

The Drafting of Vietnam's Consumer Protection Law:
An Analysis from Legal Transplantation Theories

by

Cuong Nguyen

LL.B., Hanoi Law University, 1998

LL.M., Niigata University, 2004

A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

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in the Faculty of Law

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Supervisory Committee

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Abstract

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This dissertation uses the latest development in consumer protection law in Vietnam (the adoption of the *Consumer Protection Law* of 2010 to regulate transactions between consumers and traders) to test key claims in competing legal transplantation theories. This research investigates comparative law debates about the legitimacy, usefulness and possibility of legal transplantation in law reform in developing and transitional countries. Alan Watson and his proponents believe strongly in the possibility of legal transplants, but fail to provide a clear and concrete methodology for producing effective and efficient laws. On the other hand, Robert Seidman and Ann Seidman openly reject the legitimacy of legal transplants, but offer a comprehensive methodology for effectively conducting law reform projects. They believe that, by following a problem-solving institutionalist legislative theory, legal drafters and law-makers in charge of law reform projects can easily produce effective and efficient laws.

This dissertation argues that the nature of the reform of laws regulating consumer transactions in Vietnam is much more complex than Watson's theory imagines. It also

shows that, although the reception of foreign legal models is part of this law reform project, past legal transplants as well as the local law-making culture may filter or even inhibit the reception of foreign legal solutions. This research also reveals that current consumer law reform in Vietnam tends to follow the problem-solving approach, although it deviates somewhat from the legislative methodology proposed by the Seidmans. This dissertation attempts to clarify these deviations and explain the reasons for them.

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Dedication

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Abbreviations

ADB = Asian Development Bank

APEC = Asia-Pacific Economic Cooperation Forum

ASEAN = Association of South East Asian Nations

CIDA = Canadian International Development Agency

CPL = *The Law on Protection of Consumers' Rights and Interests of Vietnam* of 2010 (or the *Consumer Protection Law*)

CPO = *The Ordinance on Protection of Consumers' Rights and Interests* of 1999

CPV = The Communist Party of Vietnam

CSR = Comparative Study Report

CSTE = The National Assembly's Committee for Science, Technology and the Environment

DC = Drafting Committee

Decree 69 = *Decree No. 69/2001/ND-CP dated 2 October 2001 giving guidelines on the implementation of the Ordinance on Protection of Consumers' Rights and Interests*

Decree 55 = *Decree No. 55/2008/ND-CP dated 24 April 2008 giving guidelines on the implementation of the Ordinance on Protection of Consumers' Rights and Interests* (replacing Decree 69)

EG = Editing Group

IMF = International Monetary Fund

JICA = Japan International Cooperation Agency

LND = Legal Normative Document

LoL = "Law on Laws" = *Law on Promulgation of Legal Normative Documents*

MoIT = Ministry of Industry and Trade

MoJ = Ministry of Justice

NA = National Assembly

NASC = The Standing Committee of the National Assembly

ODA = Official Development Assistance

SR = Survey Report

UCPD = *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* [‘Unfair Commercial Practices Directive’]

UN = United Nations

UNDP = United Nations Development Programme

UNCTAD = United Nations Conference on Trade and Development

US = The United States of America

USAID = The United States Agency for International Development

VCAD = Vietnam Competition Administration Department

VCCI = Vietnam Chamber of Commerce and Industry

Vinastas = Vietnam Standard and Consumer Protection Association

WB = World Bank

WTO = World Trade Organization

Vietnamese – English Glossary

VIETNAMESE	ENGLISH
<i>ban chat xa hoi</i>	social nature
<i>Ban soạn thảo</i>	Drafting Committee (DC)
<i>bao ve quyen va loi ich cua nguoi tieu dung/bao ve nguoi tieu dung</i>	protection of consumers' rights and interests/consumer protection
<i>Bo</i>	Ministry
<i>Bo Cong Thuong</i>	Ministry of Industry and Trade (MoIT)
<i>Bo Khoa hoc va Cong nghe</i>	Ministry of Science and Technology
<i>Bo Thong tin truyen thong</i>	Ministry of Information Communication
<i>Bo truong</i>	Minister
<i>Bo Tu phap</i>	Ministry of Justice (MoJ)
<i>Bo Van hoa thong tin</i>	Ministry of Culture and Information
<i>Bo Y te</i>	Ministry of Public Health
<i>Chinh phu</i>	Government
<i>chuyen trach</i>	[working on] full-time [basis]
<i>co che dieu chinh phap luat</i>	mechanism of legal regulation
<i>Cuc quan ly canh tranh</i>	Vietnam Competition Administration Department (VCAD)
<i>Cuc quan ly thi truong</i>	Market Control Department
<i>dai bieu kiem nhiem</i>	part-time [NA] members
<i>Dai hoi dai bieu toan quoc</i>	National Congress
<i>Hoi dong tham dinh</i>	Evaluation Council
<i>Hoi tieu chuan va bao ve nguoi tieu dung Viet Nam</i>	Vietnam Standard and Consumer Protection Association (Vinastas)
<i>hop dong dan su</i>	civil contract
<i>hop dong kinh te</i>	economic contract
<i>huong uoc</i>	village covenant
<i>kiem nhiem</i>	[working on] part-time [basis]
<i>lang</i>	village
<i>Luat</i>	Law
<i>luc luong quan ly thi truong</i>	market control agencies
<i>mo hinh kinh te tong quat</i>	general model of economic development
<i>mot nguoi day toi con hai nguoi day lui</i>	one person pushes forward while [at least] two others push back
<i>ngghi dinh</i>	Decree
<i>nguoi tieu dung</i>	Consumer
<i>nha nuoc phap quyen</i>	law-governed state
<i>nhan</i>	benevolence towards other people
<i>Phap lenh</i>	Ordinance
<i>phep vua thua le lang</i>	The law of the king is [<i>de facto</i>] lower than the village covenant
<i>Phong</i>	[District] department

<i>Phong Thuong mai va Cong nghiep Viet Nam</i>	Vietnam Chamber of Commerce and Industry (VCCI)
<i>quan ly thi truong</i>	market control
<i>qua do len chu nghia xa hoi</i>	transition to socialism
<i>quan chi phu mau</i>	state officials are “fathers” or “mothers” of ordinary people.
<i>Quoc hoi</i>	National Assembly (NA)
<i>So</i>	Provincial department
<i>tap trung dan chu</i>	democratic centralism
<i>tham dinh</i>	[to] evaluate; evaluation
<i>tham tra</i>	[to] verify; verification
<i>thong tu</i>	circular
<i>thu tuc don gian</i>	simplified civil procedure
<i>thuong nhan</i>	Merchant
<i>tin</i>	faithful treatment of others; building trust and keeping promises
<i>To bien tap</i>	Editing Group (EG)
<i>to chuc, ca nhan kinh doanh hang hoa, dich vu</i>	organizations and/or individuals conducting business in goods and/or services = traders
<i>Toa an nhan dan</i>	People’s Court
<i>Uy ban nhan dan</i>	People’s Committee
<i>Uy ban nhan dan tinh</i>	Provincial People’s Committee
<i>Uy ban nhan dan huyen</i>	District People’s Committee
<i>Uy ban nhan dan xa</i>	Commune People’s Committee
<i>Uy ban khoa hoc, cong nghe va moi truong – Quoc hoi</i>	The Committee of Science, Technology and Environment of the National Assembly (CSTE)
<i>Uy ban phap luat Quoc hoi</i>	The Law Committee of the National Assembly (the NA’s Law Committee)
<i>Uy ban thuong vu quoc hoi</i>	The Standing Committee of the National Assembly (NASC)
<i>Vienkiem sat nhan dan</i>	People’s Procuracy
<i>Vu phap che</i>	Department of Legal Affairs (of a ministry)

Chapter 1

INTRODUCTION

1.1 The Context of the Research

Prior to 1975, Vietnam was well-known throughout the world for its long and devastating war with the United States. Even now, despite the fact that the war ended in 1975, and Vietnam has been unified since that time, to many foreigners, especially in America or Europe, Vietnam is imagined as a very poor country seriously devastated by war and by many internal problems. In reality, as with many former socialist countries¹ which had bitter experiences with centrally planned economies,² in 1986, Vietnam launched the Doi Moi (Renovation) Policy and gradually transitioned from a command economy to a market-based economy. After 25 years of transition, a market economy has been established, in which most resources such as goods, services, capital, land, labour, and technology are allocated through market systems. The self-interest of individuals and enterprises is recognized as a legitimate driver of their activities. Competition, with the “carrot” of profit and the “stick” of loss, is a basic mechanism governing the activities of almost all enterprises (private-invested as well as state-invested; domestic-invested as well as foreign-invested) and is widely seen as the dynamic force moving the whole economy forward.³ Adam Smith’s “invisible hand” and the government’s “visible hand” are both used. Vietnam has also opened up its economy to the world to attract foreign investment and to promote exports. At present, Vietnam has trade and investment relationships with 180 countries and territories, with its major trading partners being the United States (US), the European Union (EU), Japan, China, Canada, South Korea, the Association of Southeast Asian Nations (ASEAN) and Russia. Vietnam has re-established official relationships with key international economic organizations,

¹ John Swan, Barry J. Reiter & Nicholas C. Bala, *Contracts: Cases, Notes & Materials*, 7th ed. (Markham, ON: LexisNexis Butterworths, 2006) at xxiii.

² See section 3.2 for detailed discussion.

³ Le Thi Hoang Oanh, “To Build Competition Law in the Context of the Transition to Market Economy in Vietnam”, online: JFTC <<http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2002/Vietnam1.pdf>>.

including the World Bank and the International Monetary Fund (IMF). Vietnam also joined the World Trade Organization (WTO) in early 2007.

These changes in policy are represented by a comprehensive legal reform carried out by the Vietnamese government to make its legal system friendlier to market operations.⁴

These new policy changes dialectically helped Vietnam to experience substantial socio-economic changes. From an economy in which state-owned enterprises and cooperatives visibly dominated prior to 1990, Vietnam now has a dynamic market economy in which the private and foreign-invested sectors play an increasing role by currently contributing about 65% of GDP. Every year, about 20,000 new private enterprises are set up, while most state-owned enterprises have been privatized or turned into joint stock companies. Vietnam has also attracted about \$150 billion USD for the past 20 years. Export and import turnover increased from around \$1 billion USD in 1990 to about \$157 billion USD in 2010.⁵ Since then, Vietnam has experienced the second highest economic growth rate in Asia, following that of China. Poverty was reduced from 58% in 1993 to around 9.45% in 2010.⁶ Most people now have a much better life. A consumer society of 87 million people is emerging, which is creating a big opportunity for the business community in Vietnam, as well as for foreign investors; however, this opportunity also poses many problems for government in terms of regulatory framework reforms.

From a social perspective, Vietnam is also witnessing unprecedented changes, including a transition from an agrarian to a more visibly industrial and trade-based society, and from a custom-based *society* to a more rule-of-law-based one. With the increasing role of markets and contracts in the daily lives of all people in Vietnam, it can

⁴ Here are some examples: in 1987 the first *Law on Foreign Investment* was adopted and, in 1990, the first *Law on Private Enterprise* and *Law on [Private] Companies* were introduced. In 1992, the new constitution was adopted to officially legalize the market mechanism, to recognize and protect private ownership and to secure the business freedom of all citizens. In 1994, the first *Labour Code* was adopted to allow private enterprises to freely hire employees. In 1995, the first *Civil Code* was enacted in which property rules, contract rules, tort rules, succession rules, land use right rules and intellectual property rules were comprehensively framed.

⁵ See the Vietnamese Government document, *Report No. 39/BC-CP dated 18 March 2011 on the socio-economic situation of 2010 to the National Assembly (Bao cao so 39/BC-CP ngay 18/3/2011 bo sung tinh hinh kinh te-xa hoi nam 2010)* at 2.

⁶ *Ibid.* at 3.

be said that, as Henry Maine has suggested,⁷ Vietnam is experiencing a transition from a status-based society to a contract-based one.⁸

For Vietnamese consumers, economic development and social changes also bring many benefits in terms of the availability and the choice of goods and services. In other words, the economic reforms of the past more than two decades have substantially broadened Vietnamese consumers' freedom of choice in comparison with the situation in the former command economy. Therefore, it is fair to say that the Doi Moi Policy, together with the introduction of a market economy, is widely welcomed by Vietnamese consumers. However, the impact of this economic transition upon Vietnamese consumers is not one-sided. In fact, the substantial changes in the economy also expose Vietnamese consumers to certain new challenges and problems that they never experienced in the former planned economy. Recently-reported scandals relating to the quality of foods, milk and other essential products, and to misleading advertising and unfair marketing practices, have shocked many consumers. Certain methods of distribution and marketing such as door-to-door sales and distance sales, which have been regarded as problematic in developed countries, are rapidly expanding in Vietnam. Feeling disrespected by businesses, Vietnamese consumers blame the government for being slow to improve the current legal system and to offer them more effective remedies for their unsatisfactory purchasing experiences.⁹ Initial examination of the current legal system of Vietnam shows that consumer protection techniques widely used in developed countries, such as mandatory disclosure of material information about consumer goods and services,

⁷ Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, first published in 1861 (New York: Dorset Press, 1986) at 141.

⁸ However, it is noteworthy that the emerging consumer protection regime in Vietnam may be inconsistent with this vindication. Buyers of goods, once described as "consumers" by consumer laws, may be granted favourable protection. In other words, their rights and obligations do not simply derive from contractual relations but arise from their special status as "consumers".

⁹ The Vietnam Standard and Consumer Protection Association (Vinastas), the national association representing Vietnamese consumers, stated that "Vietnamese consumers are those who suffer the most disadvantaged treatment by businesses". See VietnamNet, "VietnamNet Opens a News Section on Consumer Protection" ("VietNamNet mo Chuyen muc Bao ve nguoi tieu dung") (13 January 2009), online: VietnamNet <<http://vietnamnet.vn/bvkh/2009/01/823664/>>. Mr. Pham Quang Vien, a senior official of MoIT stated in November 2009 that "Vietnamese consumers get the least effective protection in the world." See Vietnam Net, "Consumers' Rights Are Not Well-protected" ("Quyền loi của người tiêu dùng bảo vệ ít, xam hai nhiều") (13 November 2009), online: VietnamNet <<http://vietnamnet.vn/bvkh/daynong/200911/Quy-en-loi-nguoi-tieu-dung-Viet-Bao-ve-it-xam-hai-nhieu-878520/>>.

invalidation of unfair contract terms, a “cooling off” period, and a warranty system are almost absent in the current legal system of Vietnam.¹⁰ Vietnamese consumers have far fewer legal remedies than their counterparts in most Western developed countries.

Responding to this perceived social situation, from early 2008, the Vietnamese government started to draft the first consumer protection law, the *Law on Protection of Consumers’ Rights and Interests* (CPL) with the purpose of addressing the myriad of challenges faced by Vietnamese consumers and of replacing a previously adopted ineffective sub-law of 1999, i.e. the *Ordinance on Protection of Consumers’ Rights and Interests* (CPO).¹¹ After more than two years of drafting, this law was approved by the Vietnamese National Assembly on 17 November 2010. Many consumers and consumer advocates have high expectations of this new law and hope that it, and its soon-to-be-drafted administrative subordinate normative instruments, will comprehensively and more effectively solve actual problems experienced by consumers in their daily lives.¹²

My dissertation on “The Drafting of Vietnam’s *Consumer Protection Law: An Analysis from Legal Transplantation Theories*” has been researched and written in this context.

1.2 Consumer Protection and Legal Transplantation Theories

In most developed countries, consumer protection has a rich tradition in terms of both legal developments¹³ and academic debates. Consumer protection law has been

¹⁰ MoJ – Institute of Legal Sciences, *Legal Provisions on Consumer Protection in Vietnam – The Actual Situation and Orientations for Improvement (Phap luat bao ve nguoi tieu dung Vietnam – Thuc trang va huong hoan thien)* (Hanoi: Law Science Information Bulletin, January 2008) at 32-37 [MoJ, *Legal Provisions*].

¹¹ For a detailed discussion of this ordinance, see section 4.2.

¹² VietnamNet, “Protection of Vietnamese Consumers in 2010: Looking forward to Seeing the Bright Morning” (“Bao ve nguoi tieu dung Viet 2010: Ngong binh minh sang”) (13 February 2010), online: VietnamNet <<http://www.vietnamnet.vn/bvkh/201001/Bao-ve-nguoi-tieu-dung-Viet-2010-Ngong-binh-minh-sang-887397/>>.

¹³ There are numerous writings about the history of consumer laws in Western developed countries. For example, see Edward P. Belobaba, “The Development of Consumer Protection Regulation: 1945 to 1984” in Ivan Bernier & Andrée Lajoie, eds., *Consumer Protection, Environmental Law and Corporate Power* (Toronto: University of Toronto Press, 1985) 1; Lauren Krohn, *Consumer Protection and the Law: A Dictionary* (Santa Barbara, CA: ABC-CLIO, 1995) 1; Robert O. Herrmann & Robert N. Mayer, “U.S. Consumer Movement: History and Dynamics” in Stephen Brobeck, ed., *Encyclopedia of the Consumer Movement* (Santa Barbara, CA: ABC-CLIO, 1997) 584.

gaining powerful momentum since the 1960s and 1970s, especially in the United States,¹⁴ Canada,¹⁵ European countries,¹⁶ Australia, and Japan.¹⁷ In the ASEAN region, as well as in China, the adoption of consumer protection laws has also been widely witnessed. For example, Thailand adopted its first *Consumer Protection Act* in 1979,¹⁸ China adopted its first *Consumer Protection Law* in 1993,¹⁹ and Malaysia adopted its first *Consumer Protection Act* in 1999.²⁰

Consumer protection laws in developed countries are formulated based on the widely-accepted truism that the consumer is the weaker party in market relations with traders and needs a special protection policy.²¹ Consumer protection laws are seen as “sets of rules aimed at protecting weak consumers from manipulations and abuses from producers and traders and at strengthening the former’s bargaining position.”²²

Historically speaking, consumer protection laws in developed countries have also

¹⁴ For example, in the United States, the following acts were adopted by the federal government: *the Fair Packaging and Labeling Act* of 1966 (Pub. L. No. 89-755), *the Truth in Lending Act* of 1968 (Pub. L. No. 90-321), *the Consumer Product Safety Act* of 1972 (Pub. L. No. 92-573), and *the Magnuson-Moss Warranty Act* of 1975 (Pub. L. 93-637).

¹⁵ William A.W. Neilson, “Harmonization of Consumer Protection Laws in Canada”, in Donald B. King, ed., *Commercial and Consumer Law from an International Perspective* (Littleton, CO: Fred B. Rothman, 1986) 411; Jacob S. Ziegel & Anthony J. Duggan, *Commercial and Consumer Sales Transactions: Cases, Text and Materials*, 4th ed. (Toronto: Emond Montgomery, 2002) at 14-16.

¹⁶ Martijn W. Hesselink, “European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?” (Centre for the Study of European Contract Law Working Paper Series No. 2006/04) (8 September 2006) at 3, online: SSRN <<http://ssrn.com/abstract=946727>>. To date, the EU has adopted several important legal instruments of consumer protection concerning liability for defective products, direct sales contracts, distance sales contracts, and unfair terms in consumer contracts.

¹⁷ In Japan, the first fundamental consumer protection act was adopted in 1968 and, in Australia, the *Trade Practices Act* (with several provisions on consumer protection) was adopted in 1974.

¹⁸ Thailand’s *Consumer Protection Law* of 1979, online: Thai Law Forum <<http://www.thailawforum.com/database1/ConsumerProtecting-law.html>>. Extracts of this law in this dissertation are based on the English version found here.

¹⁹ China’s *Law on Protection of the Rights and Interests of the Consumers* of 1993, online: Lehman Law <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/consumer-protection/law-of-the-peoples-republic-of-china-on-protection-of-the-rights-and-interests-of-the-consumers-1994.html>>. Extracts of this law in this dissertation are based on the English version found here.

²⁰ Malaysia’s *Consumer Protection Act* of 1999, online: KPDNKK <http://www.kpdnkk.gov.my/akta/akta_perlindunganpengguna1999.pdf>. Extracts of this law in this dissertation are based on the English version found here.

²¹ Elise Poillot, “Consumer and Contract Law” (January 2005) 6:1 ERA-Forum 36 at 36 [Poillot, “Consumer and Contract Law”].

²² Pamaria Rekaiti & Roger Van den Bergh, “Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach” (2000) 23 J. Cons. Pol’y 371 at 371.

changed over time. Initial laws usually focused on clear problems for consumers such as product safety, market confusion (information disclosure requirements), and outright fraud. Currently, consumer laws in developed countries directly attack a very wide range of problems arising from transactions between businesses and consumers, such as un-bargained-for contract terms, unfair pricing, unfair trade practices, unsafe products, and discriminatory or unreasonable credit requirements.²³

As for regulation of consumer transactions, most developed countries (especially EU members) use the following varied techniques: (1) the duty of disclosure; (2) the comprehensibility and clarity of information; (3) binding pre-contractual statements; (4) the right of withdrawal; (5) form requirements; (6) the non-binding effect of unfair terms; and (7) the duty to bring the service or goods into conformity with contractual terms.²⁴ In addition, a broader consumer interest can also be protected by enabling consumers to recover losses under laws dealing with competition, financial services, insurance, transport services and realty transactions. Nowadays, in developed countries, consumer law has been widely considered “a mature area of law” with a reasonably well-established body of legal rules.²⁵

²³ Kenneth W. Clarkson, *et al.*, *West's Business Law: Text, Cases, Legal, Ethical, Regulatory, and International Environment*, 7th ed. (St. Paul, MN: West, 1998) at 808. In Canada, the concept of “consumer protection” has changed substantially over time, as pointed out by David Cohen as follows: in the 1960s, consumer protection policy meant creating abstract legal rights, and perhaps expanding legal services in an effort to enhance access to traditional redress mechanisms by consumers. In the 1990s, consumer protection had a much broader meaning, namely: “(1) Effective protection against consumer misrepresentation and fraud in marketing practices; (2) the provision of information in consumer markets to reduce transaction costs and remedy market imperfections; (3) the development of consumer insurance programmes; (4) the development of licensing and associated regulatory measures in consumer services - notably banking, insurance, and medical and legal services - where it is difficult, if not impossible, for consumers to evaluate service quality and where the risks to the consumer are substantial if the firm or transaction fails; (5) product safety regulation; (6) protection of the interests of consumers in bankruptcy proceedings; and (7) the provision of effective consumer redress mechanisms.” See David Cohen, “What Role Should the Federal Government Play in Consumer Protection? A Comment on Professor Neilson’s Paper” (1992-1993) 21 *Can. Bus. L.J.* 86 at 86-87. However, the exact boundaries of consumer protection are hard to define. See William A.W. Neilson, “Reflections on Recent Federal Proposals for the Rationalization of Trade Practices Regulation in Canada” (1992-1993) 21 *Can. Bus. L.J.* 70 at 70.

²⁴ Poillot, “Consumer and Contract Law”, *supra* note 21 at 39, 41.

²⁵ Christian Twigg-Flesner, “The Future of Consumer Law” in Christian Twigg-Flesner, *et al.*, eds., *The Yearbook of Consumer Law 2008* (Farnham, UK: Ashgate, 2007) xiii at xiv.

From an academic perspective, consumer protection law is an important area of law in many law school programs²⁶ and in the textbooks on business law that are used to teach prospective members of the business community. Legal handbooks or legal manuals for business people usually include considerable sections about consumer protection laws.²⁷ Consumer protection is a hotly debated topic in many scholarly journals. The *Journal of Consumer Policy* (Europe) and the *Canadian Business Law Journal* are two of a number of prominent journals in this area.

At the global level, since the 1970s, the United Nations (UN) has recognized that “consumer protection had an important bearing on economic and social development.”²⁸ Consumer protection has become one component in the agenda for operations of United Nations’ organs. In 1985, the United Nations also issued a guideline on consumer protection and this guideline was expanded in 1999. In addition, for more than a decade, the Organization for Economic Cooperation and Development (OECD) has devoted extensive resources to the issue of consumer protection.²⁹

Against this international environment, consumer protection was marginalized extensively, or even ignored, by Vietnamese law-makers and scholars for a long time, at least until the Ministry of Industry and Trade (MoIT) started to launch a project in 2008 to draft the first consumer protection law for Vietnam. The topics of consumer protection

²⁶ Leading textbooks and reference books on consumer protection laws used at law schools in Europe, Canada, United States, and Australia include: Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2d ed. (Portland, OR: Hart, 2007); Geraint Howells & Stephen Weatherill, *Consumer Protection Law*, 2d ed. (Farnham, UK: Ashgate, 2005); Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge: Cambridge University Press, 2001); Ziegel & Duggan, *supra* note 15; Stephen Weatherill, *EU Consumer Law and Policy* (Cheltenham, UK: Edward Elgar, 2005); Chris Willet, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Farnham, UK: Ashgate, 2007); Douglas J. Whaley, *Problems and Materials on Consumer Law*, 5th ed. (Austin, TX: Wolter Kluwer, 2009); Michael M. Greenfield, *Consumer Transactions*, 4th ed. (New York: Foundation Press, 2003); John A. Spanogle, *et al.*, *Consumer Law: Cases and Materials*, 3d ed. (St. Paul, MN: Thomson/West, 2007); Lyden Griggs, Eileen Webb, & Aviva Freilich, *Consumer Protection Law* (South Melbourne, Australia: Oxford University Press, 2008).

