal law.<sup>71</sup> Direct U.S. involvement in legal assistance to Vietnam, however, remains marginal, due to the shared unpleasant history between the two countries.<sup>72</sup>

It is probably too early for direct U.S. involvement in politically sensitive projects such as those taken on by Sweden.<sup>73</sup> As things presently stand, the situation reflects a near-optimal division of labor among foreign donors.<sup>74</sup> That said, the United States can continue its focus on economic law issues as most bilateral actors do.<sup>75</sup> In particular, U.S. efforts toward the establishment of an antitrust legal system can achieve much because the United States has extensive experience and the benefits of this new system will spillover to improve the welfare of the Vietnamese people.<sup>76</sup>

### 9. *Project Justification: Summary*

Successful performance of a functioning rule of law model in the antitrust area can contribute significantly to the development of the general rule of law in Vietnam<sup>77</sup> while avoiding politically dangerous ground and inefficient duplication of efforts with other foreign donors.<sup>78</sup> This model can result in welfare benefits felt across various sections of Vietnamese society that cannot be ignored by its leaders.<sup>79</sup>

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71. *See id.* at 112.

72. *See id.* at 115, 118.

73. *See id.* at 112, 118 (explaining that Sweden's neutrality and long-term financial commitment to Vietnam have opened avenues for assistance in sensitive areas such as family and criminal law, whereas lingering distrust resulting from the Vietnam war hinders expansion of U.S.-Vietnamese legal cooperation).

74. *See id.* at 108-18 (noting the special role of the UNDP in working with governmental agencies while bilateral actors tend to focus on projects of significance to each individual country's economic interests in Vietnam).

75. *See id.* at 111, 115-16 (describing the various legal assistance programs by the United States Information Service (USIS) in Hanoi, and explaining that despite these programs, the USIS focuses more on economic reform in Vietnam than it does on legal reform).

76. *See supra* notes 38-40 and accompanying text.

77. *See supra* notes 38-40, 48-56 and accompanying text.

78. *See Rose, supra* note 2, at 108-18 (discussing the extensive scope and substance of legal assistance projects undertaken by each multilateral and bilateral actor working with Vietnam on its legal reforms).

79. *See Peter M. Lichtenstein, A New-Institutionalist Story About the Transformation of Former Socialist Economies: A Recounting and an Assessment,*

## IV. PROJECT STRATEGY AND IMPLEMENTATION

The previous section discussed various theoretical justifications for a U.S.-backed antitrust project in Vietnam. The remaining sections deal with technical and more detailed implementation issues. Since a comprehensive analysis would be beyond the scope of this essay, the discussion that follows merely intends to suggest future alternatives.

A. *Coordination Arrangements*

A key to successful project planning and implementation is coordination with a leading agency chosen by the Vietnamese government for that purpose.<sup>80</sup> One candidate, though by no means the only one, is the Ministry of Trade.<sup>81</sup> The Ministry of Planning and Investment, the Ministry of Justice, and other bodies, may also take part in the strategic planning process.<sup>82</sup>

B. *Background Research*

Another important factor is adequate background research.<sup>83</sup> Basic research will enable the prospective antitrust system to match Vietnam's specific needs.<sup>84</sup> Research to be conducted within Vietnam is a prerequisite for

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30 J. ECON. ISSUES 243, 252, 256 (1996) (explaining the inefficient economy of the old Vietnam and the benefits of moving to a more robust, efficient, and prosperous economy). Fair competition will enable private business formation and redefine state-owned enterprises as decentralized, autonomous entities. This will allow state-owned and collective enterprises to coexist with private businesses and joint state-private ventures such that "natural selection will determine which of these organizational forms will survive in the evolving environment". *Id.* at 256.

80. See Sidel, *supra* note 3, at 364, 367–68 (discussing the role of the VCP as "the force leading the State and society" and reviewing the roles of government institutions empowered by the VCP with "special responsibility for the administration of law, and security functions") (quoting HIEN PHAP art. IV).

81. See *id.* at 368 (describing the economic and trade institutions established in Vietnam and explaining that the Ministry of Trade is responsible for "Vietnam's domestic and foreign trade-related legislation").

82. See *id.* at 367–68 (describing the roles of these institutions).

83. See Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221, 222 (1993) (stating that "[l]egal training and research constitutes the base from which an effort to confront the challenges of economic liberalization and political stability and their contradictions must initially emanate").