²⁷ For example, in a legal handbook of this type published in the United States in 2007, *The Law (in Plain English) for Small Business* by Leonard D. Duboff, of 25 chapters dealing with the most frequently faced issues such as organization of business, financing, accounting, taxation, employment, contracts, etc., there are two separate chapters touching the issues of warranties and product liability. See Leonard D. Duboff, *The Law (in Plain English) for Small Business*, 2d ed. (Naperville, IL: Sphinx, 2007).

²⁸ United Nations, United Nations Guidelines for Consumer Protection (as expanded in 1999), online: UN <http://www.un.org/esa/sustdev/publications/consumption_en.pdf>.

²⁹ OECD, Consumer Policy, online: OECD <http://www.oecd.org/departement/0,3355,en_2649_34267_1_1_1_1_1,00.html>.

are not taught in law schools in Vietnam even today, although other areas of law serving as the legal foundations of a newly-introduced market economy such as property law, contract law, commercial law, and competition law are taught.³⁰ Handbooks on business law in Vietnam do not typically mention the consumer protection aspects of business activities. For example, the text *Handbook on Business Law*³¹ written in 2007 by leading scholars and practitioners working for the Ministry of Justice (MoJ) of Vietnam, the Supreme People's Court of Vietnam, and a number of relevant ministries, does not have a section dealing with consumer protection issues, while a great deal of space is given to issues such as forms of business organizations, contract law, resolution of disputes, and execution of civil judgments. Journal articles written in English by both foreign and Vietnamese scholars guiding foreign investors about the legal aspects of their operations in Vietnam simply ignore the existence of Vietnamese consumer protection law, as if this area of law did not actually exist or had no relevance to foreign investors' activities.³² In other words, these articles send an implied message that it is absolutely safe for foreign investors to invest in Vietnam without considering matters of consumer protection.

Despite the fact that the *Constitution* of 1992 (article 28) sets forth a clear commitment from the state to develop a consumer protection policy,³³ and the fact that the first legal document specifically dealing with consumer protection, namely, the *Ordinance on Protection of Consumers' Rights and Interests* (CPO) was adopted³⁴ in

³⁰ However, it is worth noting that, in one 935-page treatise on economic laws published by a well-known law scholar in Vietnam in 2004, the author explored the problems of informational asymmetry in contracts between merchants and consumers and argued for further reform of the current contract laws to better protect the weak party in this kind of legal relationship. See Pham Duy Nghia, *A Treatise on Economic Laws (Chuyen khao Luat Kinh te)* (Hanoi: Hanoi National University Press, 2004) at 594-595.

³¹ Duong Dang Hue & Nguyen Thanh Tinh, eds., *Handbook on Business Law for Small and Medium-sized Businesses (Cam nang phap luat kinh doanh danh cho doanh nghiep nho va vua)* (Hanoi: MoJ, 2007).

³² See, for example, Robert L. Wunker, "The Laws of Vietnam Affecting Foreign Investment" (1994) 28 Int'l Law. 363; Claude Rohwer, "Progress and Problems in Vietnam's Development of Commercial Law" (1997) 15 Berkeley J. Int'l L. 275; Pham Van Thuyet, "Vietnam's Legal Framework for Foreign Investment" (1999) 33:3 Int'l Law. 765; Tang Thanh Trai Le, "The Legal Aspects of Foreign Investment in Vietnam" (1995) 1 Int'l Trade & Bus. L.J. 45; Tran Phong, "Vietnam's Economic Liberalization and Outreach: Legal Reform" (2003) 9 Law & Bus. Rev. Am. 139; Pham Duy Nghia, "Commercial Legal Framework in Vietnam since the Asian Crisis: Development and Issues" (2004) 32 Int'l Bus. Law 175.

³³ Article 28 of the *Constitution* of 1992 reads as follows: "All illegal activities of production and business, causing harm to the interests of the state, legitimate rights and interests of the collective and citizens must be strictly dealt with in accordance with the law. The state shall maintain a policy of protection of interests and rights of producers and consumers."

³⁴ By the Standing Committee of the National Assembly (NASC).

1999³⁵ and its ineffectiveness was widely noted,³⁶ the real effort to introduce a specific law to deal with consumer problems was only begun in 2007, when the National Assembly (NA) agreed that the CPL would become part of its five-year law-making agenda (2007-2011).

However, it would be unfair to ignore a number of rare scholarly publications in Vietnam which discuss the issues surrounding consumer protection in recent times. For example, in an article written by Nguyen Van Manh in 2007,³⁷ the author pointed out several shortcomings of the current CPO and argued for (1) stricter control of standard contracts between consumers and merchants; (2) provision of more specific rights for consumers; and (3) delegation of more powers to a consumer protection authority (i.e. the Vietnam Competition Administration Department (VCAD)) in Vietnam.³⁸ In one article I wrote for the Vietnamese Journal of Legislative Studies in 2008,³⁹ based on my study of foreign consumer laws (especially consumer laws in Canada and the EU), I argued for a transaction-based model of consumer protection in Vietnam. In 2008, the Ministry of Justice (MoJ) – Institute of Legal Sciences published a report providing an initial evaluation of the strengths and weaknesses of the current consumer laws of Vietnam.⁴⁰ In one article published in 2009,⁴¹ Nguyen Ngoc Son, a law lecturer in Ho Chi Minh City, argued for a self-defence mechanism of consumer protection. Accordingly, he pointed

³⁵ i.e. 13 years after Vietnam officially launched its Doi Moi Policy.

³⁶ VietnamNet, “Consumers Blind to Rights” (17 March 2009) online: VietnamNet <<http://english.vietnamnet.vn/social/2009/03/836561/>>.

³⁷ Nguyen Van Manh, “Legal Framework for Protection of Public Health and Recommendations for Improvement of Consumer Protection Law” (“Phap luat bao ve suc khoe cong dong va kien nghi hoan thien phap luat bao ve nguoi tieu dung”) (2007) 105 J. Legisl. Stud. (Vietnam) online: NCLP <http://www.nclp.org.vn/thuc_tien_phap_luat/phap-luat-bao-ve-suc-khoe-cong-111ong-va-kien-nghi-hoan-thien-phap-luat-bao-ve-nguoi-tieu-dung/?searchterm=nguoi%20tieu%20dung>. The Journal of Legislative Studies is a scholarly research journal published by the Office of the National Assembly of Vietnam and is used by members of the National Assembly and interested readers.

³⁸ Currently, this authority is the Vietnam Competition Administration Department, an agency under the Ministry of Industry and Trade in charge enforcing competition and consumer policy.

³⁹ Nguyen Van Cuong, “A Number of Issues Relating to Drafting the Law on Protection of Consumers’ Rights and Interests” (“Mot so van de ve xay dung Luat bao ve quyen loi nguoi tieu dung”) (2008) 129 J. Legisl. Stud. (Vietnam) online: NCLP <<http://www.nclp.org.vn/nghien-cuu-lap-phap/129-thang-8-2008/ban-ve-du-an-luat/mot-so-van-111e-ve-xay-dung-luat-bao-ve-quyen-loi-nguoi-tieu-dung>>.

⁴⁰ MoJ, *Legal Provisions*, *supra* note 10.

⁴¹ Nguyen Ngoc Son, “Consumers and Consumer Protection Law” (“Nguoi tieu dung va phap luat bao ve nguoi tieu dung”) (2009) 138 J. Legisl. Stud. (Vietnam) online: NCLP <http://www.nclp.org.vn/ban_ve_du_an_luat/nguoi-tieu-dung-va-phap-luat-bao-ve-nguoi-tieu-dung>.

out that the absence of mechanisms for dealing with collective complaints by consumers is the key reason for the ineffectiveness of the current consumer protection law in Vietnam, and stated he hopes that the future CPL will address this shortcoming. He also argued for more freedom in allowing consumers to set up their own consumer associations. In another journal article that I wrote in late 2009,⁴² I commented on Draft 2 of the CPL⁴³ and argued for more detailed provisions on protecting consumers in their transactions with merchants.

Based on the above-mentioned review, it is apparent that the academic debate on consumer protection in Vietnam is quite a recent phenomenon and has been mainly associated with the drafting process of the first CPL in Vietnam. The scope of this debate is much narrower in comparison with the scope of similar debates in developed countries. The experience in developed countries shows that consumer protection is a multi-layered and very complex issue which the current scholarly debate in Vietnam seems to fail to fully acknowledge. In particular, the current literature in Vietnam on consumer law reform tends to ignore several essential questions regarding the reform of this area of law. For example, what is the nature and methodology of the current consumer law reform? Can foreign experiences bring benefits to the current consumer law reform in Vietnam, and, if so, how? Should Vietnamese law-makers invent their own legal solutions without paying attention to the experiences of consumer protection in other countries, especially developed countries?

In fact, the ignorance of this methodological dimension of consumer law reform in Vietnam is not unique. Many law reform projects in Vietnam tend to overlook these complicated issues, as John Gillespie, one of the leading foreign experts on Vietnamese laws, once stated, “[T]here is little critical analysis of legal reforms, especially legal transplanted, in the Vietnamese literature.”⁴⁴

⁴² Nguyen Van Cuong, “Consumer Protection Law: The More Eligible and Accessible It Is, the More Enforceable It Becomes” (“Luật Bảo vệ người tiêu dùng: quy định càng đơn giản, tinh khả thi càng cao”) (2009) 161 J. Legisl. Stud. (Vietnam) online: NCLP <http://www.nclp.org.vn/ban_ve_du_an_luat/van-hoa-xa-hoi/luat-bao-ve-nguoi-tieu-dung-quy-111inh-cang-111on-gian-tinh-kha-thi-cang-cao>.

⁴³ Draft 2 of the CPL was the draft used by the Drafting Committee and MoIT to get public comments from June 2009 until about December 2009.

⁴⁴ John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam* (Farnham, UK: Ashgate, 2006) at 37. [Gillespie, *Transplanting Law Reform*].

In reviewing the international literature on the topic, it is quite clear that the nature of law reform is a topic that is hotly and consistently debated among comparative law scholars. For Alan Watson and proponents of legal transplants, law reform projects (a main source for legal evolution) are, by nature, or essentially, legal transplantation projects.⁴⁵ Accordingly, legal drafters are essentially legal transplanters. For Otto Kahn-Freund, Pierre Legrand, and other scholars who disagree with Watson, law reform projects cannot be seen as legal transplantation projects.⁴⁶ For them, law-reform-as-transplantation projects are generally destined to fail. Law reformers have almost no way to produce desirable legal changes by transferring legal rules or legal ideas from other countries into their own legal systems. For Ann and Robert Seidman and their proponents, who are also critics of Watson, legal transplantation is also futile and dangerous. Instead, the Seidmans propose a new approach to law reform by offering a problem-solving legislative theory for law reformers, with the hope that such projects will be seen as social problem-solving projects. They insist that legal drafters and law-makers must be seen as inventors or tailors of legal solutions.⁴⁷

For the Seidmans, the best legislative theory for law reform in developing countries and transitional economies is a four-phase problem-solving methodology. The

⁴⁵ See, for example, Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens, GA: University of Georgia Press, 1993); K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1998); Thomas W. Waelde & James L. Gunderson, “Legislative Reform in Transition Economies: Western Transplants – A Short-cut to Social Market Economy Status?” (1994) 43 I.C.L.Q. 347.

⁴⁶ See, for example, O. Kahn-Freund, “On Uses and Misuses of Comparative Law”, (1974) 37 Mod. L. Rev. 1; Pierre Legrand, “How to Compare Now” (1996) 16 L.S. 232; Pierre Legrand, “The Impossibility of Legal Transplants” (1997) 4 M.J.E.C.L. 111; Pierre Legrand, “What ‘Legal Transplants’?” in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart, 2001) 55; Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences” (1998) 61 Mod. L. Rev. 11.

⁴⁷ See, for example, Ann Seidman & Robert Seidman, *State and Law in the Development Process: Problem-solving and Institutional Change in the Third World* (London: St. Martin’s Press, 1994); Ann Seidman & Robert B. Seidman, “Drafting Legislation for Development: Lessons from a Chinese Project” (1996) 44 Am. J. Comp. L. 1 [A & R Seidman, “Legislation for Development”]; Ann Seidman & Robert B. Seidman, “Law, Social Change, Development: The Fatal Race – Causes and Solutions” in Ann Seidman, *et al.*, eds., *Africa’s Challenge: Using Law for Good Governance and Development* (Trenton, NJ: Africa World Press, 2007) 19; A.W. Seidman & R.B. Seidman, “Lawmaking, Development and the Rule of Law” in J. Arnscheidt, B. van Rooij & J.M. Otto, eds., *Lawmaking for Development: Explorations into the Theory and Practices of International Legislative Projects* (Leiden: Leiden University Press, 2008) 91; Ann Seidman & Robert B. Seidman, “Between Policy and Implementation: Legislative Drafting for Development” in Constantin Stefanou & Helen Xanthaki, eds., *Drafting Legislation: A Modern Approach* (Farnham, UK: Ashgate, 2008) 287.

first phase consists of accurately identifying the true problems (or problematic repetitive patterns of behaviours or problematic social institutions) that the proposed law will address. The second phase includes examining and discovering the true causes of such problems. The third phase comprises designing, proposing and deliberating plausible alternatives to address such problems, and selecting the best solution informed by evidence and experience. The fourth phase consists of setting up a monitoring and evaluating system to make sure that the law works in the way that it was designed and intended to work.⁴⁸ In fact, the Seidmans' legislative theory is not an explanatory or descriptive theory giving an account of law-making practices in developing and transitional economies. Rather, this theory is, basically, a set of practical guidelines for law-makers and legal drafters in developing and transitional countries. However, their theory tends to assume that it is the best and only theory that offers practical or effective prescriptions for problems in law-making practices in developing and transitional countries. In other words, if legal drafters and law-makers fail to follow this methodology (or deviate from this theory), they will produce harm rather than good and the newly adopted laws will fail to address the targeted problems.

So, finally, what is the essential nature of legal reform in developing and transitional countries nowadays? Is it a problem-solving process or a legal transplantation process? Should legal drafters be seen as legal transplanners or as inventors of legal solutions? Can legal reformers hold both positions? If so, which position will be more dominant or are they equally important? Different answers will lead to different ways of proceeding with law reform projects because legal transplanners and legal inventors need substantially different skills and experiences. However, there is huge disparity between the proponents and opponents of legal transplantation in their views about many aspects of this phenomenon. And it does not seem as if the debate between them will fade any time soon.

The current consumer law reform in Vietnam, especially the introduction of the first CPL, promises to be a good case study with which to test the wisdom offered by the extant legal transplantation theories (including the Seidmans' legislative theory) for the following key reasons:

⁴⁸ A & R Seidman, "Legislation for Development", *ibid.* at 22-25.

Firstly, as pointed out by John Gillespie, the extant theories of legal transplantation are mainly based upon the experiences of legal transfers in Western Europe and North America. The examination of legal transfer experiences in developing East Asian countries, especially in South East Asia, is usually ignored or underexplored.⁴⁹ In addition, “most commentators construct theories about the transfer of laws across national and cultural boundaries from North American and European perspectives.”⁵⁰ Therefore, it is reasonable that a new theory of legal transplantation is necessary to give a more satisfactory account of legal transfer experiences in developing East Asia.⁵¹ In fact, John Gillespie has significantly contributed to this process by examining law reform in Vietnam over the past two decades, especially since the Doi Moi (Renovation) Policy was launched in 1986, with the hope of offering a more satisfactory legal transplantation theory. However, John Gillespie focuses only on the legal transplantation of commercial laws or corporate laws in Vietnam.⁵² Other areas of law (especially the area of consumer law) are apparently beyond his interest. Therefore, examining the legal transplantation of consumer laws in Vietnam promises to offer new empirical evidence to test the extant legal transplantation theories.

Secondly, while reform of private law, commercial law or even constitutional law in developing and transitional countries has been used by scholars to test the plausibility of legal transplantation theories,⁵³ it seems that law reform concerning consumer laws in these countries has not been used for this academic purpose. Consumer laws are widely seen as not being either purely private laws or purely public laws. They are “a collage of

⁴⁹ John Gillespie, “Toward a Discursive Analysis of Legal Transfers into Developing East Asia” (2007-2008) 40 *N.Y.U.J.Int’l L. & Pol.* 657 at 658.

⁵⁰ *Ibid.* at 659.

⁵¹ *Ibid.* at 661.

⁵² An inexhaustive list of the extensive literature by John Gillespie includes: John Gillespie, “Globalization and Legal Transplantation: Lessons from the Past” (2001) 6 *Deakin L. Rev.* 286; John Gillespie, “Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam” (2002) 51 *I.C.L.Q.* 641; John Gillespie, “Changing Concepts of Socialist Law in Vietnam” in John Gillespie & Pip Nicholson, eds., *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: ANU E Press and Asia Pacific Press, 2005) 45; Gillespie, *Transplanting Law Reform*, *supra* note 44; John Gillespie, “Developing a Decentred Analysis of Legal Transfers” in Penelope (Pip) Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008) 25.

⁵³ Jorg Fedtke, “Legal Transplants” in Jan M. Smits, ed., *Elgar Encyclopaedia of Comparative Law* (Cheltenham, UK: Edward Elgar, 2006) 434 at 436.

laws from different fields: criminal, civil, and administrative.”⁵⁴ Because of this characteristic, the transplantation of this kind of law may produce new and different experiences that the current legal transplantation theories may not have fully represented.

Thirdly, the research for this project was conducted from 2009 to 2011. During the year 2009, the CPL of Vietnam was actually in the process of being drafted. In fact, this law was only adopted in November 2010, just a few months before the completion of this dissertation. For this reason, all experiences associated with this process were quite clearly remembered by legal drafters and relevant agents participating in the process of drafting, debating and adopting the new law. I myself also had many opportunities to directly follow and engage in public discussion concerning the drafting of the CPL.

Fourthly, the process of drafting and adopting the CPL took place in the context of the Doi Moi era, when Vietnamese legal drafters and law-makers had already drafted and adopted more than 200 laws. With such a substantial number of laws passed by the National Assembly of Vietnam, drafting, debating and adopting a law like the CPL was no longer a totally new experience for Vietnamese legal drafters and law-makers. Put another way, Vietnamese legal drafters and law-makers may have already established a so-called law-making culture that may be identified by studying the actual experience of drafting the CPL.

1.3 Research Questions

The key research question of this study is: To what extent are Vietnam’s experiences of drafting and adopting the CPL to improve the legal regulation of consumer transactions consistent with the insights and claims of the extant legal transplantation theories?

In a more concrete way, based upon the claims in Alan Watson’s legal transplantation theory and the Seidmans’ legislative theory, this study examines a number of key issues to discover further evidence to confirm or disprove the claims of the said theories. Specifically,

⁵⁴ Krohn, *supra* note 13 at 13.

- How does the idea of consumer protection assert its legitimacy in Vietnam through the law-making process? To what extent is the process one of transplantation or of innovation? What ideological barriers, if any, does the project face?
- What determined the content of the first CPL in Vietnam (particularly, the provisions for unfair commercial practices, consumer contracts and enforcement)? How did interest groups influence and assert their voices in the process of drafting this new law? How did foreign legal models inspire and influence the contents of this law?
- What factors prevented, enhanced, or facilitated the reception of foreign legal ideas into the first CPL?
- How did Vietnam's actual practice of drafting the CPL deviate from the Seidmans' legislative theory and why?

Answering these questions is not only of academic but also of practical significance. Answering them may help us better evaluate the validity and usefulness of existing legal transplantation theories in guiding us to grasp legal transplantation phenomena in the real world. As the core concern of legal transplantation theories is the nature of law-making activities, finding the answer to these questions may help us to better understand the nature of law-making activities, at least in the case of Vietnam, in order to find out the best way to improve the quality of law reform projects.

The drafting of Vietnam's CPL looks different, depending on whether it is viewed from the perspective of Alan Watson's theory of legal transplantation, or through the lens of the Seidmans' legislative theory. Seen using Watson's theory, this law-making process serves as a filter through which foreign legal ideas or foreign legal models of consumer protection are selected, modified, adapted and reproduced to make a Vietnamese version of the CPL. On the other hand, viewed using the Seidmans' legislative theory, this process is simply one of problem-solving aimed at addressing the unique problems that Vietnamese consumers and relevant actors are facing.

This dissertation argues that the nature of consumer law reform regarding legal regulation of consumer transactions in Vietnam is much more complex than what Alan

Watson seems to imagine. It also shows that, although reception of foreign legal models actually took place during this law reform process, past legal transplants, as well as the local law-making culture, may filter or even inhibit future reception of foreign legal solutions. In other words, legal transplantation in the consumer law reform project is probably path-dependent, in the sense that new legal transplants could be shaped or patterned by previous legal transplants.

My research also shows that current consumer law reform in Vietnam tends to follow the problem-solving approach, although it deviates somewhat from the legislative methodology proposed by the Seidmans. My research attempts to clarify these deviations and explain the reasons therefor.

1.4 Methodology

The focus of this research is the drafting of the CPL rather than the CPL itself. In other words, this research highlights the key driving factors that have helped to shape the CPL, especially from legal transplantation perspectives. As William Neilson rightly points out, making a new law is a complex legal phenomenon. It involves the entirety of the legal, political, governmental, cultural, and economic environments “within which a new law is debated, drafted and brought into effect.”⁵⁵ Given this, the methodological approach of this dissertation goes well beyond the doctrinal studies of law associated with legal positivism.⁵⁶ Actually, the main approach in this research is a socio-legal

⁵⁵ William A.W. Neilson, “Competition Laws for Asian Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (New York: Routledge, 2006) 291 at 307.

⁵⁶ The doctrinal study of law is explained by Reza Banakar and Max Travers as a rule-based approach that uses “interpretive methods to examine cases, statutes and other sources of law in an attempt to seek out, discover, construct or reconstruct rules or principles.” See Reza Banakar & Max Travers, “Law, Sociology and Method” in Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005) 1 at 7. Also at this page, Banakar and Travers note that a rule-based approach to studying law is associated with theories of law rooted in legal positivism.

approach.⁵⁷ Accordingly, the drafting of the CPL is holistically examined and analyzed in its wider political, economic, social, and cultural contexts.⁵⁸

Because qualitative research methods are widely noted for helping researchers in social sciences to build “a complex, holistic picture,” to analyze “words, reports detailed views of informants,” and to conduct “the study in a natural setting,”⁵⁹ qualitative research methods were employed in carrying out this research. Specifically, documentary analysis and in-depth interviews were the methods used to obtain and analyze data.

1.4.1 Documentary Analysis

This method is applicable to the analysis of the current legal framework dealing with consumer transactions in Vietnam. This method is also applied to analyze other secondary sources of data, such as research reports conducted by the Drafting Committee (DC) of the CPL, experts’ opinions expressed at conferences held in Vietnam during the CPL public consultation process, and the stories on problems experienced by Vietnamese consumers reported by the public media.

To find out the logic of the evolution of consumer protection laws in Vietnam, especially the process of drafting and adopting the CPL of 2010, I documented the thinking of legal drafters and relevant agents involved in the process of drafting and adopting this law. What legal drafters actually thought and how their ideas changed over time during the process of drafting the CPL are usually recorded in relevant documents produced during the drafting process. The documents relevant to the process of drafting the CPL of 2010 include the following key documents:

1. All drafts of the CPL: This includes an initial draft prepared by the Editing Group (EG) of the CPL in September 2008 and seven official drafts of the CPL. The

⁵⁷ Werner Menski defines the socio-legal approach to law as an empirical study of law by which law is considered “in its social context and gives explicit recognition to the social dimensions of law.” See Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2d ed. (Cambridge: Cambridge University Press, 2006) at 161-162.

⁵⁸ However, due to the fact that during the time I wrote this dissertation, the CPL had not yet been implemented, the socio-legal analysis of the CPL has not been adopted.

⁵⁹ John W. Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Traditions* (Thousand Oaks, CA: Sage Publications, 1998) at 15.

specific provisions of these drafts are compared, contrasted and examined in order to trace the changes in legal ideas from draft to draft.

2. All research reports prepared by legal drafters of the CPL (the EG and the DC) or prepared by other experts at the request of the DC. These research reports include: a report on a comparative study of foreign consumer protection laws completed by the EG;⁶⁰ a survey report completed by a group of experts from the MoJ – Institute of Legal Sciences, VCAD and a number of other relevant agencies in order to present a picture of problematic commercial practices in Vietnam;⁶¹ and a report reviewing the current system of legal provisions on consumer protection prepared by a group of experts from the MoJ – Institute of Legal Sciences, VCAD and a number of other agencies.⁶²

3. All relevant reports prepared by the DC and MoIT to explain the specific provisions of each draft of the CPL. This includes the Submission Report,⁶³ the Elucidation Report,⁶⁴ and Report on Impact Assessment of the CPL.⁶⁵ These reports provide the official explanation for changes in specific provisions in each draft of the CPL.

⁶⁰ VCAD, *Comparative Study of Consumer Protection Laws of a Number of Foreign Jurisdictions – Lessons and Recommendations for Key Contents of the Draft Law on Protection of Consumers’ Rights and Interests of Vietnam (So sanh luat bao ve nguoi tieu dung mot so nuoc tren the gioi – bai hoc kinh nghiem va de xuat mot so noi dung co ban quy dinh trong Du thao Luat Bao ve nguoi tieu dung cua Vietnam)* (Hanoi: VCAD, 2008).

⁶¹ Le Hong Hanh, et al., *Report on Actual Violations against Consumer Rights and Current Situation of Consumer Protection in Vietnam (Bao cao thuc trang xam pham quyen loi nguoi tieu dung va thuc tien bao ve nguoi tieu dung o Vietnam)* (Hanoi: The DC of the CPL, 2008).

⁶² Le Hong Hanh, et al., *Review Report on Legal Provisions on Consumer Protection in Vietnam (Bao cao ra soat he thong phap luat bao ve nguoi tieu dung tai Vietnam)* (Hanoi: The DC of the CPL, 2009).

⁶³ This report was prepared by MoIT (actually, by the DC) to explain the reasons for introducing the draft law, key policies and the process of drafting the draft law. The draft of this report was first sent to MoJ (together with Draft 3 of the CPL) for comments. Afterwards, this report was submitted to the cabinet together with Draft 4 of the CPL. The final report was submitted to the National Assembly together with Draft 5 of the CPL. See Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers’ Rights and Interests (To trinh so 28/TTr-CP ngay 8/4/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)*.

⁶⁴ This report was prepared by MoIT (actually, by the DC) to clarify each specific provision in the draft law and explain reasons for including it. The draft of this report was first sent to MoJ (together with Draft 3 of the CPL) for comments. This report was, after that, submitted to the cabinet together with Draft 4 of the CPL. The final report was submitted to the National Assembly together with Draft 5 of the CPL. See MoIT, *The Elucidation Report on the draft Law on Protection of Consumers’ Rights and Interests (Ban thuyet minh chi tiet ve Du an Luat Bao ve quyen loi nguoi tieu dung)* (8 April 2010).

⁶⁵ MoIT, *Report on Impact Assessment of the draft Law on Protection of Consumers’ Rights and Interests (Bao cao danh gia tac dong Du thao Luat Bao ve quyen loi nguoi tieu dung)* (Hanoi, October 2009).

4. All relevant reports prepared by the National Assembly’s committees regarding the draft of the CPL.⁶⁶

5. The Records of Discussions at the National Assembly (NA) about the draft of the CPL. These include records of the NA’s first debate on 18 June 2010 and records of the NA’s final debate on 29 October 2010.⁶⁷

In addition, existing normative legal documents relevant to consumer protection are also examined to provide a brief overview of the consumer protection regime in Vietnam prior to adopting the CPL of 2010.

Journal articles and articles in newspapers and on news websites describing consumer problems in the current Vietnamese economy have also been collected and analyzed.

1.4.2 In-depth Interviews

In addition to analyzing the available documents as noted above, I conducted a number of interviews with representatives of key stakeholders who participated in drafting the CPL (especially members of the DC and of the EG, hereinafter called “legal drafters”). They were representatives from the following agencies:

- The Ministry of Industry and Trade of Vietnam – the lead agency in drafting the CPL and the lead agency in charge of enforcing this law once it takes effect. In 2004, MoIT also assumed the role of state management of consumer protection.
- The Vietnam Standard and Consumers Association (Vinastas) – the national social organization representing the voices of Vietnamese consumers throughout the nation.
- The Vietnam Chamber of Commerce and Industry (VCCI) – the association representing the voices of the Vietnamese business community.⁶⁸ VCCI is also

⁶⁶ For example, CSTE, *Report No. 956/UBKHCNMT12 dated 16 April 2010 on initial verification of the draft Law on Protection of Consumers’ Rights and Interests (Bao cao so 956/UBKHCNMT12 ngay 16/4/2010 Tham tra so bo Du an Luat bao ve quyen loi nguoi tieu dung)*; CSTE, *Verification Report 981/UBKHCNMT12 of the CSTE dated 13 May 2010 on the draft Law on Protection of Consumers’ Rights and Interests (Bao cao tham tra so 981/UBKHCNMT12 ngay 13/5/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)*.

⁶⁷ These records are kept for public viewing at the website of the National Assembly of Vietnam (www.na.gov.vn).

well-known for its ideological position, which leans to economic neo-liberalism (i.e. it favours deregulation, and promotes freedom of contract and freedom of business).⁶⁹

In addition, I also interviewed a number of legal scholars working for the EG and the DC.

My field work was conducted in August and September 2010 in Vietnam while the law-making process of the CPL was occurring.

It is noteworthy that the law-making process is multi-dimensional, involving many players and stakeholders. As a result, this process usually produces a great deal of resulting reports and other documents. These documents can be a good source of data to use for examining and evaluating the law-making process. However, as with any process of human interaction, the law-making process of CPL is also an interpretive process. Therefore, its true nature is better understood by directly engaging in the process and interviewing the relevant parties. With this idea in mind, I conducted my field work as a supplementary method of obtaining necessary data in order to better understand the process by which the CPL was created.

My fieldwork focused on the process of drafting and adopting the CPL in Vietnam from the initial ideas to the adopted version of this law. It focused on how the idea of consumer protection changed from draft to draft, as well as on the rationale for such changes. The fieldwork also focused on how international experiences influenced the way the draft CPL was formulated and what the key contents of the adopted CPL finally are.

The field work was conducted using interview questions for each group of interviewees. The interview questions focused on the following issues:

- Key reasons driving the drafting and adoption of the CPL and the key objectives of this law;

⁶⁸ However, in reality, VCCI tends to represent the voices of small and medium-sized enterprises, especially enterprises from private sectors in Vietnam. So far, foreign-invested companies have not become members of this organization.

⁶⁹ Gillespie, *Transplanting Law Reform*, *supra* note 44 at 163.

- The actual steps and procedures of preparing and drafting the CPL and the key challenges in drafting this law (especially challenges in terms of time constraints, lack of resources and expertise);
- Key input from stakeholders provided to legal drafters in formulating the CPL;
- The process of consulting foreign experiences in drafting the CPL and legal drafters' perceptions of the usefulness of international experiences for drafting the CPL;
- The potential impact of the CPL on current business practices, the plan for the implementation of the CPL and key challenges expected in the implementation of this law.

The complete list of interview questions used for the fieldwork in Vietnam is presented in Appendix 9.

To enhance the perceived neutrality and objectivity of interviewees' opinions, all interviewees' identities have been kept secret.

In addition to conducting direct interviews, I have also kept in contact with a number of legal drafters of the CPL in order to be updated about the latest developments during the process of drafting and adopting the CPL. These drafters have also shared with me some of their actual experiences and thinking about the process of drafting and adopting the CPL.

1.5. Scope and Structure of the Dissertation

This dissertation focuses on analyzing the legal regulation of consumer transactions in Vietnam from the perspective of legal transplantation theories. Specifically, it concentrates on some key policies in the CPL of Vietnam regarding concepts of consumer and trader, unfair commercial practices, consumer contracts, access to justice for consumers, and state management in the area of consumer protection.

Within the above scope of research, the dissertation consists of seven chapters and one conclusion as follows:

Chapter 1. Introduction

- Chapter 2. Legal Transplantation Theories
- Chapter 3. Introduction to the Vietnamese Legal System
- Chapter 4. Consumer Protection before the Adoption of the CPL
- Chapter 5. The Drafting of the CPL
- Chapter 6. Measuring the Influence of Foreign Inputs: Challenges and Limitations
- Chapter 7. Testing Watson's Legal Transplantation Theory and the Seidmans' Legislative Theory

The main ideas of these chapters are as follows: Chapter 1 presents the context, reasons, purpose, and scope of the research. It outlines and defines the research problem, research questions, methodology and main arguments. Chapter 2 reviews the current scholarly debate in the comparative law community about legal transplants and shows how the current debate relates to consumer law reform in Vietnam. Chapter 3 provides a brief history of the legal system of Vietnam and its key institutions and characteristics that are closely related to consumer law reform in Vietnam. Chapter 4 briefly discusses the development of consumer protection law in Vietnam prior to the adoption of the CPL. This chapter attempts to show the inner logic of this evolution. Chapter 5 details the steps and processes that the Editing Group and the Drafting Committee, as well as other relevant state authorities, have conducted in formulating and adopting the CPL. It also examines the advantages and challenges or problems that legal drafters faced during the drafting of this law. Chapter 6 describes and analyzes the key changes in the legal regulation of consumer transactions as a result of the introduction of the first CPL in Vietnam (such as introduction of the concepts of “consumer” and “trader”, unfair commercial practices, consumer contracts, access to justice for consumers, and state management). It traces the origins of legal ideas incorporated into this new law and the extent to which these incorporated ideas are related to foreign legal models of consumer protection in other countries, especially in developed countries, ASEAN countries and China. Chapter 7, based on the evidence described in the previous chapters, tests the plausibility of claims in the extant legal transplantation theories using Vietnam's experience of drafting and adopting the CPL. It attempts to uncover the validity and

invalidity of aspects of the current extant legal transplantation theories widely known in Western developed countries.

Finally, a conclusion summarizes the key insights and findings gained from conducting this research project.

Chapter 2

LEGAL TRANSPLANTATION THEORIES

The drafting and adoption of the CPL of 2010 can be viewed as one of the key events in the recent evolution of the consumer protection regime in Vietnam. However, this development is actually just a part of a much bigger law reform project in Vietnam, which has been ongoing at least since the launch of the Doi Moi Policy in 1986. Seen in the international context, law reform, at least that of the past few decades, is not a phenomenon unique to Vietnam. Similar developments have also been witnessed in various developing or transitional countries, especially after the communist system collapsed in the Soviet Union and Eastern Europe in the late 1980s and early 1990s.¹ The law reform projects in these countries have usually been conducted with the assistance of global financial institutions (such as the World Bank and the International Monetary Fund) or individual developed countries, based on the assumption that the best way to construct a functioning market economy and democracy for these countries is to borrow models from successful established Western systems.²

One of the key issues arising from this global phenomenon is how to determine the true nature of these law reform projects. Is borrowing foreign legal ideas a good way to generate a viable law reform project? Are legal transplants possible? Comparative law

¹ Gary Goodpaster, "Law Reform in Developing Countries" (2003) 13 *Transnat'l L. & Contemp. Probs.* 659; Steven J. Heim, "Predicting Legal Transplants: The Case of Servitudes in the Russian Federation" (1996) 6 *Transnat'l L. & Contemp. Probs.* 187 at 190; Thomas W. Waelde & James L. Gunderson, "Legislative Reform in Transition Economies: Western Transplants – A Short-cut to Social Market Economy Status?" (1994) 43 *I.C.L.Q.* 347 at 347-348. In this latter article, at pages 367 and 368, the authors maintain that "law reform in developing countries has leaned heavily on models imported from Western countries, often in the context of substantial financial and persuasive influence by the major development funding organisations."; John Gillespie, "Toward a Discursive Analysis of Legal Transfers into Developing East Asia" (2007-2008) 40 *N.Y.U.J. Int'l L. & Pol.* 657.

² Frederique Dahan & Janet Dine, "Transplantation for Transition – Discussion on a Concept around Russian Reform of the Law on Reorganization" (2003) 23 *L.S.* 284 at 284. This observation is also shared by Zentaro Kitagawa, who points out that Official Development Assistance (ODA) projects offered by the World Bank and IMF for developing or transitional countries are purposed to "help developing countries transplant Western legal models by enacting new legislation or by amending existing laws [...] [and] to force each country to make a choice about the direction of its legal system and to prioritize its reform needs". See Zentaro Kitagawa, "Development of Comparative Law in East Asia" in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 237 at 254.

scholars seem quite active in offering answers to these questions. Unfortunately, there is not much agreement among them. This chapter presents a brief overview of the academic literature about this debate and provides a theoretical framework for the whole dissertation.

2.1 THE CONCEPT OF “LEGAL TRANSPLANT”

As the concept of “legal transplant” is key to legal transplantation theories, it is not surprising that most scholars engaging in debate about this phenomenon usually attempt to define this term. For example, Alan Watson defines “legal transplant” as the phenomenon of “moving a rule or a system of law from one country to another, or from one people to another.”³ Otto Kahn-Freund views the concept as “the use of foreign legal patterns for the purpose of producing rather than responding to social change at home.”⁴ Edward M. Wise uses this term to refer to “the movement, the continual flow, of legal paradigms and ideas across national frontiers.”⁵ Scott Newton regards “legal transplant” as a term used for “the borrowing or importing of legislative models, concepts, approaches or even statutory language from another jurisdiction, typically via the offices of experts in the borrowed law.”⁶ For John Gillespie, legal transplantation is generally understood as “the transfer of laws and institutional structures across geopolitical or cultural borders.”⁷

However, it is noteworthy that “legal transplant” is a metaphor coined by legal scholars who have borrowed the concept of “transplant” from biology and medical science⁸ to describe a legal phenomenon. For this reason, it is not fully accepted by all

³ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens, GA: University of Georgia Press, 1993) at 21 [Watson, *Legal Transplants*].

⁴ O. Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37 *Mod. L. Rev.* 1 at 5.

⁵ Edward M. Wise, “The Transplant of Legal Patterns” (1990) 38 *Am. J. Comp. L. Supp.* 1 at 1.

⁶ Scott Newton, “Post-communism Legal Reform: The Elision of the Political” in John Hatchard & Amanda Perry-Kessaris, eds., *Law and Development: Facing the Complexity in the 21st Century* (London: Cavendish, 2003) 161 at 161.

⁷ John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam* (Farnham, UK: Ashgate, 2006) at 3.

⁸ To clarify the meaning of “transplant”, Kahn-Freund refers to the two examples of transferring, i.e. transplant of human organs and mechanical insertion of a car component as the two terminal points of a

comparative lawyers.⁹ For example, Gunther Teubner argues that this term is a misnomer because it fails to convey the truly complex nature of the phenomenon it is intended to connote.¹⁰ Some other scholars have proposed using alternative terms such as “legal transfer”, “circulation of legal models”,¹¹ “legal harmonisation”, “legal unification”, “legal borrowing”, “legal reception”, “diffusion of law”, and “learning from other legal systems”¹² to imply the phenomenon or to refer to some aspects of it that the term “legal transplant” is intended to convey.¹³ For example, William Twining proposes using the term “diffusion of law” with the meaning that “diffusion [of law] is generally considered to take place when one legal order, system or tradition influences another in some significant way.”¹⁴ His proposal was inspired by the concept in social sciences that

[...] the diffusion of social practices, beliefs, technologies or moral rules is a subject of interest for both sociologists and anthropologists. In both cases, diffusion process analysis points out how individuals, groups or communities may incorporate, reject, or adapt practices, rules, or social representations designed by others.¹⁵

continuum. One terminal point represents organic transplantation and the other represents so-called “mechanic” transplantation. For Kahn-Freund, legal transplant will stand at a point in this continuum. The use of the term “legal transplant” tends to imply that imported legal ideas or legal rules must be naturalized or assimilated into local legal systems, otherwise they may be rejected. See Kahn-Freund, *supra* note 4 at 5-6.

⁹ David Nelken, “Towards a Sociology of Legal Adaptation” in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart, 2001) 7 at 15-20

¹⁰ Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences” (1998) 61 *Mod. L. Rev.* 11 at 11. In this widely-cited article, Teubner argues that the metaphor “legal transplant” seems to connote only two possibilities of post-transplantation consequences, i.e. foreign ideas may be either accepted or rejected. However, in his observation, the third possibility is usually ignored, i.e. legal transplantation may produce a series of unpredictable choices and behaviours. In other words, imported foreign legal rules may act as legal irritants in the recipient legal system. In Teubner’s words, at 12, legal transplants act like “legal irritants in host country legal systems. They unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change”.

¹¹ Michele Graziadei, “Comparative Law as the Study of Transplants and Receptions” in Reimann & Zimmermann, *supra* note 2, 441 at 443 [Graziadei, “Transplants and Receptions”].

¹² Daphne Barak-Erez, “The Institutional Aspects of Comparative Law” (2008-2009) 15 *Colum. J. Eur. L.* 477 at 478.

¹³ Gillespie, *supra* note 7 at 10.

¹⁴ William Twining, “Diffusion of Law: A Global Perspective” (2004) 49 *J. Legal Pluralism & Unofficial L.* 1 at 14.

¹⁵ L.A. Brown, “Diffusion: Geographical Aspects” (2001) 6 *Int’l Encyclopedia Soc. & Behavioral Sciences* 3676 at 3681, cited in Twining, *ibid.* at 14.

Due to the widespread use of the term “legal transplant”, in this dissertation, this metaphor is also used to refer to the phenomenon of ideas, elements, aspects or even institutions or structures of foreign legal systems travelling or being adopted across legal borders to become ideas, elements, aspects or parts of legal systems in other countries. However, the limitations of this metaphor will be noted.

Looking back at the history of legal evolution in Western countries, Watson and many other legal scholars found that “the adoption of law(s) from abroad has a tradition as old as law and cultural intercourse.”¹⁶ Legal transplantation can occur through colonial imposition or voluntary borrowing.¹⁷ This description is also regarded by Gillespie as accurate in the case of legal evolution in Vietnam – a South East Asian nation with complex experiences of interacting with many kinds of foreign cultures and powerful foreign countries including China, France, the United States and the former Soviet Union.¹⁸

However, some key questions arise from the phenomenon of legal transplantation, namely: (1) What actually travels (e.g. legal ideas, legal rules)?; (2) Is law actually transferable?; (3) If transferable, to what extent and under what conditions?; and (4) How does legal transplantation take place (mechanism of legal transplantation)? These are also the key questions that various legal transplantation theories try to answer.

2.2 COMPETING LEGAL TRANSPLANTATION THEORIES

2.2.1 A Warning from Montesquieu

Alan Watson is usually claimed to be one of the first scholars to introduce the subject of legal transplants for academic debate, in his well-known book, *Legal Transplants: An Approach to Comparative Law*, first published in 1974.¹⁹ However,

¹⁶ Waelde & Gunderson, *supra* note 1 at 366; See also Watson, *Legal Transplants*, *supra* note 3 at 21; Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, (Oxford: Oxford University Press, 2001) at xii.

¹⁷ Brian Z. Tamanaha, *ibid.* at xii.

¹⁸ Gillespie, *supra* note 7 at 39-68.

¹⁹ P.G. Monateri, “The Weak Law: Contaminations and Legal Cultures” (2003) 13 *Transnat’l L. & Contemp. Probs.* 575 at 575.

more than 230 years before Watson's book was published, Montesquieu, one of the widely acclaimed fathers of modern comparative law,²⁰ had put forward an important thesis about the possibility of borrowing foreign laws in designing the domestic laws of another country. In his classic book published in 1748, *De l'esprit des lois (The Spirit of Laws)*, Montesquieu explicitly maintained that:

[Laws] should be so specific to the people for whom they are made, that it is a great coincidence if those of one nation can suit another. They should be relative to the physical qualities of the country; to its frozen, burning or temperate climate; to the quality, location, and size of the territory; to the mode of livelihood of the people, farmers, hunters, or pastoralists; they should relate to the degree of liberty which the constitution can admit, to the religion of the inhabitants, to their inclinations, to their wealth, to their numbers, to their commerce, to their mores, to their manners [...]²¹

This statement was later reformulated by Kahn-Freund as follows: "It was only in the most exceptional cases that the institutions of one country could serve those of another at all."²²

The legal developments throughout the world, even the developments of legal systems long before Montesquieu put forward the above-cited words, do not seem to fully validate what he claimed. The spread of civil law and common law systems throughout the world, even from "civilized" Europe to "barbarian" Asian countries,²³ has really made serious proponents of Montesquieu rethink the issue. Watson and Kahn-Freund seemed to respond to this inquiry in a timely manner. In 1974, both these scholars revived the debate about legal transplantation.²⁴ Watson's book *Legal Transplants: An Approach to Comparative Law*²⁵ and Kahn-Freund's journal article "On Uses and Misuses of

²⁰ Robert Launay, "Montesquieu: The Specter of Despotism and the Origins of Comparative Law" in Annelise Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001) 22; see also Bénédicte Fauvarque-Cosson, "Development of Comparative Law in France" in Reimann & Zimmermann, *supra* note 2, 35 at 40.

²¹ Cited in Launay, *ibid.*, at 23.

²² Kahn-Freund, *supra* note 4 at 6.

²³ Graziadei, "Transplants and Receptions", *supra* note 11 at 445-455.

²⁴ Helen Xanthaki, "On Transferability of Legislative Solutions: The Functionality Test" in Constantin Stefanou & Helen Xanthaki, eds., *Drafting Legislation: A Modern Approach* (Farnham, UK: Ashgate, 2008) 1 at 16.

Comparative Law”²⁶ offer two competing theories to describe and explain the phenomenon of legal transplantation past and present.

2.2.2 Alan Watson’s Theory

Summarizing Watson’s 20 books and more than 100 articles on the history of Western law, William Ewald concluded that Watson’s unified theory of legal change is that “the growth of law is principally to be explained by the transplantation of legal rules.”²⁷ Put another way, the key ideas in Watson’s theory are that “borrowing has been the most fruitful means of legal development, hence comparative law is the best approach to understanding the relationship between law and society.”²⁸ This theory is succinctly presented in Watson’s 1974 book,²⁹ in which he states that

[...] the transplanting of individual rules or of a large part of a legal system is extremely common. This is true both of early times [...] and the present day [...] [T]ransplanting is, in fact, the most fertile source of development. Most changes in most systems are the result of borrowing.³⁰

However, it should be made clear that this thesis was not originally Watson’s idea. Watson himself admitted that the above-mentioned thesis was a modified copy of Roscoe Pound’s idea published in 1920 that “the history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.”³¹ In turn, Pound’s idea was inspired by the dominant

²⁵ According to Gary Francione, this book of Watson’s was written in 1970 but it could not be published until 1974 because of the outright hostile response of outside readers for academic presses. See Gary Francione, “Alan Watson’s Controversial Contribution to Legal Scholarship” (2002-2003) 31 Ga. J. Int’l & Comp. L. 59 at 61.

²⁶ Kahn-Freund, *supra* note 4 at 5.

²⁷ William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants” (1995) 43 Am. J. Comp. L. 489 at 489.

²⁸ Francione, *supra* note 25 at 61.

²⁹ Watson, *Legal Transplants*, *supra* note 3.

³⁰ *Ibid.* at 95.

³¹ Cited in Watson, *Legal Transplants*, *supra* note 3 at 22; also, on this same page, Watson refers to the view of anthropologists that “cultures develop mainly through borrowings due to chance contact.” Here, Watson is quoting R.H. Lowie, *Primitive Society* (New York: Boni & Liveright, 1920) at 441.

view of cultural anthropologists of that period that “cultures develop mainly through borrowings due to chance contact.”³²

Nevertheless, in contrast to Pound, Watson made a great effort to construct a more systematic theory of legal transplantation. He not only accepted Pound’s idea about the pervasiveness and the role of legal transplants in law reform projects, but also pushed the discussion to a higher level, i.e. to measure the possible extent of legal transplants, and offered an explanation for the pervasiveness of legal transplants. In his opinion, “the transplanting of legal rules is socially easy.”³³ For Watson “whatever opposition there might be from the bar or legislature, it remains true that legal rules move easily and are accepted into the system without too great difficulty”³⁴ and “this is so even when the rules come from a very different kind of system.”³⁵ Further, he argues, “reception is possible and still easy when the receiving society is much less advanced materially and culturally, though changes leading to simplification, even barbarisation, will be great.”³⁶

As for the scale of legal transplants, Watson states that “receptions come in all shapes and sizes: from taking over single rules to (theoretically) almost a whole system.”³⁷

Watson gave the following two reasons for the pervasiveness of legal transplants:

The first reason is that law has a value of knowledge that can exist in an independent form and spill over the borders within which it was invented. He states that, [...] law like technology is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented, its advantages can be seen and the wheel used by many. So important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations.³⁸

³² Watson, *Legal Transplants*, *supra* note 3 at 22.