84. See *id.* at 226 (explaining that researchers have the task of "determining the appropriate relationship between the competing areas of legal reform, economic reform, and political reform").

any future action.<sup>85</sup> The Institute of State and the Law in Hanoi is probably the most appropriate institution to conduct the research, mainly due to its relative academic strength, its connection to policy debates within the VCP, and its experience with foreign contacts.<sup>86</sup> U.S. expertise on antitrust regulation and economics, combined with the Institute's familiarity with what is actually going on in Vietnam, is likely to yield the desired outcome,<sup>87</sup> namely, the gathering of relevant background data and realistic analysis of that data for project design purposes.<sup>88</sup>

### C. Training

A later and equally important phase is the training of specialists in the antitrust field. Training programs must accommodate not only students but also Vietnamese officials who will serve in the antitrust enforcement agency, officials from other related government agencies, and judges.<sup>89</sup> As with the research aspect of the project, U.S. assistance in establishing antitrust law courses in one or more of the leading academic institutions<sup>90</sup> necessitates the presence of U.S. experts in Vietnam, visits to the United States by

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85. See, e.g., LICHTENSTEIN, *supra* note 13, at 36–37. Lichtenstein asserts that in Vietnam, specific legislation promoting competition is not enough. See *id.* “[I]t is also important that other legislation be reviewed and revised to remove potential anti-competitive effects, such as requiring people’s committee approvals of new entrants to compete with state enterprises under their jurisdiction.” *Id.*

86. See Sidel, *supra* note 83, at 242–43 (stating that the Institute is not burdened by the training obligations of other legal research institutions, and it is one of the few schools best connected with Communist Party policy debates).

87. See *id.* at 242 (explaining that the Institute “participate[s] in inter-agency Party and government task forces and research committees,” which accounts for its understanding of the VCP’s policy issues).

88. See *id.* (describing the Institute’s work as “primarily theoretical” allowing it to focus on research and apply that information to resolving problems, such as its recent involvement in organizing “the structure of the state apparatus and the relationship between center and locality”) (quoting the Institute Director Profesor Dao Tri Uc).

89. See *id.* at 254–55 (explaining that law school faculty, legal officials, and judges have received general legal training but lack specialized training in economic, civil, corporate, trade, investment, banking, and labor law).

90. See Sidel, *supra* note 83, at 230–45 (providing an overview of the organization and programs, faculty and faculty training, and development goals and conflicts at the Hanoi Law College and its Ho Chi Minh City Branch College, Hanoi University Faculty of Law, Ho Chi Minh City University Faculty of Law, and the Institute of State and Law in Hanoi, which are the leading academic institutions).

Vietnamese officials, and investment in libraries and information facilities.

#### D. Legislation

Once the necessary background research is concluded, the drafting of Vietnamese antitrust legislation can begin. Legislation will cover both substantive laws, such as laws prohibiting cartels and monopolies, and procedural issues, such as establishing an enforcement agency. As with any other legislative effort in Vietnam, many actors are expected to be involved, including the National Assembly.<sup>91</sup> One outstanding component of the prospective Vietnamese antitrust legislation, which distinguishes it from the U.S. system, is the significance of state-controlled enterprises, their relation to private enterprises, and their subjection to antitrust control.<sup>92</sup>

#### E. Enforcement Mechanisms

Considerable difficulties relating to the rule of law in Vietnam are implementation and enforcement.<sup>93</sup> It follows that special emphasis in those areas is necessary.<sup>94</sup> As in the United States and the European Union, two tiers of enforcement are needed.

On one level, an agency designed to address antitrust issues must be established. A relatively independent executive agency similar to the Federal Trade Commission is

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91. See Laura A. Malinasky, Comment, *Rebuilding With Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 BERKELEY J. INT'L L. 438, 440 (1996) (describing the National Assembly as the supreme legislative body in Vietnam, giving it the power to amend the constitution and change laws, whereas the highest administrative body is the Government, which is an executive body of the National Assembly and is headed by the Prime Minister).

92. See Chua, *supra* note 23, at 9 (noting that "Hanoi seems bent on protecting domestic manufacturers, many of them inefficient state-owned enterprises" from the effects of foreign investor competition, and industry analysts claim protectionism undermines the government's export-led growth goals).

93. See, e.g., Jiang Ping, *Chinese Legal Reform: Achievements, Problems and Prospects*, 9 J. CHINESE L. 67, 74 (1995) (providing a useful description of the Chinese experience with legal reforms, which may be similar to what Vietnam will experience where enforcement of newly promulgated laws is difficult because the government fails to observe the law in its own conduct, thereby undermining the rule of law concept).

94. See *id.* (giving an example of the Chinese State Council's refusal to abide by its authority limits set by its constitution when it passed regulations to give effect to its own budget because the legislative authority would not pass them).

one option.<sup>95</sup> An agency similar to the Antitrust Division of the U.S. Department of Justice is another.<sup>96</sup> Each has its pros and cons, but the second may be a preferable model for Vietnam because under its prevailing political environment, a strong link to the leadership is of utmost importance for eventual success.<sup>97</sup>

The second line of enforcement shall consist of assigned specialized courts.<sup>98</sup> These courts will deal with appeals from administrative decisions. The Economic Division of the Supreme People's Court (Economic Division) is probably best qualified for this task.<sup>99</sup> Assignment of this responsibility to the Economic Division can further two goals. First, the Division's involvement will emphasize the importance attributed to antitrust enforcement by the Vietnamese leadership.<sup>100</sup> Second, the presence of an administrative body that is subject to weighty judicial review creates a mini-model that is the very object of any rule of law project.<sup>101</sup>

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95. See 15 U.S.C. §§ 41, 45 (1997) (creating the Federal Trade Commission and detailing the scope of the Commission's power).