³³ *Ibid.* at 95.

³⁴ *Ibid.* at 95-96. He further notes that, “we are considering only the existence of similar rules and not whether they always work to similar effect in the different systems.” *Ibid.* at 96.

³⁵ *Ibid.* at 96.

³⁶ *Ibid.* at 99.

³⁷ Alan Watson, “Aspects of Reception of Law” (1996) 44 Am. J. Comp. L. 335 at 335 [Watson, “Aspects of Reception”].

³⁸ Watson, *Legal Transplants*, *supra* note 3 at 100.

In other words, law is the knowledge about a set of solutions to social problems. It is a system of know-how. Accordingly, it has a spillover effect in that its value and benefits can be appreciated not only by the country in which it was first invented, but also by other countries facing similar problems.

The second reason is the existence of a huge gap between “law in books” and “law in action” (i.e. the gap problem in the sociology of law³⁹ or the gap between “the talk of law” and “the walk of law”⁴⁰). For Watson, law can function as both “working machines” and “stored machines” (i.e. a kind of tool kept and stored by a society in their “warehouses” and used only when necessary). In other words, law includes, at the same time, both active rules and inactive rules. Watson states that

[...] the truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness [...] usually legal rules are not peculiarly devised for the particular society in which they now operate and also [...] this is not a matter of great concern.⁴¹

Consistent with his view on the reasons for the pervasiveness of legal transplants, Watson also explains why legal drafters or law-makers tend to prefer legal transplants rather than self-innovation. According to him, a number of important driving factors which should be noted include: (1) the practical utility of legal transplants (including the usefulness or benefits of legal transplants as well as the effect of time- and resource-saving for law-makers); (2) the availability of knowledge about foreign legal solutions (especially through providing legal education and legal training by donor countries to experts and scholars of recipient countries); and (3) the prestige or authority of foreign sources (i.e. borrowing foreign legal sources could, in certain situations, help to strengthen the legitimacy of the current regime in the recipient country).⁴²

As for the rationale relating to the availability of foreign legal knowledge to legal drafters or law-makers, Watson further argues that

³⁹ David Nelken, “The ‘Gap Problem’ in the Sociology of Law: A Theoretical Review” (1981) 1 Windsor Y.B. Access Just. 35.

⁴⁰ Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (Chicago: University of Chicago Press, 2010) at 94.

⁴¹ Watson, *Legal Transplants*, *supra* note 3 at 95-96.

⁴² Watson, “Aspects of Reception”, *supra* note 37 at 335-351.

[...] law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it.⁴³

Therefore, for Watson, the extent of legal transplants depends very much on the knowledge constraints of the lawmaking elite – the constraints that could be broadened by the use of comparative law. He states that

[...] if borrowing is the main way law develops, and if the lawmaking elite is bound by its legal culture, and if this culture is restricted by what the elite does not know, then it follows that the quality of legal education, including exposure to Comparative Law (where that occurs), plays a powerful role in law reform.⁴⁴

One of the most contentious theses in Watson's legal transplantation theory is his view of legal autonomy. For Watson,

[...] to a large extent, law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy, of the ruling elite or of the members of the particular society.⁴⁵

He argues that

[...] if there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power of survival would be severely limited. Changes in societal structure would always entail changes in the law.⁴⁶

In his 2007 book, *Comparative Law: Law, Reality and Society*, Watson again states his thesis, but in a softer voice. He writes,

[...] much law in books reflects the conditions, needs and desires of the society in which it operates. But likewise much is accepted because it was borrowed often without much thought [...] History shows that borrowed law, foreign law, is not necessarily to be regarded as unsatisfactory law. It may be as satisfactory as indigenous law.⁴⁷

⁴³ Alan Watson, "Comparative Law and Legal Change" (1978) 37 Cambridge L.J. 313 at 315 [Watson, "Comparative Law"].

⁴⁴ Watson, *Legal Transplants*, *supra* note 3 at 118.

⁴⁵ Watson, "Comparative Law", *supra* note 43 at 314-315.

⁴⁶ *Ibid.*

⁴⁷ Alan Watson, *Comparative Law: Law, Reality and Society* (Lake Mary, FL: Vandeplass, 2007) at 12.

Based on what Watson writes it can be fairly stated that he is an open critic of a xenophobic attitude in law reform.

2.2.3. Otto Kahn-Freund's Theory

If Watson revives the ideas of legal scholar Roscoe Pound of the early 20th century, Kahn-Freund revives the claims of Montesquieu, an 18th century legal thinker, about the difficulty of legal transplants. However, based on his own update of the historical development of legal systems in England, France, the United States and a number of other developed countries,⁴⁸ Kahn-Freund, in his 1974 article “On Uses and Misuses of Comparative Law”,⁴⁹ offers a softer thesis about the difficulty of legal transplantation. He maintains that “we cannot take for granted that rules or institutions are transplantable.”⁵⁰ He stresses the risk of rejection when a foreign legal rule or a foreign legal idea is incorporated into a different legal system. He states that “the criteria answering the question whether or how far [transplantability of legal rules or legal institutions is] [...], have changed since Montesquieu's day, but any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection.”⁵¹ In Kahn-Freund's view, legal transplants are possible in certain cases, but not in all cases. In addition, he claimed that “there are degrees of transferability.”⁵² This thesis was summarized and reformulated by Gillespie as follows:

[...] All laws have to some extent de-coupled from their sociopolitical moorings, making legal transplants across sociopolitical boundaries a theoretical possibility. Since laws de-couple to varying degrees, some are more likely to survive the journey across cultural borders than others. Sociopolitical factors determine the degree of coupling between law and society; these factors are the political role of law, the distribution of state power, and pressure from non-state institutions.⁵³

⁴⁸ He considers both examples of successful and unsuccessful legal transplantation.

⁴⁹ Kahn-Freund, *supra* note 4 at 5.

⁵⁰ *Ibid.* at 27.

⁵¹ *Ibid.*

⁵² *Ibid.* at 6.

⁵³ Gillespie, *supra* note 7 at 22.

For Kahn-Freund, successful legal transplants require many conditions. He suggests that the use of a foreign legal model for law reform “requires a knowledge not only of the foreign law, but also of its social, and above all its political context.”⁵⁴ In other words, legal transplanters need not only have an accurate knowledge of law in books but also a sufficient knowledge of law in action, especially in terms of the relationship between legal rules and their political contexts. The creation of a viable legal transplant requires a two-step process: (1) identifying the relationship between the legal rule to be transplanted and the socio-political structure of the donor state; and (2) comparing the donor and the recipient states to ascertain the compatibility of their socio-political environments.⁵⁵ Failing to follow this process, legal transplantation becomes an abuse because “it is informed by a legalistic spirit which ignores this context of the law.”⁵⁶ This idea is also shared by René David, a well-known French comparative lawyer, who states that “when used with appropriate care, the French legislator is likely to borrow only from legal systems that are already similar to the French.”⁵⁷

There are two key differences between Kahn-Freund’s thesis and what Watson claims in his theory of legal transplantation. The first difference is the extent of possibility of legal transplants. While Watson tends to believe in an extremely high potential for legal transplants, Kahn-Freund claims that this potential is extremely limited by a strict condition, i.e. the compatibility of the socio-political environments of the donor and the recipient states. The second difference is the degree of transferability of legal rules. While Watson is silent on the relationship between the degree of transferability of legal rules and their types and nature, Kahn-Freund believes that legal rules in different areas of law could have different degrees of transferability.

⁵⁴ Kahn-Freund, *supra* note 4 at 27.

⁵⁵ Loukas A. Mistelis, “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations” (2000) 34 Int’l Law. 1055 at 1066.

⁵⁶ Kahn-Freund, *supra* note 4 at 27.

⁵⁷ Fauvarque-Cosson, *supra* note 20 at 51.

2.2.4 Alan Watson's Theory under Attack

Despite the fact that both Watson and Kahn-Freund offered their theories in the same year, these two competing theories did not draw the same kinds of responses from comparative lawyers. In fact, Watson's theory faced severe criticisms from many legal scholars, especially those in the field of law and society. Perhaps the underlying reason is that Watson's theory tends to lead to the conclusion that there is no meaningful connection between law and society, even between law and culture. And this conclusion is clearly contrary to the widely-held beliefs in the legal community, especially among scholars in the law and society movement,⁵⁸ as well as among legal anthropologists,⁵⁹ that law is a mirror of society and that there is "an organic connection between the law and the particular character of the people."⁶⁰

⁵⁸ In his well-known book *A History of American Law* (first published in 1973), Lawrence M. Friedman consistently argues that law is not autonomous. He argues that law is a mirror of society. However, in the third and latest edition of his book (2005), he concedes that "perhaps it [law] is a distorted mirror. Perhaps in some regards society mirrors law. Surely law and society interact [...] Law is the product of social forces, working in society. If it has a life of its own, it is a narrow and restricted life." See Lawrence M. Friedman, *A History of American Law*, 3d ed. (New York: Simon & Schuster, 2005) at ix. It is worth noting that the idea that law is a mirror reflecting society is also widely shared among contemporary Vietnamese legal scholars. See, for example, Do Ngoc Thinh, *Role of Laws in the Process of Transforming a Centrally Planned Economy to a Market-based Economy (Vai tro cua phap luat trong qua trinh chuyen doi nen kinh te ke hoach hoa, tap trung, bao cap sang nen kinh te thi truong)* (Ph.D. Dissertation, Institute of State and Law, Hanoi, 2000) at 33-34 [unpublished].

⁵⁹ Clifford Geertz, in one of his widely cited books published in 1983, argues for a hermeneutic view of law. In his view, law is a cultural expression and a component of a bigger picture, i.e. the culture of a community. He argues that "law [...] is local knowledge, local not just as to place, time, class, and variety of issue, but as to accent – vernacular characterization of what happens connected to vernacular imaginings of what can." For him, "setting out to build a general theory of law is any more likely a venture than setting out to build a perpetual motion machine." He adds that "law, rather than a mere technical add-on to a morally (or immorally) finished society, is along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it." See Clifford Geertz, *Local Knowledge: Further Essays in Comparative Anthropology* (New York: Basic Books, 1983) at 215-218. John Griffiths, one of the leading contemporary sociologists of law, openly states that "thinking about law without thinking about where it comes from and about all of the things that make it important and interesting is dreadfully dull [...] [It is like] thinking about something that only has meaning in relation to something else, without thinking about the something else [...]" See John Griffiths, "The Idea of Sociology of Law and Its Relation to Law and to Sociology" in Michael Freeman, ed., *Law and Sociology: Current Legal Issues 2005* (Oxford: Oxford University Press, 2006) 49 at 67-68.

⁶⁰ Graziadei, "Transplants and Receptions", *supra* note 11 at 446. However, note the view held by Brian Tamanaha in one of his publications in 1997, *Realistic Socio-Legal Theory*, which contains a nuanced departure from the dominantly cultural concept of law that "what law is and what law does cannot be captured in any single scientific concept. The project to devise a scientific concept of law was based upon a misguided belief that law comprises a fundamental category. To the contrary law is thoroughly a cultural construct, lacking any universal essential nature. Law is whatever we attach the label law to." See Brian Tamanaha, *Realistic Socio-Legal Theory* (Oxford: Oxford University Press, 1997) at 128.

Lawrence M. Friedman, one of the leading American legal historians and sociologists of law, and a supporter of the “mirror” thesis, comments that Watson and other proponents of legal borrowing tend to assume that

[...] law is a kind of technology [...] that it is in essence culture-free, and that it improves or evolves, and [...] that “modern” law must be better than “old” law, just as modern medicine is better than leeches and witchdoctors, and a Boeing 747 goes faster and carries more than an ox-cart.⁶¹

Friedman expressed his doubt that

[...] the evidence that economic growth and social development needs “developed” law (in the lawyerly sense) is scanty, to say the least. Little is known about the role of borrowed law in everyday life, in the borrowing countries – or for that matter, in the source countries. What little there is suggests, not unexpectedly, that the impact is variable and complex. We have barely begun to understand it.⁶²

Ann and Robert Seidman are also opponents of Watson’s thesis. In Robert Seidman’s 1978 book *The State, Law and Development*,⁶³ the author explicitly declares that “legal transplants practically never work.”⁶⁴ He uses the words “never work” here with the meaning that legal transplantation cannot create laws that produce the same desirable effects (outcomes) in the recipient country as they did in the donor country. Explaining this failure, Seidman reasons that the actual behaviours of a legal rule addressee (or “role-occupant”) are “a function not only of [that legal rule’s] prescriptions but also of his physical environment and of the complex of social, political, economic and other institutions within which he makes his choices about how to behave.”⁶⁵ Due to the fact that these environments “differ from time to time and place to place [...] the activity induced by rules of law is usually specific to time and place.”⁶⁶ In other words, “the same rules of law and their sanctions in different times and places, with different physical and

⁶¹ Lawrence M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs, NJ: Prentice-Hall, 1977) at 46.

⁶² *Ibid.* at 47.

⁶³ Robert B. Seidman, *The State, Law and Development* (New York: St. Martin’s Press, 1978).

⁶⁴ *Ibid.* at 34.

⁶⁵ *Ibid.* at 36.

⁶⁶ *Ibid.*

institutional environments, will not induce the same behaviour in role-occupants in different times and places.”⁶⁷

This message is repeated and broadened throughout most of the Seidmans’ writings in subsequent years.⁶⁸ For the Seidmans, legal drafters or law-makers following the approach of legal borrowing have failed to recognize the “law of non-transferability of law”⁶⁹ which states that “save accidentally, no country can copy another country’s law and achieve similar outcomes.”⁷⁰ The reason is that

[...] all behaviours – and therefore all institutions – emerge historically as various actors respond, not only to the law’s commands, but also to their environments’ unique constraints and resources [...] The most important element in those environments consists of other institutions, that is, the historically-shaped repetitive patterns of behaviours of other social actors. Simply to eliminate the institutional structures of a planned economy cannot automatically ensure that the relevant economic actors will chose to behave in ways likely to produce the goodies neoclassical economists promise; that depends upon the specific circumstances. If those circumstances conspire to induce individual actors to make socially perverse choices – a possibility that even neo-classical economic theory allows – the assumed optimal outcome will not occur.⁷¹

The Seidmans refer to Eastern Europe’s contemporary history to support their claims.

They note that,

[...] Eastern Europe’s contemporary history suggests that instead of choosing to behave in economically productive and socially useful ways, many newly-rich millionaires have reaped huge profits as the expense of a drastic drop in the majority’s living standards and an environmental apocalypse.⁷²

In their 1997 essay “Not a Treasure Chest, a Tool Box”, the Seidmans write,

[...] the belief that drafters may simply copy a foreign law or an ‘international standard’ makes the study of foreign law not merely useless, but positively dangerous. At its most innocuous, this approach produces laws which almost

⁶⁷ *Ibid.*

⁶⁸ Ann Seidman & Robert Seidman, *State and Law in the Development Process: Problem-solving and Institutional Change in the Third World* (London: St. Martin’s Press, 1994) [A & R Seidman, *State and Law*] at 44. Here, the Seidmans stress that copying laws from a seemingly successfully developed country is a practice that results in “almost universal failure.”

⁶⁹ *Ibid.* at 44.

⁷⁰ Ann Seidman & Robert B. Seidman, “Drafting Legislation for Development: Lessons from a Chinese Project” (1996) 44 *Am. J. Comp. L.* 1 at 34-35 [A & R Seidman, “Drafting Legislation”].

⁷¹ *Ibid.*

⁷² *Ibid.*

inevitably fail to achieve their stated aims. Even worse, it may generate unanticipated counterproductive social behaviours.⁷³

The Seidmans' view is shared by numerous scholars. For example, based on his decades of observing legal transplants from developed countries to developing countries, Kenneth W. Dam in 2006 expressed his doubt about the success of naïve legal transplants as follows:

I [...] know that the first instinct of lawyers, which is simply to transplant world-class legal institutions to developing countries, will most likely produce little more than a harvest of dead leaves. The institutions important to development are more likely to bear fruit if they evolve out of roots already growing in the soil of particular countries.⁷⁴

However, both the Seidmans' and Dam's arguments seem to unfairly attribute the failures of the legal systems in transitional and developing countries to the sole cause of their origins in legal transplantation. In reality, many factors can make a legal system fail to work effectively.⁷⁵

Although he shares the Seidmans' belief in the complete failure of legal transplantation,⁷⁶ Pierre Legrand offers a different interpretation of the impossibility of legal transplantation. For Legrand, law never actually travels across the border. What actually travels is something else, not the meaning of legal rules. He constructs this thesis based on his cultural view of law. For Legrand, law as a part of the bigger culture, "is part of the symbolic apparatus through which entire communities try to understand themselves better."⁷⁷ He stresses that "law is, first and foremost, a cultural phenomenon, not unlike singing or weaving [...] law is an indissoluble amalgam of historical, social,

⁷³ Ann Seidman & Robert B. Seidman, "Not a Treasure Chest, a Tool Box: Lessons from a Chinese Legislative Drafting Project" in Ann Seidman, Robert Seidman & Janice Payne, eds., *Legislative Drafting for Market Reform: Some Lessons from China* (London: Macmillan Press, 1997) 1 at 9 [A & R Seidman, "Not a Treasure Chest, a Tool Box"]

⁷⁴ Kenneth W. Dam, *The Law – Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institution Press, 2006) at 6.

⁷⁵ See Lon L. Fuller, *The Morality of Law* (New Haven, CN: Yale University Press, 1969) at 39. See section 2.3.

⁷⁶ Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 M.J.E.C.L. 111 [Legrand, "Impossibility"].

⁷⁷ *Ibid.* at 124.

economic, political, cultural, and psychological data, a compound, a hybrid [...]”⁷⁸ Based upon this cultural view of law, Legrand states that

[...] anyone who believes in the reality of legal transplants must broadly accept a ‘law-as-rules’ and a ‘rules-as-bare-propositional-statements’ model. [...] In other words [they] must envisage that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage [...] Rules are just not what they are represented as being by Alan Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.⁷⁹

According to Legrand,

[...] the meaning of a rule [...] is not entirely supplied by the rule itself [...] [its] meaning is [...] perhaps mostly a function of the application of the rule by its interpreter, of the concretisation or instantiation in the events the rule is meant to govern [...] the meaning of the rule is a function of the interpreter’s epistemological assumptions which are themselves historically and culturally conditioned.⁸⁰

Further,

[...] a rule is not identical to the inscribed words. A rule is necessarily an incorporative cultural form. [...] A rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is an expression and a synthesis of the whole: it resonates.⁸¹

In other words, there is an intimate connection between the meaning of legal rules and the cultural context in which the rules are used.⁸² If cultural context (i.e. the whole world of local meaning) cannot be transplanted, the meaning of legal rules will be lost through legal transplantation. Legrand insists that

⁷⁸ Pierre Legrand, “How to Compare Now” (1996) 16 L.S. 232 at 236.

⁷⁹ Pierre Legrand, “What ‘Legal Transplants’?” in Nelken & Feest, *supra* note 9, 55 at 57.

⁸⁰ *Ibid.* at 57-58.

⁸¹ *Ibid.* at 59.

⁸² However, it is worth noting Jaakko Husa’s critique that:

[...] the ideas of Pierre Legrand are fascinating and rich with insight, of course, but basically obsolete because they assume that there still is something as pure ‘continental law’ or pure ‘English common law’ thinking, i.e. mentalité. The situation seems to be more complicated than this – purity has vanished and, instead, we have plurality.

See Jaakko Husa, “Global Comparative Law – Right Cure for the Wrong Disease?” (2006-2007) 13 *Tilburg Foreign L. Rev.* 393 at 411.

[...] at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words. To claim more is to claim too much. In any meaningful sense of the term, 'legal transplants', therefore, cannot happen.⁸³

By this argument, Legrand seems to imply that any knowledge about the existence of the so-called "legal transplantation" phenomenon is simply false or illusory. "Legal transplant" is an empty concept devoid of any representation of social reality. The reason is that this phenomenon simply does not exist. So-called "legal transplantation" is not only a misnomer but a sham phenomenon. Perhaps, it is a metaphor which refers to a social reality that warrants a different name.

It is interesting to note that Watson's idea of the possibility of legal transplantation, which has its roots in cultural anthropologists' observations on the reality of cultural exchanges and contacts, is now challenged by Legrand, who makes recourse to the concept of culture to argue for a totally opposite position. Perhaps Watson and Legrand build their theories on two opposite assumptions about culture. In Watson's view, at least elements of culture can travel beyond borders while, in Legrand's view, such possibility is simply illusory.

2.2.5 In Defense of Alan Watson's Theory

In addition to those who critique Watson's thesis, many others seem to share ground, to some extent, with Watson, at least with his premise that legal ideas, legal rules or their meaning can travel or be transplanted under certain conditions. Those believing in the possibility (and usefulness) of legal transplants have tried to discern the rationales and conditions for "effective" or "successful" legal transplants.⁸⁴

For example, Konrad Zweigert and Hein Kötz maintain that "legislators all over the world have found that on many matters, good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports

⁸³ Legrand, "Impossibility", *supra* note 76 at 120.

⁸⁴ However, as pointed out by David Nelken, the concept of "successful legal transplant" is also very problematic. The criteria to ascertain whether a legal transplant has "failed" or is "successful" are usually implied rather than being explicitly stated in most writings about legal transplantation. See David Nelken, "The Meaning of Success in Transnational Legal Transfers" (2001) 19 Windsor Y.B. Access Just. 349 at 350-351.

specially prepared on the topic in question.”⁸⁵ The rationale or the justification for legal transplants lies in the benefits or the usefulness that legal transplants may bring about. The mere fact that legal rules or legal solutions are “foreign” or “alien” does not prevent them from being received or decrease their usefulness. According to Zweigert and Kötz, this opinion has been widely held in Europe since the 19th century.⁸⁶ For instance, the well-known German jurist Rudolph von Jhering clearly put forward this position as follows:

[...] the reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.⁸⁷

However, Zweigert and Kötz are also aware of the risks posed by legal transplantation. They state that “it may well prove impossible to adopt at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit.”⁸⁸ To avoid rejection of legal transplants (i.e. to make legal transplants possible and successful), they offer the advice to legal drafters and law-makers that:

[...] Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proven satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it.⁸⁹

Zweigert and Kötz’ argument is also shared by many other scholars. For example, based on the experience of legal transplants in Japan, Japanese scholar Zentaro Kitagawa also believes in the viability of legal transplants but stresses that the successful import of foreign legal elements “requires their comparison with the domestic system in order to

⁸⁵ K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1998) at 16.

⁸⁶ Michele Graziadei, “Legal Transplants and the Frontiers of Legal Knowledge” (2009) 10 *Theor. Inq. L.* 723 at 730.

⁸⁷ This quote is cited in Zweigert & Kötz, *supra* note 85 at 17.

⁸⁸ Zweigert & Kötz, *supra* note 85 at 17.

⁸⁹ *Ibid.*

determine which foreign law elements could fit in and which would not.”⁹⁰ Experts working for the World Bank also follow this line of argument. In a report published in 1996, the World Bank acknowledged that “importing [foreign laws] is risky.”⁹¹ The reason is that “different histories and cultural traditions shape the way legal systems work. If laws do not take local legal culture into account, they may be inappropriate or may not take root.”⁹² However, the World Bank stresses that “borrowing ideas from best-practice models abroad, then adapting them through indigenous legal drafting and political debate usually works best.”⁹³ Unluckily, the World Bank has failed to provide concrete advice for developing countries about how they can determine which models are “best-practice” and how they can modify and adapt these best practices to fit the local conditions.

Jonathan M. Miller shares with Watson the belief that the key factors driving law reformers to borrow foreign legal solutions include: (1) the cost-saving nature of the legal transplantation process; and (2) the prestige of foreign legal models. Miller offers two additional driving factors, namely: (1) external pressures (in cases of imposed or compulsory legal transplants);⁹⁴ and (2) interest groups’ manipulation of the law-making process to enhance their own social positions and status.⁹⁵ Replying to scholars who prefer local rather than imported solutions, Miller explicitly states that

[...] a local product may be as unrealistic as any transplant. While one would expect domestic drafters to have a sense of local problems, nothing makes local drafting ‘per se’ better suited to local conditions than a foreign model that local legislators deem useful.⁹⁶

⁹⁰ Zentaro Kitagawa, “Development of Comparative Law in East Asia” in Reimann & Zimmermann, *supra* note 2, 237 at 239.

⁹¹ World Bank, *From Plan to Market: World Development Report 1996* (New York: Oxford University Press, 1996) at 87.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Jonathan M. Miller also points out that this type of legal transplant (i.e. an externally-dictated transplant) will fail “once the incentives or coercive forces disappear, unless the transplant has already taken root due to the rational authority of the legal system or local lobbies.” See Jonathan M. Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) 51 *Am. J. Comp. L.* 839 at 868.

⁹⁵ *Ibid.* at 843-867.

⁹⁶ *Ibid.* at 844.

Ugo Mattei, while agreeing with Watson that legal borrowing is the main source of legal change,⁹⁷ is not satisfied with the reasons offered by many comparative law scholars for this pervasive phenomenon. He argues that the current explanations for this interesting phenomenon mainly rely upon empty ideas such as the “prestige” of the donor legal systems or “the felt social needs” of the recipient societies. He asserts that the true logic of legal transplants is the superiority of foreign “efficient legal rules.”⁹⁸ In other words, legal transplantation (especially by voluntary legal reception) is a product of a process in which available foreign legal rules (or available foreign legal solutions) compete with one another to be accepted by legal transplanters (legal drafters and law-makers of recipient countries). The victory for this competition is granted to foreign legal rules or foreign legal solutions which offer superior solutions (in term of economic efficiency) for the problems the recipient countries are facing.

In line with Watson and Mattei, Jorg Fedtke is of the opinion that legal transplants are pervasive.⁹⁹ According to Fedtke, voluntary legal transplantation promises a higher rate of successful legal transplantation.¹⁰⁰

Thomas W. Waelde and James L. Gunderson, although referring to many examples in which legal transplants failed to work in developing countries, still believe in the necessity of copying laws from abroad. Their views, despite agreeing to some extent with Watson’s claims, seem to be leaning toward Kahn-Freund’s theory. Waelde and Gunderson maintain that,

[...] in times of dramatic change, there is not time carefully to craft “organic”, home-made legislation. Particularly with regard to legislation of a more technical, less political character (as traditional core contract law) it makes sense not to try

⁹⁷ In Mattei’s view “every legal system contains imported elements. All legal systems are, to some extent, mixed; no legal system has been constructed out of purely indigenous materials.” See Ugo Mattei, *et al.* eds., *Schlesinger’s Comparative Law: Cases-Text-Materials*, 7th ed. (New York: Foundation Press, 2009) at 240.

⁹⁸ Ugo Mattei, *Comparative Law and Economics* (Ann Arbor, MI: University of Michigan Press, 1998) at 124-126.

⁹⁹ Jorg Fedtke, “Legal Transplants” in Jan M. Smits, ed., *Elgar Encyclopaedia of Comparative Law* (Cheltenham, UK: Edward Elgar, 2006) 434 at 435. Fedtke states that “there is, in principle, no limit as far as the subject matter of a legal transplant is concerned; foreign ideas have been copied in most areas of private, administrative, constitutional, social security and even criminal law. The process can involve both single provisions and large portions of a statute.”

¹⁰⁰ *Ibid.* at 436. Fedtke notes that “legal tradition and a preference for ‘national’ solutions are equally powerful obstacles to a successful transplantation [but] a legal transplant is most likely to succeed in its new environment if it was chosen and introduced without external pressure.”

to reinvent the wheel; indeed it may seem that “technical” or “formal” rules, i.e. those that do not have a strong linkage with the prevailing social and political beliefs, interests and institutions, can be transplanted quite easily.¹⁰¹

However, they also note that, “the effectiveness of law is usually intimately linked to the institutional set-up of government and economic organisations as well as the shape, force and focus of social and economic forces and their interaction.”¹⁰² In their view,

[...] it is a delusion to believe that the formulation and enactment of foreign statutes will bring about the transition toward market economies desired. The fallacy is in thinking that legislation per se without (or rather than) an economic policy backed by social and institutional change, can be the lever for change. Laws become effective by social forces and pressures interested in and working for implementation. Without a proper institutional setting, the law will remain a fig-leaf, pretending action without changing social reality.¹⁰³

Waelde and Gunderson warn legal drafters and legal reformers in transitional countries that

[...] any effort at mere legislative reform will fail if it does not cover as well, or more so, the challenges of helping to build up the organisations required and the institutional environment within which a legal culture can emerge and flourish.¹⁰⁴

Therefore, according to them, “substantive legal reform and institution building must [...] be implemented together so that each reinforces the other.”¹⁰⁵ They believe that “the longer a law has been in effect and the more frequent or broader the range of its application, the more likely it is to be considered legitimate by businessmen, their advisors and society as a whole.”¹⁰⁶

Based on his examination of legal transplantation in a number of South East Asian countries (especially Thailand, Malaysia and Indonesia), Andrew Harding has

¹⁰¹ Waelde & Gunderson, *supra* note 1 at 368-369.

¹⁰² *Ibid.* at 360.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at 361.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 362.

confirmed Watson's thesis¹⁰⁷ but contributes important new insights. Harding maintains that

[...] South East Asian experience, in which virtually all law has been transplanted in some way, apparently proves conclusively that legal systems do develop out of legal transplants [...] Far from being impossible, transplants are a necessary catalytic element [...] South East Asia has been doing precisely this for hundreds of years. However, when it occurs [...] both the existing law and the transplanted law become something other than they were: each interacts not just with the other, but with the evolving social context which they both share. The purpose and effects of the transplant may not remain the same or precisely what was intended, because global doctrine becomes clothed in local knowledge.¹⁰⁸

Harding also seems to share Teubner's view that transplanted legal rules may act as legal irritants and states that the legal transplant "raises new questions and new solutions."¹⁰⁹ However, Harding does not agree with Kahn-Freund's idea of "degrees of transferability." For Harding,

[...] in South East Asia, there is also no evidence that one kind of law is more easily transplanted than another [...] In general it is nonetheless true that the region has absorbed all of its foreign influences. All have succeeded in that they have found fertile soil and taken root. All have failed in that they have not escaped being used for localised purposes or being modified in their practical application.¹¹⁰

Although Frederique Dahan and Janet Dine heed the insights suggested by Kahn-Freund as well as the critiques of the Seidmans, they still place their faith in the possibility of legal transplants. They argue from their experience of engaging in a law reform project in Russia that a legal transplant can be successfully implemented if the transplant is the product of a decision-making process strictly consistent with the following three-phase approach, which involves: (1) clearly identifying and understanding the issue or problem that the recipient country wants to address; (2) discerning the underlying rationales (political, economic or cultural) behind the foreign legal rules addressing the similar problem to be transplanted and examining whether they

¹⁰⁷ Andrew Harding, "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'" in Nelken & Feest, *supra* note 9, 199 at 213.

¹⁰⁸ Andrew Harding, "Global Doctrine and Local Knowledge: Law in South East Asia" (2002) 51 I.C.L.Q. 35 at 45.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

would fit the aspirations of the recipient country; and (3) reviewing the recipient country's institutional framework in which the transplanted rules will operate to see whether this framework will, to an acceptable extent, accommodate the transplanted laws.¹¹¹

John Gillespie, one of the leading foreign scholars of Vietnamese law, is of the opinion that the two sides of the current debate on legal transplantation in the comparative law community are not as divided as initially thought. For Gillespie, the viability of legal transplants can be predicted based upon the insights informed by the three following postulates widely held among scholars of legal transplants: (1) “transplant viability increases where the ideological content of transplanted laws is compatible with the dominant ideology shaping legal and economic thinking in recipient countries”; (2) “transplant viability increases where imported laws comport with power-distribution structures in recipient countries [...] [i.e.] transplanted laws are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law”; and (3) “non-state pressure groups influence the selection and implementation of foreign laws.”¹¹²

Penelope Nicholson, based on her comprehensive research on the borrowing by Vietnam of the Soviet court system, especially in the early 1950s and 1960s, tends to confirm the possibility of legal transplants in Vietnam but suggests that

[...] legal culture [local factors], in combination with other local influences, plays a dominant role in affecting legal transplants. It also indicates that political orientation affects the take-up of a transplant, but does not necessarily dominate in terms of its effect on the operation of a transplanted law or institution. Instead, the case study illustrates that despite Vietnam and the Soviet Union sharing a similar political orientation, the borrowed transplant permutes. It is reshaped in the Vietnamese context.¹¹³

¹¹¹ Dahan & Dine, *supra* note 2 at 308-309.

¹¹² Gillespie, *supra* note 7 at 14-15.

¹¹³ Penelope (Pip) Nicholson, “Comparative Law and Legal Transplants between Socialist States: An Historical Perspective” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (Abingdon, UK: Routledge, 2007) 143 at 143.

2.3 THE SEIDMANS' LEGISLATIVE THEORY

Despite the controversial nature of law reform projects, it seems apparent that law reformers share a common purpose of producing “good” or “quality” laws.¹¹⁴ Lon Fuller was one of the leading scholars discussing the concept of “good law” or “quality law”. In his famous book, *The Morality of Law*, Fuller convincingly argues that there are eight problems in a legal system or a statute which could prevent it from working effectively, namely: (1) a lack of rules; (2) failure to publicize; (3) unclear or obscure legislation that is impossible to understand; (4) retroactive legislation; (5) contradictions in the law; (6) demands that are beyond the capacity of the subjects and the ruled; (7) unstable legislation (too frequently revised); and (8) divergence between adjudication/administration and legislation (i.e. the huge gap between “law in books” and “law in action”).¹¹⁵ In the case of the CPL in Vietnam, it is unlikely that criteria (2) (failure to publicize) and (4) (retroactive legislation) will be violated.¹¹⁶ However, some criteria such as (1) a lack of rules, (2) unclear provisions, (3) self-contradicting provisions, (4) demands beyond the capacity of the enforcement agencies and targeted groups, and (5) divergence between administration and legislation, may become important concerns. The reason is that these five problems are widely found with most of the adopted laws in Vietnam.¹¹⁷

¹¹⁴ N.A. Florijn, “Quality of Legislation: A Law and Development Project” in J. Arnscheidt, B. van Rooij & J.M. Otto, eds., *Lawmaking for Development: Explorations into the Theory and Practices of International Legislative Projects* (Leiden: Leiden University Press, 2008) 75 at 75.

¹¹⁵ Fuller, *supra* note 75 at 39.

¹¹⁶ It has been a common practice in Vietnam, at least since the *Law on Laws* of 1996 took effect, that all legal documents must be publicly published. The current *Law on Laws* of 2008 even requires that draft laws must be published for public comments. These laws also stipulate that retroactive legislation is possible only in very exceptional cases.

¹¹⁷ Ha Thi Mai Hien, “New Developments in the Legal System of Vietnam for the Period of 2004-2009” (“Nhưng phát triển mới của hệ thống pháp luật Việt Nam giai đoạn 2004 -2009”) (2010) 162 J. Legis. Stud. (Vietnam), online: NCLP <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat/nhung-phat-trien-moi-cua-he-thong-phap-luat-viet-nam-giai-1110an-2004-2009>. See also Le Viet Truong, “The Role of National Assembly Committees in Ensuring the Consistency of the Legal System” (“Vai trò của các ủy ban của Quốc hội trong bảo đảm tính thống nhất của hệ thống pháp luật”) (2010) J. of Legis. Stud. (Vietnam), online: NCLP <[http://www.nclp.org.vn/nha_nuoc_va_phap_luat/ly-luan-ve-nha-nuoc/vai-tro-cua-cac-uy-ban-cua-quoc-hoi-trong-bao-111am-tinh-thong-nhat-cua-he-thong-phap-luat](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/ly-luan-ve-nha-nuoc/vai-tro-cua-cac-uy-ban-cua-quoc-hoi-trong-bao-dam-tinh-thong-nhat-cua-he-thong-phap-luat)>. In this article, Le notes “[T]he current legal system of Vietnam exposes many shortcomings. One of the most visible shortcomings is the overlapping and inconsistency among contents of legal normative documents [...] The key reason is the poor implementation of requirements in the *Law on Laws*.” [translated by author]

International scholars of recent times, when discussing the criteria of a quality statute, emphasize four criteria, namely: (1) efficacy (i.e. ability to produce the desired or intended results); (2) effectiveness (i.e. having the actual desired impact); (3) efficiency (i.e. producing optimal output at the least cost of input by passing the test of positive cost/benefit analysis); and (4) clarity, precision, and unambiguity, being written in plain language.¹¹⁸ Actually, the requirement that a good law or an ideal law should be a law written in simple and clear language was proposed hundreds of years ago by such famous legal thinkers as Montesquieu and Jeremy Bentham.¹¹⁹ However, the concept that a good law is an effective and efficient law (i.e. producing the intended outcomes at the least social cost) is a criterion of the present time, especially when laws are seen as instruments for social engineering.

If it is quite difficult to discern what a good or quality law is, it is even harder to determine how to make or produce a quality law to create social change, especially for development in developing and transitional countries. For the past three decades, the Seidmans have been widely considered the most important scholars in this field.¹²⁰ Despite the complex nature of law-making processes,¹²¹ the Seidmans have actively proposed a law-making approach that promises to produce what law reformers badly need, i.e. “quality law”. This helps to overcome the paradox faced by numerous

¹¹⁸ Helen Xanthaki, “On Transferability of Legislative Solutions: The Functionality Test” in Stefanou & Xanthaki, *supra* note 24, 1 at 4-14. However, in reality, following these criteria usually requires a balancing act and even tradeoffs. For example, sometimes, a tradeoff between legal certainty and flexibility, or feasibility and adequacy, may be needed. See N.A. Florijn, “Quality of Legislation: A Law and Development Project” in Arnscheidt, van Rooij & Otto, *supra* note 114, 75 at 77; See also B. van Rooij, “Bargaining about the Land Bill: Making Effective Legislation to Protect Arable Land in China” in Arnscheidt, van Rooij & Otto, *ibid.*, 145 at 147-149.

¹¹⁹ For example, Montesquieu, in his well-known treatise *The Spirit of Laws (De l’esprit des lois)*, argued that “laws should not be subtle [...] They are designed for people of common understanding, not as a work of logic, but as the plain reasoning of a family father.” Cited in Eva Steiner, *French Legal Method* (Oxford: Oxford University Press, 2008) at 19. Bentham, in his *Theory of Legislation*, also advocated that “the style and the method should be simple; the law ought to be a manual of instruction for each individual; and everyone should be enabled to consult it in doubtful cases without the aid of an interpreter.” Cited in Steiner, *Ibid.*

¹²⁰ B. van Rooij, J. Arnscheidt & J.M. Otto, “Lawmaking for Development: An Introduction” in Arnscheidt, van Rooij & Otto, *supra* note 114, 11 at 12.

¹²¹ Richard Posner, *Economic Analysis of Law*, 7th ed. (New York: Aspen, 2007) at 562.

developing countries implied in the oxymoron that these countries “have good laws, but they are poorly implemented.”¹²²

Observing the law-making practice in many countries, especially in developing and transitional countries, the Seidmans have found a common problem among legal drafters in these countries, namely, that legal drafters “lacked a theory or methodology directing them to examine the specific constraints and resources that structure the environment within which a new law’s addressees must determine how to behave in the face of the new law.”¹²³ Put another way, legal drafters or law-makers usually lack reliable guidance to accurately estimate or predict the social outcome produced by the introduction of a new law into the existing social environment. The Seidmans call this reliable guidance an “adequate legislative theory”. In the absence of such legislative theory, the Seidmans observe that legal drafters have usually followed one of the following four methodologies: “they copied law from other jurisdictions, they compromised between competing interests, they criminalized unwanted behaviours indiscriminately, they drafted in vague and imprecise terms.”¹²⁴ In other words, “almost none of the new states drafted bills grounded on a detailed examination of local circumstances, nor justified them in terms of reason informed by experience.”¹²⁵ As a result, most laws failed to produce their expected outcomes, i.e. “actually changed their targeted institutions in desired ways.”¹²⁶ The Seidmans convincingly pointed out that, although “law is a process by which government structures choice,”¹²⁷ it cannot succeed in “its ostensible purposes of affecting the behaviour of its addressees unless law-makers can predict accurately the actual behaviour of a law’s addressees in the face of the rule.”¹²⁸

¹²² Ann Seidman & Robert B. Seidman, “Between Policy and Implementation: Legislative Drafting for Development” in Stefanou & Xanthaki, *supra* note 24, 287 at 287.

¹²³ A.W. Seidman & R.B. Seidman, “Lawmaking, Development and the Rule of Law” in Arnscheidt, van Rooij & Otto, *supra* note 114, 91 at 104 [A & R Seidman, “Lawmaking, Development and the Rule of Law”].

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* at 105.

¹²⁶ *Ibid.*

¹²⁷ William Chambliss & Robert Seidman, *Law, Order and Power*, 2d ed. (Reading, MA: Addison-Wesley, 1982) at 79.

¹²⁸ *Ibid.* at 77.

In addition, according to the Seidmans, the key issue in making law for positive social changes is finding a way to transform the existing dysfunctional institutions which perpetuate social problems.¹²⁹ Unfortunately, the ignorance of “dysfunctional existing institutions” is too frequently observed in developing and transitional countries. The governments in these countries are usually more ready to spend their scarce resources on other programs, without paying due attention to the reforms of institutional arrangements that are currently distorting all of these programs. Therefore, the Seidmans argue, to effectively improve the current situation, institutional reform must be a key component in any kind of development program.¹³⁰ The Seidmans believe that law is a good, and possibly the most important, tool that governments can use for institutional reform in developing and transitional countries.¹³¹ However, law or law-making is not automatically a good tool. Instead, it can be misused or, as the Seidmans observe, “many new governors designed and implemented legislation arbitrarily, without either stating their reasons or engaging stakeholder participation.”¹³² For the Seidmans, law can become an effective tool for transforming “dysfunctional institutions” only when it is used “skillfully”,¹³³ following a strict set of conditions that the Seidmans try to discern and propose, i.e. “an adequate legislative theory and methodology [...] guiding officials in designing effective bills, and elected discretion in making subsidiary rules [...] in the course of implementing legislatively enacted law.”¹³⁴

Believing that organizations and individuals will respond to legal changes and the law may induce “desired” changes in problematic behaviours, the Seidmans argue that “the issue becomes, not whether a law can ever induce desired social change, but the circumstances under which a law will, or will not, induce the appropriate behaviours.”¹³⁵

¹²⁹ See, for example, Ann Seidman & Robert B. Seidman, “Law, Social Change, Development: The Fatal Race – Causes and Solutions” in Ann Seidman, *et al.*, eds., *Africa’s Challenge: Using Law for Good Governance and Development* (Trenton, NJ: Africa World Press, 2007) 19 [A & R Seidman, “The Fatal Race”]; A & R Seidman, “Lawmaking, Development and the Rule of Law”, *supra* note 123.

¹³⁰ A & R Seidman, “Lawmaking, Development and the Rule of Law”, *supra* note 123 at 97.

¹³¹ A & R Seidman, *State and Law*, *supra* note 68 at 52.

¹³² A & R Seidman, “Lawmaking, Development and the Rule of Law”, *supra* note 123 at 97.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 94.

The Seidmans emphasize that “a law’s addressees decide to behave as they do, not only in response to the rules of formal law, but also to all the non-legal factors that comprise the arena of choice inherent in their country’s unique environment.”¹³⁶ The Seidmans summarize seven factors behind all problematic behaviours of a law’s addressees. These are: (1) an [existing legal] rule prescribing a change in problematic behaviours of a law’s addressees; (2) opportunity (the environmental circumstances which facilitate or thwart the specified problematic behaviour); (3) the capacity of a law’s addressees to change their behaviours as required; (4) communication (i.e. a law’s addressees must understand the message of the law); (5) process (i.e. the procedures by which a law’s addressees decide whether to obey the rule); (6) interest (i.e. factors which a law’s addressees view as incentives for behaving as they do); and (7) ideology (i.e. a law’s addressees’ own values, beliefs, attitudes that influence their behaviours).¹³⁷ The Seidmans abbreviate these seven factors as “ROCCIPI”.

According to the Seidmans, “social problems” are deeply rooted in the existing dysfunctional institutions which are the historically-shaped “repetitive patterns of social behaviours.”¹³⁸ Making a new “effective” law to solve these problems requires inducing changes in the behaviours of relevant actors/players. In other words, the Seidmans introduce a behavioural aspect to analyzing the law-making and law-enforcing process in developing and transitional countries. According to them, if we follow the old way, we will only reach the old destination.

The Seidmans propose a legislative theory for developing and transitional countries – called “problem-solving institutionalist legislative theory” – as a way of thinking about how to make “optimal” legal solutions for social problems faced in these societies.¹³⁹ This legislative theory is, as the Seidmans have clearly stated, an application of the model of problem-solving¹⁴⁰ in the area of legislative activities. In the Seidmans’

¹³⁶ *Ibid.* at 95.

¹³⁷ *Ibid.* at 95-96.

¹³⁸ *Ibid.* at 94.

¹³⁹ See, for example, A & R Seidman, “The Fatal Race”, *supra* note 129; A & R Seidman, “Lawmaking, Development and the Rule of Law”, *supra* note 123.

¹⁴⁰ Problem-solving is usually defined as “a uniform process of identifying potential problems, defining and representing the problem, exploring possible strategies, acting on those strategies, and looking back and

view, problem-solving comprises four steps: (1) identifying the problem; (2) explaining it; (3) proposing solutions; and (4) implementing and monitoring a solution.¹⁴¹ The Seidmans further suggest that step 3, “proposing solutions”, has three sub-steps: (1) critically reviewing alternative possible measures that follow logically from warranted explanations; (2) finding the alternatives that will most likely effectively resolve the problem; and (3) determining which seems most cost-effective.¹⁴² In other words, the Seidmans’ preferred solutions are effective and efficient (i.e producing the desired outcome at the least cost) or, optimal solutions.

However, it is noteworthy that, if we see the law-making process as a policy-making process, it can be said that the Seidmans are, perhaps, not the first persons proposing to apply the problem-solving methodology to this process in a systematic manner. Actually, this idea was already quite well-known among scholars in the field of public policy analysis – a branch of political science founded in the United States in the 1950s by Harold Lasswell.¹⁴³ In this field of research,

[...] the stages of policy-making were originally conceived as evolving in a (chrono)logical order – first, problems are defined and put on the agenda, next, policies are developed, adopted and implemented; and finally these policies will be assessed against their effectiveness and efficiency and either terminated or restarted.¹⁴⁴

The four-phase problem-solving methodology for optimal law-making process is explained by the Seidmans as follows: (1) identifying the difficulty or the perceived social problems; (2) proposing and warranting explanations (the causes for such problematic patterns of social behaviours); (3) proposing and assessing proposed legal solutions (laws) (i.e. identifying alternatives and assessing the social and economic costs/benefits of each alternative to determine the optimal solution); and (4) monitoring

evaluating the effects of those activities.” See David H. Jonassen, *Learning to Solve Problems: An Instructional Design Guide* (San Francisco: Pfeiffer, 2004) at xxii.

¹⁴¹ A & R Seidman, *State and Law*, *supra* note 68 at 76.

¹⁴² *Ibid.* at 79.

¹⁴³ Frank Fischer, Gerald J. Miller & Mara S. Sidney, eds., *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (New York: CRC Press, 2007) at xix.