96. See BORK, *supra* note 63, at 407 (describing the responsibilities of the Antitrust Division as including both litigation and the formation of new legislation to promote competition).

97. See Rose, *supra* note 2, at 99 (outlining how the VCP controls the basic direction for development of the law and how every government institution must operate within this framework).

98. See Malinasky, *supra* note 91, at 457 (showing that the recent changes to the Vietnamese judicial system include an assigned, specialized group of Economic Courts, which were established to respond to the needs of foreign investors for adequate dispute resolution).

99. See Trinh Hong Duong, *Organization and Functioning of the People's Courts in Vietnam*, VIETNAM L. & LEGAL F., Dec. 1994, at 28, 28-29 (describing the composition and interrelation of the Supreme People's Court and the Economic Division); see also Malinasky, *supra* note 91, at 457-58 (illustrating the extent of power vested in the Economic courts, which began hearing cases in July 1994, and were created to provide an adequate means of resolving the disputes of foreign investors).

100. See Duong, *supra* note 99, at 28-29 (describing the system of People's Courts as one of the four organs of "the State machinery," with the Supreme People's Court being "the highest Court of the Socialist Republic of Vietnam," and the Economic Division being responsible for conducting "economic cases that are of nationwide consequences").

101. See Suzanne Novak, *Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional*, 26 FORDHAM URB. L.J. 121, 157 (1998) (discussing the importance of judicial review in an administrative law system because this provides a means for citizens to challenge the action of the administrative law action in an independent tribunal); see also Kim Rubenstein & Jenny Schultz, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO*, 11 ST. JOHN'S J. LEGAL COMMENT. 271, 294-95 (1996) (noting the importance of

## V. RISKS

To be sure, the proposed antitrust project entails significant risks and might fail for a variety of reasons. First, extensive interaction with Vietnam's somewhat Byzantine bureaucracy is inevitable.<sup>102</sup> It is difficult to estimate the likely outcome of that interaction, and there is a real risk that it will ultimately harm rather than strengthen the rule of law and U.S.-Vietnamese relations. Second, the proposed scheme creates a new and potentially burdensome administrative system on top of the already existing one.<sup>103</sup> Finally, even if successfully implemented, the fate of the project ultimately depends on whether the model established will actually create domestic confidence in the rule of law. In particular, there is a danger that the whole field of antitrust law will be viewed as an American attempt to dominate Vietnam's internal affairs.<sup>104</sup>

## VI. CONCLUSION

The project outlined above aims to help build a model and set an example for proper operation of the rule of law. It does so by focusing on a specific and limited area of law, antitrust. It is hoped that successful performance of the antitrust system will enhance Vietnam's confidence in the rule of law,<sup>105</sup> improve and expedite the advance of U.S.-Vietnamese

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appellate review in the World Trade Organization's dispute settlement system and comparing this appellate review to judicial review in an administrative law system).

102. See Malinasky *supra* note 91, at 440-41 (pointing out that the National Assembly, the Government headed by the Prime Minister, and other "national committees and regional or local government bodies enact regulations" so investors must examine the relevant laws at the national as well as the local level); see also John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 334-35 (1994) (laying out the "complex patchwork of central and provincial legislation" upon which implementation of statutes depends).

103. See *id.*

104. The VCP may take the same view as the Chinese government when it comes to American involvement. See, e.g., Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products From the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611, 621 (1994) (observing that "China's leadership interprets America's conditional renewal of [most-favored-nation] as meddling in internal affairs").

105. What may result instead of confidence in the rule of law is a reaction similar to that experienced in China. See, e.g., William P. Alford, *Double-edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, 122 DAEDALUS 45, 63 (1993) (explaining how the Chinese elite abuse the legal

relations, and serve U.S. investors' interests without provoking prohibitively strong opposition in Vietnam or the United States. Considering the current political weaknesses of some of its neighboring countries, Vietnam, in its latest transitional state, may wish to differentiate itself from those countries and learn from their mistakes. One such mistake is the scant supply of true domestic competition, and Vietnam will need to work on this area to distinguish itself from its neighbors.<sup>106</sup> From this standpoint, the United States may be surprised to find fertile ground for its future efforts to help reinforce Vietnam's rising commitment to the rule of law.

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system by using it to attack political opponents rather than "aspiring to serve higher ideals of justice," as a positive rule of law model would envision).

106. See Chua, *supra* note 23, at 9 (discussing how the Vietnamese government is consolidating state-owned businesses and therefore restricting domestic competition); see also Michael S. Bennett, *Banking Deregulation in Indonesia*, 16 U. PA. J. INT'L BUS. L. 443, 471-72 (1995) (comparing the varying degrees of progress in dismantling restrictive banking regulations in Southeast Asia with Vietnam being the furthest behind on the reform spectrum, and describing its banking system as "completely closed and monolithic").