¹⁴⁴ Werner Jann & Kai Wegrich, “Theories of the Policy Cycle” in Fischer, Miller & Sidney, *ibid.*, 43 at 44.

and evaluating the implementation.¹⁴⁵ Of these four steps, the first and foremost step in making law will be identifying and accurately defining the social problems that are in need of being solved. In other words, a “good” draft of law must start with “an adequate investigation of the role occupants’ non-legal surroundings.”¹⁴⁶ Good drafts of law must, therefore, be accompanied by “quality research reports structured by a problem-solving methodology that [require] empirical investigations at each of the four stages.”¹⁴⁷ In addition, the Seidmans promote the view that the public should participate at a very early stage of the law-making process, i.e. the stage of problem definition. They state that

[...] unlike ends-means, problem-solving calls for the maximum feasible participation by those who bear the brunt of social problems [...] Instead of viewing [...] peoples as “targets”, the problem-solving methodology requires that they participate in every step of the problem-solving process.¹⁴⁸

The reason is that “those affected by [...] problems know best the detailed ways those problems impinge on their lives and work.”¹⁴⁹

In summary, the Seidmans synthesize the key ideas of their legislative theory as follows:

- (1) Institutions constitute society’s building blocks, and law comprises government’s primary tool for creating and changing them [...]
- (2) The legislative theory [...] argues for the possibility of drafting legislation to facilitate the transformation process, based not merely on power’s dictates, but on reason informed by experience.
- (3) Drafters cannot copy foreign law and experience, but they can utilize its teachings at every stage of the problem-solving methodology. Foreign consultants in the drafting enterprise can best contribute to this process by bringing, not a treasure chest of foreign laws to copy, but a tool box of theories and methodologies, and information about foreign law and experience.
- (4) Drafters need specialized skills in social science research, mainly as educated consumers of social science findings, with respect to both quantitative and qualitative evidence relating to causes of problematic social behaviours.¹⁵⁰

¹⁴⁵ Ann Seidman & Robert B. Seidman, “Drafting Legislation for Development: Lessons from a Chinese Project” (1996) 44 Am. J. Comp. L. 1 at 22-25 [A & R Seidman, “Lessons from a Chinese Project”].

¹⁴⁶ A & R Seidman, “Not a Treasure Chest, a Tool Box”, *supra* note 73 at 10-11.

¹⁴⁷ *Ibid.* at 11.

¹⁴⁸ A & R Seidman, *State and Law*, *supra* note 68 at 83.

¹⁴⁹ *Ibid.*

¹⁵⁰ A & R Seidman, “Lessons from a Chinese Project”, *supra* note 145 at 41-42.

As it turns out, the Seidmans' legislative methodology directly touches one important topic taught in law schools in Vietnam, namely, "the mechanism of legal regulation" (*co che dieu chinh phap luat*). According to the current law textbook used at Hanoi Law University, "Legal regulation is the process by which the state uses law (as an instrument of regulation) to have impacts upon behaviours of members of the society to attain the planned objectives."¹⁵¹ According to the authors of this textbook, the standard process of legal regulation in Vietnam consists of four phases, namely: (1) identifying the tasks and objectives of legal regulation to formulate law-making programs; (2) drafting and enacting laws; (3) organizing the implementation of the enacted laws; and (4) checking and supervising the implementation of the enacted laws and evaluating the impacts of the enacted laws.¹⁵² Actually, this process is a version of the ends-means methodology. Accordingly, this standard process of legal regulation starts with the step of setting up the objectives of legal regulation rather than identifying the actual social problems to be solved. In other words, this process starts with imagination rather than with reality. It obscures or says nothing about the importance of problem definition and the role of public participation in this very first step of law-making. Perhaps this approach is a logical derivative of the extremely instrumental view of law commonly held among members of the legal community in Vietnam.

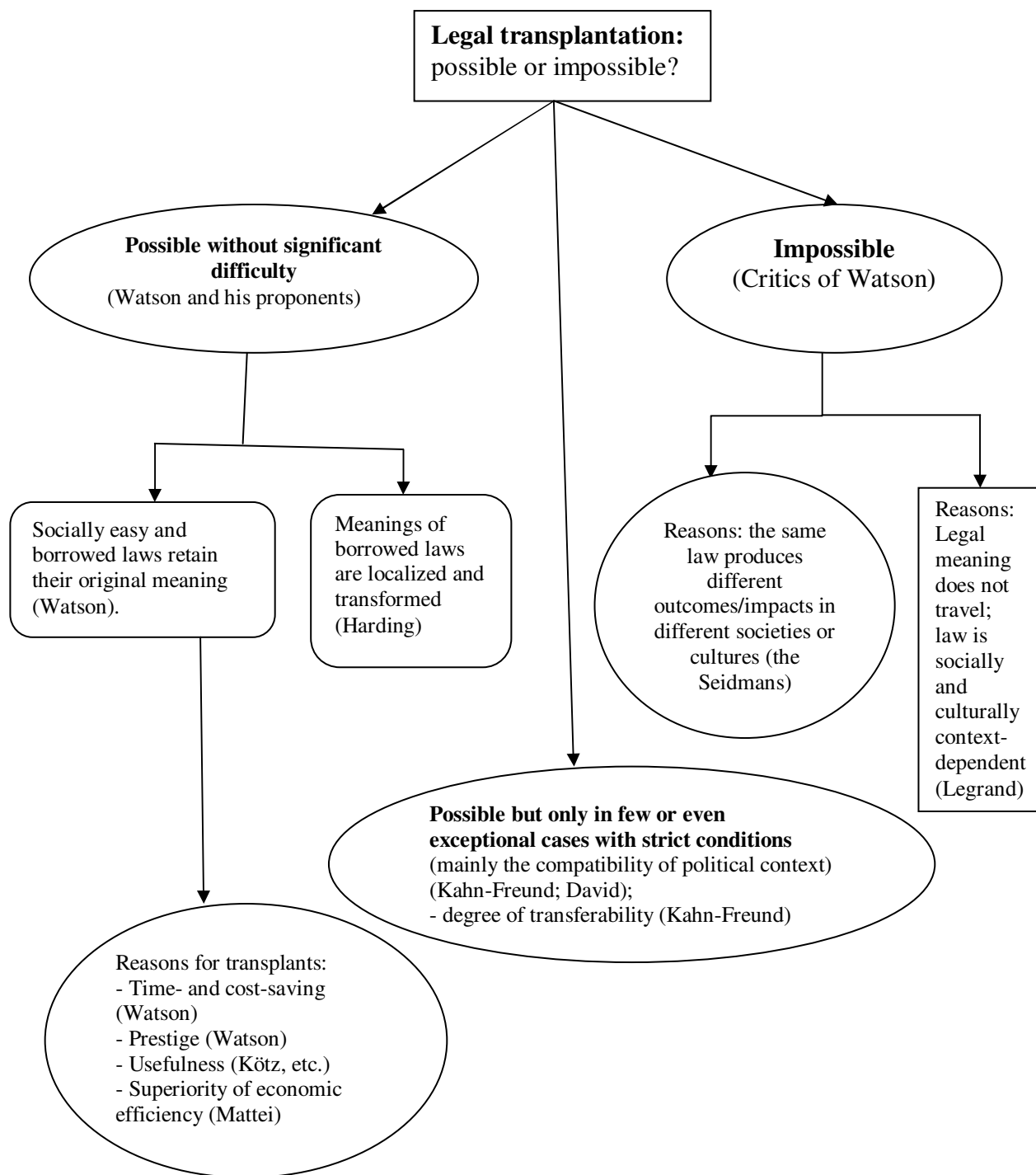
2.4 INITIAL EVALUATIONS AND CONCLUSIONS

This literature review shows that the writings on legal transplantation theories (including the Seidmans' legislative theory) are rich. However, there is a huge division between proponents and opponents of legal transplantation (as a key source for law reform) about many aspects of this phenomenon, and it does not seem that this debate will end in the foreseeable future. The rich and diverse thoughts in the extant legal transplantation theories are outlined in the following figure:

¹⁵¹ Nguyen Minh Doan, "Legal Regulation, Mechanism of Legal Regulation, and Efficiency of Law" ("Dieu chinh phap luat, co che dieu chinh phap luat va hieu qua cua phap luat") in Le Minh Tam, ed., *The Textbook: Theory on State and Law (Giao trinh ly luan nha nuoc va phap luat)* (Hanoi: People's Public Security Press, 2007) 537 at 539.

¹⁵² *Ibid.* at 542-545.

Figure 1. A Map of Legal Transplantation Theories



Scholars participating in the debate about the viability of legal transplants remain divided about many issues, such as:

The possible extent of legal transplants: Watson and his proponents seem to believe in a potentially very large scope for legal transplants, while his critics admit to there being only a very limited scope for legal transplants. Some critics of Watson's thesis even deny the existence of any cases in which effective and successful legal transplants actually occur.

The extent of legal meaning retained, lost, transformed, distorted or infringed through legal transplantation: Watson and his proponents tend to believe that legal meaning can be fundamentally retained through legal transplantation. At the same time, other scholars believe that legal meaning will be transformed during legal transplantation. Some even believe that legal meaning is completely distorted or lost during legal transplantation.

The degree of transferability: Watson and his proponents tend to believe that transferability of legal rules does not depend on types of law while Kahn-Freund and his proponents believe that different areas of law may have different levels of transferability.

Conditions by which a legal transplant could be a suitable or even optimal law-making solution.¹⁵³

All of these aspects of the legal transplantation process are still open for further debate. It seems that the truth does not fully lie with any one side of the debate, but each side may hold certain truths regarding the phenomenon of legal transplants and the possibility or impossibility of these activities. Each side of the debate contributes important insights about how the law can spill over its "birthplace" boundaries and what the consequences of this spillover are.

It is noteworthy that the reason for the disagreement among scholars about legal transplants does not simply lie with empirical issues but also arises from their different concepts of law and, especially, from their different concepts about the relationship between law and society,¹⁵⁴ as well as between law and culture.¹⁵⁵ However, in order to

¹⁵³ Loukas A. Mistelis points out that, due to the differences of views between proponents and opponents of legal transplants, scholars of these two sides "clash not only over how to evaluate the viability of a proposed legal transplant, but also over the general conclusions that can be reached about the usefulness of legal transplants as a tool of comparative scholars". See Mistelis, *supra* note 55 at 1067.

¹⁵⁴ William Ewald notes that the debate between Watson and his opponents about legal transplantation is the debate between two approaches to law, namely, the marginalized held textualist approach (or "law in books" approach) and the dominantly held contextualist approach ("law in action" or "law in context"). For Ewald, both approaches are untenable. The former is too narrow, while the latter is too broad. See William

shed more light on the current debate between proponents and opponents of legal transplantation, more empirical evidence is still needed. The empirical evidence from the process of drafting and adopting the CPL in Vietnam to be examined in this dissertation promises to test some practical aspects of these competing legal transplantation theories (e.g whether legal rules or legal ideas truly travel, how much these legal rules retain their original meaning, and the post-transplantation consequences of these legal rules).¹⁵⁶ More concretely, the dissertation will focus on testing the following claims:

- Legal transplantation is socially easy and law-making is (basically) a legal transplantation process.
- Legal meaning is not lost through the legal transplantation process; however, legal meaning is transformed (i.e. localized) through this process.
- Different legal rules may have different levels of transferability.

However, as the CPL had not yet been implemented at the time of writing this dissertation, I cannot investigate whether the CPL is an effective transplant in the socio-legal sense. Instead, I focus on the effectiveness of this legal transplant in terms of whether the CPL fits with other laws in the existing legal system of Vietnam.

As for the Seidmans' legislative theory, it should be noted that, from the early days of constructing their legislative theory, the Seidmans openly critiqued the practice of legal transplantation. Their clear intention was to provide legal drafters and law-makers in developing or transitional countries an alternative to the current practice of legal transplantation. By rejecting the legitimacy of (almost all or all) legal transplantation, the Seidmans offered a legislative theory that they hoped would become an adequate theory providing the best or optimal guidelines for legal drafters and law-makers in developing

Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'" (1998) 46 Am. J. Comp. L. 701 at 702-703.

¹⁵⁵ Gail Edwards points out that the debate between Watson and Legrand about legal transplantation is the debate between the transferists and culturalists. Watson is a true transferist, while Legrand is a culturalist. See Gail Edwards, "Legal Transplants and Economics: The World Bank and Third World Economies in 1980s – A Case Study of Jamaica, the Republic of Kenya and the Philippines" (2007) 9 Eur. J. L. Ref. 243 at 247. Also in this writing, Edwards attacks Watson's thesis as being "simplistic" and charges that his thesis is the theoretical culprit for failures of the process, supported or imposed by World Bank in the 1980s, of transplanting neoclassical economic models in developing countries, while ignoring the history, politics, and social environments of those countries.

¹⁵⁶ Nevertheless, it should be noted that this empirical evidence cannot help to solve the normative problems of disagreement among scholars about the concepts and boundaries of law.

and transitional countries, who dream of a brighter future for their countries by effectively changing problematic patterns of social behaviours. This theory or this set of guidelines seems to be especially relevant, practical and useful for legal drafters and law-makers in these countries. It is also quite obvious that the Seidmans' theory can offer helpful guidelines for the law-making process in Vietnam. While other legal transplantation theories (whether those of Watson or Kahn-Freud or other scholars) offer very little practical advice or concrete steps and procedures for how to make a good law (i.e. effective and efficient law), the Seidmans' theory seems to be a great advance in this respect. The Seidmans' theory can be seen as a model for evaluating the current law-making process in Vietnam. Employing Vietnam's actual process of drafting and adopting the CPL to test the Seidmans' legislative theory, this dissertation will focus on identifying the deviations of the actual CPL law-making process from requirements in the Seidmans' legislative theory and explain the reasons therefor.

Chapter 3

INTRODUCTION TO THE VIETNAMESE LEGAL SYSTEM

Law is a complex and multidimensional social phenomenon.¹ This is not only true of law in developed countries, but is also true of law in Vietnam. As a result, a comprehensive analysis of the nature and concrete contents of Vietnamese laws would require a multi-volume treatise. This is certainly beyond the reach of this dissertation.

The purpose of this chapter is simply to provide a short overview of the key aspects of the Vietnamese legal system, such as its historical and economic contexts² and the institutions charged with making and enforcing law. This overview will provide an essential framework for discussions in later chapters, putting consumer protection law in Vietnam in a meaningful context. Further, as law is widely regarded by mainstream legal scholars in Vietnam as the instrument³ for legalizing and implementing the ideologies and policies of the ruling party, the Communist Party of Vietnam (CPV),⁴ a discussion of law in Vietnam would not be meaningful without some discussion of its relevant policies.

Most of the topics briefly analyzed in this chapter have been discussed and written about by various well-known foreign and Vietnamese scholars. Being aware of this, I construct my analysis in this chapter on the existing literature about Vietnam and its legal system. However, most of this existing literature is not problem-free. For many reasons (e.g. legal, political, financial and time barriers to accessing the daily legal

¹ Suri Ratnapala, *Jurisprudence* (Cambridge: Cambridge University Press, 2009) at 12.

² James A. Holland & Julian S. Webb, *Learning Legal Rules*, 5th ed. (Oxford: Oxford University Press, 2003) at 3.

³ However, this view of law has been recently challenged by Mark Sidel. Using the case study of constitutional reform in Vietnam, Sidel argues that “instrumental constitutional theory can no longer effectively explain and analyze what is occurring in [...] Vietnam, where [...] [the] process of [...] constitutional dialogue and debate is utilized with great effectiveness by multiple, overlapping, often conflicting forces [...] to achieve their purposes.” See Mark Sidel, “Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam” (2002) 6 *Sing. J.I.C.L.* 42 at 44.

⁴ Hoang Thi Kim Que, “Nature, Principles, Role and Fundamental Orientations for Development of Socialist Vietnamese Laws” (“Ban chat, nguyen tac, vai tro va phuong huong phat trien co ban cua phap luat Vietnam xa hoi chu nghia”) in Hoang Thi Kim Que, ed., *The Textbook: General Theory on State and Law (Giao trinh ly luan chung ve nha nuoc va phap luat)* (Hanoi: Hanoi National University Press, 2007) 336 at 343.

experience of Vietnamese people and Vietnamese societies), this literature tends to focus on “law in books” rather than “law in action”, ignoring how law is actually lived and experienced by ordinary people. When discussing the interaction between law and society, most available existing literature usually reflects concepts of law held by the mainstream legal community rather than fully representing the many voices of ordinary Vietnamese people. Although I will try my best to overcome these shortcomings, this mission is well beyond the reach of this dissertation.

3.1 A BRIEF HISTORY OF VIETNAM PRIOR TO THE DOI MOI ERA

Vietnam today is a country of 87 million people,⁵ located in South East Asia. It shares land borders with China, Laos, and Cambodia, and sea borders with the Philippines, Indonesia, Malaysia, and Thailand. The country’s current economy is dynamic with impressively rapid growth over the past 25 years. The real average annual growth rate for the period of 1987-1997 was 7.7% and that of 1997-2007 was 7.2%.⁶ Against the background of the global economic crisis, the economic growth rate of the Vietnamese economy in 2008, 2009, and 2010 was 6.31%, 5.32%, and 6.7% respectively.⁷ This achievement is acknowledged by the international community. For example, Klaus Rohland (the World Bank’s Vietnam director from 2002 to 2007) stated that “there’s probably no other country in the world that, over the last 15 years, has moved its development so far and so fast.”⁸ Robert Zoellick (President of the World

⁵ The General Statistics Office of Vietnam (GSO), “The Population of 2009” (Dan so nam 2009), online: GSO <<http://www.gso.gov.vn/default.aspx?tabid=387&idmid=3&ItemID=9865>>.

⁶ Leng Jing, “Commercial Regulatory Reform in China during Transition: An Alternative Path to the Regulatory State” in John Gillespie & Albert H. Y. Chen, eds., *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge, 2010) 226 at 230.

⁷ The General Statistics Office of Vietnam, “1994-based Gross Domestic Product” (Tong san pham trong nuoc theo gia 1994) online: GSO <<http://www.gso.gov.vn/default.aspx?tabid=388&idmid=3&ItemID=9895>> and the Government of Vietnam’s *Report 145/BC-CP dated 17 October 2010 on the socio-economic situation of 2010 and Plan of Socio-Economic Development for the year 2011 (Bao cao so 145/BC-CP ngay 17/10/2010 cua Chinh phu ve tinh hinh kinh te - xa hoi nam 2010 va du kien ke hoach phat trien kinh te - xa hoi nam 2011)* at 2.

⁸ Quoted in Annette Miae Kim, *Learning to be Capitalists: Entrepreneurs in Vietnam’s Transition Economy* (Oxford: Oxford University Press, 2008) at 4.

Bank), on his visit to Vietnam in 2007, also stated that “Vietnam has the potential to be one of the great success stories in development.”⁹

However, Vietnam’s reputation for economic growth is a recent phenomenon. Prior to the Doi Moi era, Vietnam was usually best known for its history of fighting wars against powerful foreign forces to regain and maintain its independence.¹⁰ The history of this country began many centuries before it was invaded and occupied by China from 207 BC until AD 938.¹¹ In 938, with a victory over foreign invaders from China, Ngo Quyen regained independence for Vietnam¹² and this event heralded a new epoch for this nation – an epoch of independence for approximately 1,000 years until Vietnam was colonized by the French in the late 19th century. The struggles against foreign threats and natural calamities (in order to protect and maintain wet rice agriculture in Vietnam) are usually regarded as the two most important factors making and shaping the identity and history of this nation.¹³ From the year 939 to the time Vietnam was invaded by French colonists in 1858, Vietnam was governed by many dynasties such as the Ngo (939-965), Dinh (968-980), former Le (980-1009), Ly (1010-1225), Tran (1226-1400), Le (1428-1788), Tay Son (1788-1802), and Nguyen (1802-1945).¹⁴

During this more than 1,000 years of independence, foreign-originated Buddhism, Confucianism and Taoism all had huge impacts upon the thinking of Vietnamese people.¹⁵ As for governance of the country, Confucianism gradually dominated the way the feudal dynasties ruled Vietnam, especially since the 15th century, when the well-known king Le Thanh Tong (who reigned from 1460 to 1496) proclaimed Confucianism

⁹ *Ibid.*

¹⁰ D.R. Sardesai, *Vietnam: Past and Present*, 4th ed. (Cambridge, MA: Westview Press, 2005) at xv.

¹¹ *Ibid.* at 9-12.

¹² Bill Hayton, *Vietnam: Rising Dragon* (New Haven, CN: Yale University Press, 2010) at 187.

¹³ Sardesai, *supra* note 10 at 12; see also Le Minh Tam & Vu Thi Nga, eds., *The Textbook on the History of State and Law in Vietnam (Giao trinh lich su nha nuoc va phap luat Vietnam)* (Hanoi: People’s Public Security Press, 2006) at 14-16; Phan Ngoc, *A Deep Reflection on Vietnamese Culture (Mot thuc nhan ve Van hoa Vietnam)* (Hanoi: Culture-Information Press, 2005) at 19-21.

¹⁴ Nguyen Ngoc Huy & Ta Van Tai, *The Le Code: Law in Traditional Vietnam*, vol. 1. (Athens, OH: Ohio University Press, 1987) at 7-31.

¹⁵ Nguyen Minh Doan, *Role of Law in Society (Vai tro cua phap luat trong doi song xa hoi)* (Hanoi: National Political Press, 2009) at 168.

as the official ideology of Vietnam.¹⁶ The special status of Confucianism was lost only when the French colonists invaded Vietnam in the late 19th century. This historical fact reveals some interesting aspects of the mentality of Vietnamese people and their rulers. For example, while Vietnam usually resisted the official ideology of foreign hegemony when it was imposed upon it from the outside, during peace and independence, Vietnamese people and their rulers did not object to employing the ideologies of previous foreign enemies in order to govern their country.

Nevertheless, the adoption of Confucianist visions for governing society was not a good condition for the flowering of the legal profession. The reason is that Confucianism discredited the role of law in governing society.¹⁷ In addition, a strict hierarchy-based Confucian society did not encourage challenges brought by the lower classes against their king, their mandarins or their social superiors.¹⁸ In this context, until French colonists first introduced Western-style courts into Vietnam in 1862, neither a distinct court system nor a distinct legal profession was known in Vietnam.¹⁹ During this period, Vietnamese people were aware of only a few preliminary forms of what is now understood as the “lawyering” profession,²⁰ such as assisting disputants to draft their claim papers or to

¹⁶ Le & Vu, *supra* note 13 at 134-135. According to these authors, during the Ly and Tran dynasties (from 1010 to 1400), Buddhism was regarded as the dominant ideology. However, Confucianism competed with Buddhism in this period and gradually rose to become the dominant ideology in the Le dynasty from the 15th century.

¹⁷ Confucius himself once stated in his well-known “Analects” that “if you govern the people by laws, and keep them in order by penalties, they will avoid the penalties, yet lose their sense of shame. But if you govern them by your moral excellence, and keep them in order by your dutiful conduct, they will retain their sense of shame, and also live up to this standard.” See Confucius, “Analects”, cited in Frank J. Finamore, ed., *Half Hours with the Best Thinkers* (New York: Gramercy Books, 1999) 11 at 13.

¹⁸ Nguyen Hung Quang & Kerstin Steiner, “Ideology and Professionalism: The Resurgence of the Vietnamese Bar” in John Gillespie & Pip Nicholson, eds., *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: Asia Pacific Press, 2005) 191 at 192.

¹⁹ Le Kim Que, “Origin of the Legal Career [in Vietnam]” (“Nguon goc nghe luat su”) Lawyer Today Magazine (Vietnam) (11 September 2003); see also, Nguyen Hung Quang, “Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality” in Stephanie Balme & Mark Sidel, eds., *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (Basingstoke, UK: Palgrave Macmillan, 2007) 162 at 164.

²⁰ Actually, professional lawyering in Vietnam only started to grow rapidly a few years ago, mainly since the dawn of the Doi Moi era. However, even today, the number of professional private lawyers operating in Vietnam remains low. By the end of 2010, there were only 5,633 private lawyers providing legal services for 87 million people in Vietnam. In fact, most provide services primarily in large cities like Ho Chi Minh City and Hanoi. See Huong Giang, “Lawyering in 2011: Enhancing Morality and Quality of Practice” (“Hoat dong luat su trong nam 2011: Nang cao dao duc va chat luong hanh nghe”) (24 February 2011), online: MoJ <http://moj.gov.vn/ct/tintuc/Lists/Nghin%20cu%20trao%20i/View_Detail.aspx?ItemID=4369>. It should

prepare their arguments by consulting knowledgeable scholars. These forms of “lawyering” were also conducted only on an *ad hoc* and non-professional basis.²¹

However, Vietnamese rulers knew very well that their rule was not secure without the presence of laws. As a result, a number of legal codes were adopted. One of the well-known legal codes was the *Le Code* (or *Hong Duc Code*) which was said to have been issued by King Le Thanh Tong (1460-1497). This criminal code had 722 articles, nearly half of which were said to borrow from a number of Chinese criminal codes of the Tang and Ming dynasties. However, 408 articles of this code were said to be indigenous legal innovations by Vietnamese people,²² especially the provisions regarding the status of women, the protection of contractual relations, the protection of private property, and the protection of poor people. Another well-known *Gia Long Code* was issued by the Nguyen dynasty in 1815. However, this 398-article code was said to be copied almost entirely from the *Ching Code* in China.²³

Generally speaking, the laws of Vietnam in feudal times had characteristics typical of pre-colonial laws in Asia, i.e. relations were governed by “criminal” laws and the apparent absence of private law rules.²⁴ The principles of contract law and other private legal rules were only implicitly drawn from prohibitions in criminal codes or administrative regulations.²⁵ The state acted as the protector of the general public and employed criminal measures to keep the social order. This legal situation seemed to fit

be noted that, in 1987, only 400 private lawyers practised in Vietnam. By 2001, this number was only 2,100. See Nguyen & Steiner, *supra* note 18 at 195. In 2010, private lawyers in Vietnam provided their services for 15,000 criminal cases, 13,000 civil lawsuits, 908 economic lawsuits, 1,088 administrative cases and provided advice in 37,000 other circumstances. See Phong Tran, “Vietnam Lawyers’ Federation: Towards a Common House” (“Lien doan luat su Vietnam: Huong den ngoi nha chung”) (28 February 2011), online: MoJ <http://moj.gov.vn/ct/tintuc/Lists/ThongTinKhac/View_Detail.aspx?ItemID=4358>.

²¹ Nguyen & Steiner, *supra* note 18, 191 at 192.

²² Ngo Huy Cuong, *Contribution to the Debate on Law Reform in Vietnam Today* (*Gop phan ban ve cai cach phap luat o Vietnam hien nay*) (Hanoi: Judicial Press, 2006) at 26.

²³ The *Ching* (or *Qing*) Code was promulgated in China during the Ching dynasty (1644-1912). See John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam* (Farnham, UK: Ashgate, 2006) at 45 [Gillespie, *Transplanting Law Reform*].

²⁴ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2d ed. (Cambridge: Cambridge University Press, 2006) at 523-525.

²⁵ Pham Duy Nghia, *Vietnamese Business Law in Transition* (Hanoi: World Press, 2002) at 23-25; see also MoJ – Institute of Legal Sciences, *A Number of Issues Concerning the Civil Law of Vietnam from the 15th Century to the Time of French Rule* (*Mot so van de ve phap luat dan su Vietnam tu the ky XV den thoi Phap thuoc*) (Hanoi: National Political Press, 2008) at 13.

with the fact that Vietnam during this time was also a traditional wet rice agricultural society.²⁶ Vietnamese people in this period mainly lived and operated in semi-autonomous grassroots communities called *lang* (villages). Each village usually had its own covenant to regulate the relationships among its members as well as the relationships between villages and their members.²⁷ Village covenants were so influential in the daily lives of Vietnamese people that there was a well-known saying in Vietnam that “*phep vua thua le lang*” (literally “the law of the King is [*de facto*] lower than the village covenant”).²⁸ Actually, the existence and influence of village covenants can be seen as evidence of the existence of legal pluralism in Vietnam, at least during feudal times, when local legal knowledge supplemented and sometimes competed with national legal knowledge in governing society.²⁹ However, in the present day in Vietnam, “village covenants” are sometimes understood as implicit rules internally administered within state authorities or party organizations which perpetuate departmentalism, localism (i.e. local governments ignore the limits set up by the central government and pursue their own preferences) and cronyism.³⁰

The process of the colonization of Vietnam by French colonists began in 1858 and only officially ended in 1954 with their defeat in the famous Dien Bien Phu battle.

²⁶ Le Cao Doan, “Socialist-oriented Market Economy in Vietnam” (“Kinh te thi truong dinh huong XHCN o Vietnam”) in Pham Van Dung, ed., *Socialist Orientation in Development of Market Economy in Vietnam: Current Situation and Solutions (Dinh huong XHCN trong phat trien kinh te thi truong o Vietnam: Thuc trang va giai phap)* (Hanoi: Hanoi National University Press, 2009) 41 at 47. The author notes that, in this society, “[...] markets and industrial business relations [...] were not factors determining the shape of the society.” See also Phan Ngoc, *Vietnamese Cultural Identity (Ban sac van hoa Vietnam)* (Hanoi: Culture-Information Press, 1998) at 68. Phan notes that in the absence of urban culture, “urban areas did not dominate rural areas [...] but on the contrary, urban areas were ruralized.”

²⁷ Phan Dai Doan, *Reflections on Village Covenants in Rural Management (May suy nghi ve huong uoc trong quan ly van hoa nong thon)* (Hanoi: MoJ, 1996). The author notes at 103-104 that “village covenants were a part of the management system of the village and were important aspects of the social structure in Vietnam.” See also Phan Trung Hoai, *Improving Laws on Lawyers in Vietnam (Hoan thien phap luat ve luat su o Viet Nam)* (Hanoi: Judicial Press, 2006) at 19. Phan notes that many covenants had provisions that all disputes among members of the village had to be first resolved by the head or the board of management of the village. Only when a dispute was not successfully resolved were parties allowed to submit it to the authorities. However, sometimes parties not happy with the resolution at the village submitted their disputes to the state authorities, but if they got the same results from the state authorities, they would be fined by the village.

²⁸ Le & Vu, *supra* note 13 at 359.

²⁹ Pham Duy Nghia, *supra* note 25 at 27-29. Pham called this phenomenon “the dualism between state statutory law and the village’s customary law”.

³⁰ Nguyen Dang Dung, *The State is a Simple Sum (Nha nuoc la nhung con so cong gian don)* (Hanoi: Labour and Society Press, 2009) at 342-356.

During this period, French colonists tried to impose their laws upon the society of Vietnam by adopting a number of legal codes³¹ modelled after French legal codes.³²

However, as noted by John Gillespie, these transplanted laws

[...] rarely touched the lives of most Vietnamese. Only a small number of Vietnamese ever elected to submit property disputes to French law, and even then only for domestic, family or inheritance disputes. Most Vietnamese remained remote from the colonial [...] The strong sense of community in villages meant that [...] disputes [...] were resolved without reference to colonial law.³³

The current regime in Vietnam, known originally as the Democratic Republic of Vietnam and then the Socialist Republic of Vietnam,³⁴ was set up in 1945 under the leadership of Ho Chi Minh – the founder of the current ruling CPV.³⁵ The current regime was also the government that led the nation to defeat the French colonists in 1954 and ruled North Vietnam during the second Indochina War (or Vietnam War) from 1954 to 1975. During the period from 1954 to 1975 (actually until the collapse of the Soviet Union in 1991), the fact that the CPV and the Vietnamese government had a historically close relationship with the Soviet Union opened the gate to a massive importation into Vietnam of elements from the Soviet economic model (i.e. a centrally planned economy)³⁶ and their accompanying socialist legal ideology.³⁷ This was achieved through

³¹ Such as the *Civil Code* for South Vietnam in 1883, the *Criminal Code* for South Vietnam in 1902, the *Code of Civil and Commercial Procedures* for North Vietnam in 1921, the *Code of Criminal Procedure* for North Vietnam in 1921, the *Criminal Code* for North Vietnam in 1922, the *Civil Code* for North Vietnam in 1931, the *Criminal Code* for Central Vietnam in 1933, the *Code of Civil and Commercial Procedures* for Central Vietnam in 1935, the *Code of Criminal Procedure* for Central Vietnam in 1935, and the *Civil Code* for Central Vietnam in 1936.

³² Like the French *Civil Code* of 1804, the French *Commercial Code* of 1807 and other French codes of civil procedure or criminal procedure. See Le & Vu *supra* note 13 at 393-396.

³³ Gillespie, *Transplanting Law Reform supra* note 23 at 53.

³⁴ Sardesai, *supra* note 10 at 59.

³⁵ *Ibid.* at 54.

³⁶ According to Adam Fforde and Stefan De Vylder, the neo-Stalinist model of economic development (i.e. a centrally planned economy) was imported from the Soviet Union into North Vietnam beginning in 1957. Accordingly, the private sector was “reformed” or nationalized. Farmers were forced to join cooperatives. The whole economy was dominated by the state-owned sector and the collective-owned sector (i.e. cooperatives). The economy was run by the central government according to pre-determined annual plans. See Adam Fforde & Stefan de Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Oxford: Westview Press, 1996) at 56-63.

³⁷ Actually, the influence of Soviet Union’s experience on the Vietnamese legal system was witnessed even earlier. According to Mark Sidel, the model of the Standing Committee of the National Assembly (at that time called the People’s Congress) in the *Constitution* of 1946 was created with reference to the Soviet

technical assistance from the Soviet Union and the provision of training for legal officials and Vietnamese law students.³⁸ The current regime actually extended its rule over the whole nation only after the unification of Vietnam with the 1975 collapse of the Saigon regime backed by the United States. With this national unification of Vietnam, the economic model based on Marxist-Leninist principles (the imported neo-Stalinist economic model from the Soviet Union) was extended to the whole nation. However, such hegemony of the centrally planned economic model did not bring prosperity to Vietnam; in fact, the actual consequences were totally the opposite. Not long after the application of a centrally planned economy, the whole nation experienced a comprehensive socio-economic crisis. This set the background for the introduction of a market economy in Vietnam, based on the Doi Moi Policy adopted by the CPV in 1986 at its sixth National Congress.³⁹

Duong Phu Hiep, one of the key economic scholars in Vietnam, described the model of a centrally planned economy as follows: “the whole society was considered a giant machine and the state was the director and all other economic units or agents were simply persons who received and realized orders imposed by the state [...]”⁴⁰ This model

Union’s model. See Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Oxford: Hart Publishing, 2009) at 31 [Sidel, *Constitution of Vietnam*].

³⁸ It should be noted that most leading law professors or law lecturers in Vietnam (currently teaching at Hanoi Law University, the Law Faculty of the National University of Hanoi and the Law University of Ho Chi Minh City, Institute of State and Law) got their training in the former Soviet Union or in East Germany. This is also true of the senior experts who are working for MoJ of Vietnam. However, in recent times, a growing number of law lecturers and staff working for MoJ receive their training in a number of developed countries, especially in Japan and Australia. See Per Bergling, *et al.*, *An Introduction to the Vietnamese Legal System* (Umea, Sweden: Umea University Press, 1998) at 13-15, 18.

³⁹ It is noteworthy that the National Congress (*Dai hoi dai bieu toan quoc*) is the CPV’s highest organ. National Congresses are usually convened every five years. These are the occasions for key leadership appointments and for shaping the future government strategic policy. During the recess of the two consecutive National Congresses, the CPV’s Central Committee (160 members, elected by the National Congress) is the party’s key decision maker. The Central Committee holds their plenums every six months and shapes policy directions on current issues. These plenums are the main source of policy initiatives and government agenda-setting. The Politburo (14 or 15 members, elected by the Central Committee) is usually regarded as the brain of the Communist Party of Vietnam. It is the ultimate maker of concrete decisions or concrete proposals of the CPV. Members of the Politburo usually occupy the key positions in the State apparatus, such as the State President, the Chairman of the National Assembly, the Prime Minister, Deputy Prime Ministers, the Minister of National Defence, and the Minister of Public Security. See Martin Painter, “Coordination Failures in a Fragmented State: The Politics of Central Policy Management in Vietnam” (Paper presented at Vietnam Legal Culture Symposium, University of Victoria, Victoria, B.C., 27-29 March 2003).

⁴⁰ Duong Phu Hiep, *Philosophy and Doi Moi (Triet hoc va Doi Moi)* (Hanoi: National Political Press, 2008) at 95.

was mechanically copied from the Soviet Union with the hope of “conducting a ‘socialist reform’ in order to immediately set up the public ownership system of all means of production and of creating a giant and expanding state apparatus to direct the daily operation of the economy.”⁴¹

In this economic model, the private sector was not only discouraged but regarded as the target for socialist reform (i.e. nationalization).⁴² Le Duan, then General Secretary of the CPV, stated in 1976 that “in order to construct [socialism] [...] [we] [...] must eliminate private property and reform the property of farmers and independent handicraft men into socialist property to establish the socialist ownership system with only two forms of the whole people’s ownership and cooperative ownership.”⁴³ The Resolution of the National Congress of the CPV in 1982⁴⁴ clearly stated that Vietnam would “completely eliminate private businesses in commercial activities.”⁴⁵

The collapse of the planned economy in Vietnam, as well as in many other former socialist countries, seemed to confirm the 1922 prediction by Ludwig von Mises, a famous Austrian economist and “a champion of classical liberalism”,⁴⁶ that “the nationalization of the means of production, and the resulting abolition of money, market competition, and the price system, socialism would lead to economic chaos and not to social prosperity [...]”⁴⁷ Vietnam’s experience of the centrally planned economy in the 1970s and early 1980s showed that the economy of Vietnam moved quite quickly to the brink of collapse. During the implementation of the five-year plan of 1976-1980 (right after the unification of Vietnam and the widespread application of the centrally planned economy), the annual economic growth rate was only 0.4%, while the annual population growth rate was 2.34%. The implementation results were only equal to 50% or less of the

⁴¹ *Ibid.* at 94.

⁴² Tran Nguyen Tuyen, *et al.*, *Members of the Communist Party of Vietnam as Owners of Private-owned Enterprises: Reality and Solutions (Dang vien lam kinh te tu nhan: Thuc trang va giai phap)* (Hanoi: National Political Press, 2009) at 40.

⁴³ CPV, *Collection of Party Resolutions (Van kien Dang toan tap)*, vol. 37 (Hanoi: National Political Press, 2004) at 512

⁴⁴ The Fifth National Congress, when Le Duan was still the General Secretary of the party.

⁴⁵ Tran, *et al.*, *supra* note at 42.

⁴⁶ Richard M. Ebeling, “Introduction” in Ludwig von Mises, *The Free Market and Its Enemies: Pseudo-Science, Socialism, and Inflation* (New York: Foundation for Economic Education, 2004) ix at xi.

⁴⁷ *Ibid.* at xii.

planned objectives.⁴⁸ The economic situation in the early 1980s was not significantly improved. It is not surprising that, in the 1980s, Vietnam's gross national output (GNP) per capita stood only at some \$150 USD and it was considered one of the poorest countries in the world.⁴⁹ In 1986, the inflation rate was a shocking 774.7%.⁵⁰ This crisis was regarded as an apparent threat to the existence and stability of the then current regime.

Commenting on the centrally planned economy, Vietnamese scholar Duong Phu Hiep notes that this economic model

[...] did not produce incentives and motives for development. It did not create space for innovation and the dynamism of human beings. It turned human beings into passive order-takers seeking favors from the state. Workers and employees did not want to work hard.⁵¹

As a consequence, there were shortages, wastage of manpower and financial resources, and slowness in innovation of technology. Both productivity and efficiency were low. The economy “failed to meet the increasing needs of the people and failed to meet the requirements of global competition.”⁵² The whole nation of Vietnam fell into a socio-economic crisis.⁵³

3.2 THE DOI MOI POLICY AND THE NEW MODEL OF ECONOMIC DEVELOPMENT

The Doi Moi (Renovation) Policy is usually said to have been officially launched in 1986 by the CPV at its sixth National Congress in December of that year.⁵⁴ This event

⁴⁸ Hoang Duc Than & Dinh Quang Ty, *Economic Growth and Social Justice in Vietnam (Tang truong kinh te va tien bo, cong bang xa hoi o Viet Nam)* (Hanoi: National Political Press, 2010) at 123.

⁴⁹ Fforde & de Vylder, *supra* note 36 at 10.

⁵⁰ Hoang & Dinh, *supra* note 48 at 131.

⁵¹ Duong, *supra* note 40 at 95.

⁵² *Ibid.* at 94.

⁵³ *Ibid.* at 95.

⁵⁴ The true driving forces and initial intention of the CPV for launching the Doi Moi Policy were recently questioned by Martin Gainsborough when he discussed the relationship between the two dialectical aspects (i.e. “change” and “continuity”) of the Doi Moi Policy in Vietnam. He argued that the employment of the term “Doi Moi” or “reform” created a misleading description of what was actually happening in Vietnam. This term overemphasized the change while ignoring what was constant, unchanged or only changed on the

occurred after China had already adopted its “open door policy” seven years earlier (in 1979) and the Soviet Union had launched its pro-market reform program (*perestroika*) in 1986.⁵⁵ Actually, the sixth National Congress of the Communist Party was only the start of the so-called Doi Moi era in Vietnam.⁵⁶ Adam Fforde and Stefan de Vylder explain that the Doi Moi policy was a move away from the traditional neo-Stalinist model,⁵⁷ with the most important element being “the shift away from central planning to voluntary exchange as the basis for product distribution.”⁵⁸ It was a shift in the way people made choices in their daily lives and in the extent of their freedom.⁵⁹ It discarded the idea of state planning as the solution to the problems originating from capitalism and market forces to espouse the idea of the market as the solution to many of the problems besetting the planning system.⁶⁰ This was also “a shift in the characteristic nature of power relations in the society away from compulsion and prescription and toward those more diffuse pressures seen in a market economy.”⁶¹ The ideological abandonment of the neo-Stalinist model led to “an acceptance of the positive role of the private sector”⁶² (from the

surface. See Martin Gainsborough, *Vietnam: Rethinking the State* (London: Zed Books, 2010) at 5-6, 135-155

⁵⁵ To Huy Rua, *et al.*, *The Process of Renovation of Theoretical Thinking of the Party since 1986 to the Present (Qua trinh doi moi tu duy ly luan cua Dang tu 1986 den nay)* (Hanoi: National Political Press, 2006) at 66.

⁵⁶ Current thinkers of the CPV argued that Doi Moi (Renovation) had a beginning but had no ending point. See To, *ibid.* at 140. This is true in terms of philosophical thinking but it seems also to reflect the fact that these thinkers have not succeeded in projecting a clear vision about the future society of Vietnam.

⁵⁷ Fforde and de Vylder further explained that this model contained certain biases in economic policies as follows: (1) an exaggerated belief in state planning and a pervasive use of administrative allocation of resources; (2) an excessive use of price controls and subsidies, with concomitant distortions in relative costs and prices; (3) a lack of financial discipline and a neglect of monetary issues; (4) a low cost-consciousness within the state sector; (5) a high priority given to modern industry at the expense of agriculture and small-scale undertakings; (6) a tendency to overoptimistic targets and excessive fixed capital formation, especially in early years; (7) a neglect of exports. See Fforde & de Vylder, *supra* note 36 at 16.

⁵⁸ *Ibid.* at 29.

⁵⁹ *Ibid.* at 41.

⁶⁰ *Ibid.* at 17.

⁶¹ *Ibid.* at 29.

⁶² *Ibid.* at 14. Actually, it was not a coincidence that article 3 of the 1990 *Law on Private Enterprises* stated that “the State shall recognise the long term existence and development of private enterprises, recognise their equality before the law with other enterprises and the lawfulness of profit-making nature of business activities.” However, this article also stated that “within the legal framework, private enterprises are entitled to freedom of business and active in all business activities”. Article 4 of this law also stated that “ownership of production means [...] shall be protected by the State”. These provisions were even beyond the limits of the constitution of that time (i.e. the *Constitution* of 1980). Article 17 of this

status of public enemy to the status of public benefactor⁶³) and a repositioning of the state sector.⁶⁴ In other words, the Doi Moi Policy envisioned a new model of economic development – a radical break from the former centrally planned economy.

Since the launching of the Doi Moi Policy in 1986, the CPV has kept laying down the new model of economic development, as well as the new model of political governance for Vietnam, both based on its experiences from within Vietnam as well as on those from other countries.

The new model of economic development in Vietnam was officially named “the socialist-oriented market economy” in 2001 at the ninth National Congress of the CPV. This model of market economy was understood by the CPV as “a multi-component commodity economy subject to market mechanisms under the management of the State, following a socialist orientation.”⁶⁵ This general model of economic development was also institutionalized in article 15 of the current *Constitution of Vietnam* of 1992 (amended in 2001).⁶⁶ According to mainstream scholars in Vietnam, there are two fundamental and “unshakeable” aspects of the socialist orientation of this model of economic development, namely, the leading role of the state economic sector,⁶⁷ and the exclusive leadership of the CPV.⁶⁸ These two characteristics are regarded as the two key

constitution clearly stated that “the state shall [...] reform non-socialist economic sectors [i.e. private sectors] [...] to create a national economy mainly consisting of state-own economic sector [...] and cooperatives [...]” The freedom of business of citizens was officially recognized by a constitutional provision only in the *Constitution* of 1992 (article 57).

⁶³ Vu Quoc Tuan, “Development of the Business Community – Some Thinking on a Process” (“Phat trien doanh nghiep – suy nghi ve mot qua trinh”) in Dao Xuan Sam & Vu Quoc Tuan, eds., *Doi Moi in Vietnam: Looking and Thinking (Doi moi o Vietnam: Nho lai va suy ngam)* (Hanoi: Knowledge Press, 2008) 123 at 131.

⁶⁴ Fforde & de Vylder, *supra* note 36 at 14.

⁶⁵ CPV, *Documents of the 10th National Congress (Van kien Dai hoi dai bieu toan quoc lan thu X)* (Hanoi: National Political Press, 2006) at 86.

⁶⁶ Article 15 states that “the State consistently implements the policy of developing a socialist-oriented market economy. The multi-component economic structure with diversified forms of production and business organization is based on the regimes of the entire people’s ownership, collective ownership and private ownership, in which the entire people’s ownership and collective ownership constitute the foundation.”

⁶⁷ Do Hoai Nam, *A Number of Issues on Industrialization and Modernization in Vietnam (Mot so van de ve cong nghiep hoa, hien dai hoa o Vietnam)* (Hanoi: Social Science Press, 2004) at 217.

⁶⁸ Dang Dinh Tan, et al., *Ruling Party: Theoretical and Practical Issues (The che dang cam quyen: mot so van de ly luan va thuc tien)* (Hanoi: National Political Press, 2006) at 20.

aspects differentiating the Vietnamese model from other models of market economy, especially in Western countries.

In 2006, the CPV officially declared that a “socialist-oriented market economy” should be the “general model of economic development” (*mo hình kinh tế tổng quát*) for the whole period of “transition to socialism” (*qua đò len chu nghĩa xã hội*).

The current model of economic development in Vietnam is said to have been constructed based on Vietnamese historical experiences, but with reference to experiences of economic development in China, Asian “dragon” economies (Japan, South Korea, Taiwan, and Singapore),⁶⁹ as well as of newly industrialized ASEAN nations.⁷⁰

It is noteworthy that the Doi Moi Policy in Vietnam was, therefore, not seen as a shift away from socialism. This is also explicitly explained by the CPV in the ninth National Congress’ Political Report in 2001 that

[...] our national development path is a transition to socialism bypassing capitalism, in the sense of bypassing the period in which capitalist production relations and capitalist superstructure dominate, while nevertheless, receiving and inheriting the mankind’s achievements gained in the capitalist regime, especially the scientific and technological achievements, to make rapid development of productive forces, constructing modern economy.⁷¹

This political report further states that

[In transition to socialism], the State itself occupies the role of developing productive forces [...] generating material conditions for corresponding production and social relations [...] as the actual foundation for socialism [...] so that it is possible to follow a short-cut path of national development.⁷²

The sixth Plenum of the CPV’s Central Committee (10th term) in 2008 further elaborated on the socialist-oriented market economy. The party gave a lengthy definition of its “socialist-oriented market economy” as

an economy in which institutions, instruments and the operating principles of a market economy are intentionally established and used to completely liberate productive forces, gradually improve the living standard of the people, aiming at the goals of rich people in a strong nation, and an equitable, democratic and

⁶⁹ To, *supra* note 55 at 245.

⁷⁰ Fforde & de Vylder, *supra* note 36 at 15.

⁷¹ CPV, *Documents of the Ninth National Congress (Van kien dai hoi dai bieu toan quoc lan thu IX)* (Hanoi: National Political Press, 2001) at 21.

⁷² Cited in Vu Van Phuc, *The Economy in the Stage of Transition to Socialism in Vietnam (Nen kinh te qua đò trong thòi ky qua đò len chu nghĩa xã hội ở Vietnam)* (Hanoi: Political Theory Press, 2005) at 13.

civilized society, developing an economy with plurality of ownership and multi economic sectors in which the state economic sector plays the leading role, together with the collective economic sector, as an ever firmer and firmer foundation of the national economy; encouraging lawful wealth creation along with poverty reduction and hunger eradication; gradually making all members of the society to have a life of fullness and happiness; realizing the social progressiveness and social justice in each step and each policy of development; generating economic growth along with development of culture, public health, education and environmental protection; effectively resolving social problems for the purpose of human development; promoting the right of the people to social mastery; ensuring *the role of management and adjustment of the economy by the socialist law-governed State under the leadership of the Party.*⁷³

In short, this was described as “an economy which is subject to both economic laws of market economy and economic laws of socialism and factors ensuring a socialist orientation.”⁷⁴

In one interview with the Indian Express Agency in February 2010, Nguyen Phu Trong,⁷⁵ the current chairman of the National Assembly (NA) further explained that market economy in Vietnam is “not a free market economy or a socialist market economy. It is still in a form of transition [towards a socialist market economy].”⁷⁶ However, not all scholars in Vietnam are convinced by this vision of the CPV. For many, “market economy does not necessarily equate to capitalism. However, it is fair to say that it is fundamentally capitalistic.”⁷⁷ In addition, in clarifying the model of a socialist-oriented market economy, the CPV and the state of Vietnam seem fairly unsuccessful at providing clear and consistent positions on a number of important questions such as: What is the actual role of the private sector in the economy? What happens if the growth of the private sector amounts to a challenge of the leading role of the state-owned sector? How can the government of Vietnam ensure that the state-owned sector operates

⁷³ CPV, *Documents of the Sixth Plenum of the CPV's Central Committee – Tenth Term (Van kien hoi nghi lan thu 6 BCHTW Khoa X)* (Hanoi: National Political Press, 2008) at 140 [emphasis added].

⁷⁴ *Ibid.* at 140.

⁷⁵ He was elected General Secretary of the CPV on 19 January 2011.

⁷⁶ VietnamNet, “There is No Objective Necessity for a Multi-Party Regime in Vietnam” (“Chua thay su can thiet khach quan phai co da dang”) (26 February 2010), online: VietnamNet <<http://vietnamnet.vn/chinhtri/201002/Chua-thay-su-can-thiet-khach-quan-phai-co-da-dang-896146/>>.

⁷⁷ Nguyen Van Thanh, “Some Contemplations about Development” (“Suy ngam ve phat trien”), in Nguyen Van Thanh, ed., *Why Market Economy is Only the Means and the Public Economic Sector Must Hold the Leadership Role (Vi sao kinh te thi truong la phuong tien, kinh te nha nuoc la chu dao?)* (Hanoi: National Political Press, 2008) 34 at 49.

efficiently and in the public interest, rather than in the interest of public officials who seek better access to the resources held by this sector? When would this model end its historical mission and what would its alternative be? Furthermore, the model of a socialist-oriented market economy is also constructed from the perspective of producers (i.e. economic sectors) and completely ignores the views of other important players in a market economy, i.e. consumers. Therefore, it is far from clear whether the model of a socialist-oriented market economy embraces the ideal of consumer sovereignty. It is also far from clear whether a socialist-oriented market economy is a competitive market-based economy.

Despite certain shortcomings in the Doi Moi Policy and the model of a socialist-oriented market economy supported by the CPV, the adoption of this model actually provided political legitimacy for pro-market law reforms in Vietnam. The adoption of the first *Law on Foreign Investment* in 1987, the *Law on Private Enterprises* of 1990 and the *Law on Companies* of 1990 (even before the *Constitution* of 1980 was revised),⁷⁸ and the enactment of hundreds of laws and decrees on economic and commercial activities, are conspicuous examples. Under the rubric of making laws for a market economy, the Doi Moi process paved the way for Vietnamese law-makers and policy makers to import massive numbers of commercial legal rules from developed countries into Vietnam.⁷⁹ One of the reasons for such importation was the commonly-held belief among Vietnamese law-makers and policy makers that developed countries had already accumulated valuable experiences in constructing laws for market economies and Vietnam could learn certain lessons from them.⁸⁰ Another reason was the pressure

⁷⁸ The *Constitution* of 1980 legalized the centrally planned economy. It did not recognize the existence of the private sector or market relations in the economy of Vietnam. This constitution was revised and replaced by the *Constitution* of 1992, which gave the green light to the development of the private sector and market relations in Vietnam.

⁷⁹ Gillespie, *Transplanting Law Reform*, *supra* note 23 at 73.

⁸⁰ The official policy of legal transplantation is also expressed in a number of legal and political documents in Vietnam. For example, the *Overall Program on Administrative Reform for the period of 2001-2010* issued by the Prime Minister's *Decision 136/2001/QĐ-TTg dated 17 September 2001* stressed that

[...] administrative reform has to be based on the actual situation of Vietnam with its own characteristics, traditions, and Vietnamese identity; and at the same time, consulting and learning knowledge and experiences from other countries regarding organization and operation of management in order to be properly applied.

Resolution No. 48-NQ/TW dated 24 May 2005, issued by the Politburo of the CPV on “the strategy to build and improve the legal system of Vietnam to the year of 2010 with a vision to the year of 2020” (*Chien luoc*

Vietnam faced in negotiating access to the WTO, beginning in 1995.⁸¹ This process of legal transplantation was carried out with the assistance of foreign donors such as European Union members, North American countries, Japan, and Australia.⁸² The imported economic and commercial laws are said to be based on the Hayekian rule of law ideology which attaches importance to the calculability and predictability of legal rules and behaviours of authorities.⁸³ These imported rules were considered suitable for meeting Vietnamese law-makers' and policymakers' concerns about generating a stable and transparent environment in which foreign and domestic investors could run their operations according to the law.⁸⁴

Adoption of the Doi Moi Policy also paved the way for Vietnam to improve its relationships with Western countries as well as with neighbouring countries. As a result, Vietnam was able to integrate more deeply into the international community, especially in terms of economic and trade activities.⁸⁵ Vietnam's process of international economic integration has been marked by many important milestones, such as the adoption of the

xay dung va hoan thien he thong phap luat den nam 2010, tam nhin den nam 2020) also repeated the similar message that law reform in Vietnam should "derive from the actual situation of Vietnam, in the meantime, [it should] *selectively receive international experiences* in constructing and implementing the laws; securing the harmonious combination of [Vietnamese] cultural characteristics and good tradition with the modernity of the legal system" [emphasis added]. According to Vietnamese legal scholars Nguyen Duy Quy and Nguyen Tat Vien, the imported laws should meet three conditions, namely: (1) being compatible with Vietnam's dominant ideology; (2) avoiding undermining the current principles of state power structure; and (3) being compatible with Vietnam's current economic and social conditions and mentality of Vietnamese people so that the general public can accept these laws. See Nguyen Duy Quy & Nguyen Tat Vien, *Vietnam's Law-Governed Socialist State of the People, from the People, and for the People: Theory and Practice (Nha nuoc phap quyen XHCN Viet Nam cua dan, do dan, vi dan: Ly luan va thuc tien)* (Hanoi: National Political Press, 2008) at 322.

⁸¹ According to Gillespie, this negotiation forced Vietnamese law-makers not only to harmonize substantive law with its key trading partners (i.e. commercial laws of developed countries) but also to "develop a procedural 'rule of law' that makes private commercial rights credible." See Gillespie, *Transplanting Law Reform*, *supra* note 23 at 97.

⁸² *Ibid.* at 73. In addition, according to Gainsborough, these foreign donors help to extensively expose Vietnamese policymakers to neoliberal institutions, their ideas and practices. Since the mid-1990s, the international donor community pledged an annual ODA loan of \$3-4 billion USD. See Gainsborough, *supra* note 54 at 162.

⁸³ Gillespie, *Transplanting Law Reform*, *supra* note 23 at 73.

⁸⁴ *Ibid.*

⁸⁵ Current thinkers of the CPV argue that Doi Moi (renovation), reform and international integration is the only possible way for Vietnam (and its current regime) to sustainably survive and develop in the world of globalization. "Closed door" policies and isolation would inevitably lead to the collapse and death of the regime. However, they also note that current globalization is dominated by capitalist forces which are basically hostile to the current regime in Vietnam. See To, *supra* note 55 at 39-42.

first *Law on Foreign Investment* in 1987, the reestablishment of a relationship with the IMF, the World Bank, and the Asian Development Bank (ADB) in 1993, the application to join ASEAN in 1994 (Vietnam was adopted into this association in 1995), the normalization of relations with the United States in 1994, the application to join the WTO in 1995, membership in the Asia-Pacific Economic Cooperation forum (APEC) in 1998, and official membership in the WTO after 12 years of negotiation.⁸⁶

The Doi Moi Policy, with its introduction of a market economy into Vietnam, has actually brought about substantial changes to all facets of Vietnamese society. Economic growth is one of the clearest evidences of the positive results of the Doi Moi Policy.

Economic reform in Vietnam following a gradualist approach is widely noted as being more successful and less risky (for the short-term), at least in comparison with the situation in Russia – a country which also has a legacy of a centrally planned economy, but followed this with “shock therapy” reforms.⁸⁷

The Doi Moi era also witnessed a boom of business activities in Vietnam, especially the flourishing of the private sector. The changes seemed to be good for both producers and consumers. The number of privately-owned enterprises rose from 414 in 1991 to 15,276 in 1995, to 41,700 in 2000, to 200,000 in 2007, and to 330,000 in 2008.⁸⁸ The number of registered business households increased from 800,000 in 1990 to 1,533,100 in 1994, to 2,215,000 in 1998, and to 2,600,000 in 2007.⁸⁹ Vietnam also has approximately 10,000,000 independent farming households.⁹⁰ The private sector (i.e. not the state-owned sector or the foreign-invested sector) contributed 46.5% of Vietnam’s GDP in 2009. The percentage of GDP contributed by privately-owned enterprises increased from 7.4% in 1995 to 11% in 2009. In addition to the private sector boom in

⁸⁶ Hoang The Lien, *et al.*, *International Economic Integration (Hoi nhap kinh te quoc te)* (Hanoi: Judicial Press, 2008) at 9-12.

⁸⁷ Roger E. Backhouse, *The Puzzle of Modern Economics: Science or Ideology?* (Cambridge: Cambridge University Press, 2010) at 42-43. The author notes that Russia adopted the “shock therapy” model of economic reform in 1992, with the hope of transforming its centrally planned economy into a free market economy within 18 months to two years. As a result, it experienced a hyperinflation of 3,000% in 1992. By 1998, Russia’s GDP had fallen to a level equal only to 55% of the pre-reform level. The proportion of Russians living in poverty rose from 2% to 50%.

⁸⁸ Tran, *supra* note 42 at 88.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* at 89.

Vietnam, the foreign-invested sector also dramatically increased its presence in the economy by contributing 18.3% of Vietnam's GDP in 2009, while this number was only 6.3% in 1995.⁹¹ As for consumers, in the former centrally planned economy of Vietnam they were simply passive buyers of products and services directed by the government. In fact, consumers were only allowed to buy assigned portions. For example, a worker was only allowed to buy 15kg of rice each month.⁹² However, nowadays, "you can buy whatever you want as long as you have the money," as stated by a Vietnamese interviewed at random by Bill Hayton.⁹³

One of the clearest changes in the economic policy of Vietnam in the Doi Moi era has been the CPV's decision to permit its members to set up and run privately-owned enterprises.⁹⁴ This decision was officially made at its Tenth National Congress in 2006.⁹⁵ This decision was considered "one important step forward in the new thinking of the Party after 20 years of directly leading the national renovation process."⁹⁶ In fact, this decision was simply to express the attitude of the party about the fact that numerous privately-owned enterprises had been set up and run by members of the Communist Party, especially by retired state officials, many years before this decision.⁹⁷

With this decision, the CPV broadened its social basis as the national party in a new context. However, this decision also exposed an irony for the CPV itself: how could communists, at the same time, be capitalists – persons who "exploit" workers? The adoption of this decision thus faced numerous criticisms from old generation members of

⁹¹ General Office of Statistics of Vietnam, "Real Gross Domestic Product" (Tong san pham trong nuoc theo gia thuc te), online: GSO <<http://www.gso.gov.vn/default.aspx?tabid=388&idmid=3&ItemID=9894>>.

⁹² Hayton, *supra* note 12 at 10.

⁹³ *Ibid.*

⁹⁴ The Chinese Communist Party had already made a similar decision in 2002. See Peter Hirschberg, "Vietnam's Communist Party Courts Entrepreneurs, Follows China" Bloomberg Business Week (14 January 2011), online: Business Week <<http://www.businessweek.com/news/2011-01-14/vietnam-s-communist-party-court-entrepreneurs-follows-china.html>>.

⁹⁵ CPV, *Documents of the 10th National Congress (Van kien Dai hoi dai bieu toan quoc lan thu X)* (Hanoi: National Political Press, 2006) at 302.

⁹⁶ Tran, *supra* note 42 at 89.

⁹⁷ According to the reports of 43 provinces and cities in Vietnam in 2003, by February 2003, 622 members of the Communist Party owned private enterprises. Some enterprises owned by members of the Communist Party employed thousands of workers with a turnover of 400 billion VND (equal to \$25 million USD). See Tran, *supra* note 42 at 90.

the CPV.⁹⁸ However, because every year more than 1,000,000 young men and women seek jobs, while the state-owned economic sector provides very few new jobs, the CPV tends to set aside the theoretical and thorny ideological issues and follows a more practical approach, by permitting its members to set up and run private enterprises. It seems that, after more than two decades of living with a market economy, the CPV is now more confident in believing that it can not only survive but even develop along with the growth and expansion of the market economy.

3.3 STATE ECONOMIC MANAGEMENT IN VIETNAM

“State economic management” or “state management” was a regulatory approach imported from the Soviet Union in the 1960s to unify political and economic leadership in the state.⁹⁹ It is a model of governance in which the roles and scope of state activities in the economy and in society are defined and justified. The official textbook *Theory of State and Law* published in 2007 by Hanoi Law University¹⁰⁰ explains that “state economic management” is the distinguishing function of a socialist state. This function is based on the fact that the socialist state is the owner of the major means of production in the economy (i.e. land, factories, and important economic establishments). This function is also regarded as the precondition for ensuring that exploitative production relations [i.e. labour relations in the private sector] can be “reformed” during the process of constructing socialism.¹⁰¹

⁹⁸ For example, Nguyen Duc Binh, a former member of the Politburo, argues that the adoption of this decision could substantially undermine the nature of the Communist Party (as the vanguard of the working class). According to him, allowing members of the CPV to set up and run privately-owned enterprises is clearly contrary to the natural essence of the CPV and contrary to the thoughts of Ho Chi Minh. Nguyen was of the opinion that, if a person owned and ran a private enterprise, this person should give up his/her party membership. See Nguyen Duc Binh, “How to Make Our Party Strong” (“Xay dung Dang ta that vung manh”) in Chu Hao, ed., *Debate for Consensus (Tranh luan de dong thuan)* (Hanoi: Knowledge Press, 2006) 7 at 31.

⁹⁹ John Gillespie, “The Juridification of State Regulation in Vietnam” in Gillespie & Chen, *supra* note 6, 78 at 90, 91 [Gillespie, “Juridification”].

¹⁰⁰ Le Minh Tam, ed., *Textbook on Theory of State and Law (Giao trinh Ly luan Nha nuoc va Phap luat)* (Hanoi: Public Security Press, 2007) at 231-236.

¹⁰¹ *Ibid.* at 232. According to the official textbook *Ly luan chung ve nha nuoc va phap luat (The General Theory on State and Law)* used in the Law Faculty of the National University of Hanoi, published in 2007, “state economic management” is explained by Nguyen Van Dong, one of the authors of that textbook as including the following tasks: “strengthening and enhancing socialist production relations; developing

Looking through the resolutions of the CPV (especially those from the Doi Moi era since 1986), it is obvious that state economic management (more concretely, the function and role of the state in the economy) has always been a topic for debate, definition and redefinition. The role and function of the state in the new context – the presence of a market economy – is thought to be substantially different from that of the state in the former centrally planned economy. The introduction of the market mechanism required a comprehensive overhaul of state economic management.¹⁰² In the new hybrid socialist-oriented market economy, state management is said to correct market failures and overcome the challenges arising from globalization and international integration.¹⁰³ However, state management is also seen as a precondition to ensuring that Vietnam will move towards socialism. The dominance of state ownership and collective ownership, as well as of state-owned enterprises and cooperatives, is seen as an instrument to secure this strategic goal.¹⁰⁴ It is, therefore, not surprising that the state in Vietnam is “rarely out of business”.¹⁰⁵ Instead, “it remains firmly committed to retaining control over enterprises in pillar industries and the high-technology sector.”¹⁰⁶

The new model of state economic management was described in the CPV’s Political Report at its Tenth National Congress in 2006. Accordingly, in the socialist-oriented market economy, the state focuses on effectively carrying out the following functions:

- Managing the economy through the legal system; establishing a legal framework which is friendly and favourable to the development of all social resources;

productive forces; [...] improving the economic management mechanism; [...] checking and supervising the implementation of economic laws and policies; distributing resources; and solving social problems arising from economic development and economic management.” See Nguyen Van Dong, “Functions and Forms of the Socialist State of Vietnam” (“Cac chuc nang va hinh thuc cua Nha nuoc cong hoa xa hoi chu nghia Vietnam”) in Hoang Thi Kim Que, *supra* note 4, 192 at 199.

¹⁰² Pham Van Dung, “Some Reflections on Vietnam’s Market Economy Model” (“Mot vai suy nghi ve mo hinh kinh te thi truong Vietnam”) in Pham Van Dung, *supra* note 26, 379 at 384.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at 402-403.

¹⁰⁵ William A.W. Neilson, “Competition Laws for Asian Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (New York: Routledge, 2006) 291 at 308.

¹⁰⁶ Donald Clarke, “Introduction to Part IV” in Gillespie & Chen, *supra* note 6, 219 at 222.

- Setting forth the directions of development through adopting strategic plans and through planning based on the principles of a market economy;
- Developing and constructing important social and economic infrastructures;
- Stabilizing the macroeconomic environment, by reducing the negative effects of market mechanisms;
- Intervening in the market through policy mechanisms, economic instruments, and timely employment of other necessary instruments, when domestic markets do not work efficiently or when there are large fluctuations in regional or world markets.¹⁰⁷

According to this model, the state maintains its presence through both economic instruments (state-owned enterprises) and other regulatory state vehicles (e.g. laws, macroeconomic policies, licensing systems, supervision systems, and insurance programs). In other words, it seems that the state of Vietnam still wants to stand in a higher position than society in order to manage the economy and society, rather than simply becoming a player in the new market economy. To realize this ambition, the toolbox that the state in Vietnam claims to possess for governing society and the market economy seems to be more richly stocked and larger than a toolbox that could be possessed by a state envisioned by liberalism or neoliberalism.¹⁰⁸ Furthermore, the party and the state in Vietnam make no effort to explain the legitimate constraints on their presence in society and in the economy. Nevertheless, since Vietnam became a member of the WTO on 11 January 2007, the Vietnamese government's presence in the economy has been somewhat restrained by its accession commitments. For example, according to paragraph 78 of the *Report of the Working Party on the Accession of Vietnam* dated 27 October 2006, Vietnam committed to

¹⁰⁷ CPV, *Political Report of the CPV's Central Committee at its 10th National Congress (Bao cao chinh tri cua BCHTW Dang khoa IX tai Dai hoi X cua Dang)*, online: <http://123.30.49.74:8080/tiengviet/tulieuvankien/vankiendang/details.asp?topic=191&subtopic=8&leader_topic=699&id=BT1960657802>.

¹⁰⁸ As explained by Linda Weiss, a scholar of comparative economics, in free market economies (like Anglo-Saxon liberal market economies) “the state is held to play a basic regulatory or ‘market facilitating’ role, underwriting market relationships, maintaining the competitive rules of the game, and intervening only to correct market failure.” See Linda Weiss, “The State in the Economy: Neoliberal or Neoactivist?” in Glenn Morgan, *et al.*, eds., *The Oxford Handbook of Comparative Institutional Analysis* (Oxford: Oxford University Press, 2001) 183 at 184. Weiss also notes that the idea that the state could use its powers to “achieve developmental goals of structural transformation and catch-up” were only found in the model of “statism capitalism” in Japan, South Korea, Taiwan, and Singapore.

[...] ensure that all enterprises that were State-owned or State-controlled [...] would make purchases, not for governmental use, and sales in international trade, based solely on commercial considerations, [...] and that the enterprises of other WTO Members would have an adequate opportunity in accordance with customary business practice to compete for participation in sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of Viet Nam would not influence, directly or indirectly, commercial decisions on the part of enterprises that are State-owned, State-controlled, [...] except in a manner consistent with the WTO Agreement and the rights accorded to non-governmental enterprise owners or shareholders.¹⁰⁹

Furthermore, the fact that the state of Vietnam does not place explicit boundaries upon its presence in society and in the economy does not indicate that it is a strong state which could easily shape the economy and society in its own image. Its aborted efforts to curb the persistence of high inflation,¹¹⁰ the long-lasting inefficiency of many state-owned enterprises (for example, in the latest insolvency, that of Vinashin – a state-owned giant shipbuilding group carrying an unpaid debt of about \$5 billion USD¹¹¹), and the low competitiveness of the Vietnamese economy are just a few of many conspicuous examples.

Looking at the existing legal system of Vietnam, it is also quite obvious that the idea that the state should be present and manage all sectors of economic and social activities remains pervasive. It is not a coincidence that the 2001 *Law on the Organization of the Government* states that the Government (*Chinh phu*) shall “exercise the unified management of socio-economic activities”¹¹² or “unify the management of the

¹⁰⁹ WTO. *Report of the Working Party on the Accession of Vietnam* (27 October 2006), online: WTO <http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm>.

¹¹⁰ The accumulated inflation rate from 2008 to 2010 amounted to 40%. See Thuy Anh, “In the Current Inflation Situation, Earners of Income Less Than 10 Million VND Will Suffer” (“Gia hien nay, thu nhap 10 trieu moi chap nhan duoc”) (28 April 2011), online: VEF <<http://vef.vn/2011-04-27-gia-hien-nay-thu-nhap-10-trieu-moi-chap-nhan-duoc->>>.

¹¹¹ Thuy Mai, “Vinashin Are Actually Bankrupt” (“Dai bieu Nguyen Minh Thuyet: Vinashin thuc su da sup do”) (1 November 2010), online: Tuoitre <<http://tuoitre.vn/Chinh-tri-Xa-hoi/408650/%E2%80%9CVinashin-thuc-su-da-sup-do%E2%80%9D.html>>. Another well-known example of the problems associated with state-owned enterprises is a recently reported story on a state-own business group working in coal and other minerals in Vietnam (Vinacomin). This business group was reported to have been involved in 13 criminal cases relating to corruption or abuse of powers for the period of 2006-2009. It was also suspected to have evaded about 200 billion VND of income tax (equal to about \$10 million USD) in 2010. See Pham Huyen, “Vinacomin Explains about 200 Billion VND of Income Tax” (“Tap doan than khoang san giai trinh suyt lam that thoat 200 ty”) (19 April 2011), online: VEF <<http://vef.vn/2011-04-18-tap-doan-than-ks-giai-trinh-suyt-lam-that-thoat-200-ty->>>.

¹¹² Article 1.

national economy and develop the socialist-orientated market economy; strengthen and develop the State economic sector, attaching importance to key branches and domains in order to ensure its leading role, which shall, together with the collective economy, constitute the firm foundation of the national economy.”¹¹³ In addition, most laws adopted in the Doi Moi era have one chapter or some articles stipulating the state management of the sectors the laws are designed to regulate. These provisions are typically designed using a fairly uniform format¹¹⁴ by stating that the Government conducts unified state management over that sector throughout the nation and one lead ministry is designated to assist the Government to be in charge of that sector. In addition, other ministries are also directed to conduct state management in their own sectors. These provisions also create a mechanism to devolve state management authority from the central government to local governments (usually provincial People’s Committees). This model of state management again embeds the idea that laws are regarded as instruments of the central government and its ministries (or even of local governments). The concept of viewing laws as instruments to be used by the public to place pressure upon the Government, ministries and local governments to meet their needs is usually ignored or marginalized. In addition, provisions on state management usually fail to stipulate the requirements for transparency and accountability in order to prevent corruption or abuse of state powers in state management. These provisions also seem to privilege the administrative authorities, allowing them to stand in a higher position than all other members of society. Other components of society, especially non-governmental organizations,¹¹⁵ are usually regarded as targeted groups to be managed, rather than as

¹¹³ Article 9.

¹¹⁴ For example, the *Law on Foreign Investment* of 1996 (articles 54 to 64), the *Commercial Law* of 1997 (articles 244 to 262), the *Commercial Law* of 2005 (article 8), the *Law on Tourism* of 2005 (articles 10 & 11), and the *Law on Quality of Products and Goods* of 2007 (articles 68 to 70).

¹¹⁵ The official policy of the State of Vietnam to maintain close control over the growth of citizen-based associations and other voluntary organizations through a complicated regime of approval, registration and monitoring has been widely noted. Following Leninist practice, in Vietnam, “public” organizations like consumer associations must be state-recognized as being responsible for a subject field and were historically put under the aegis of the Fatherland Front. Given this, it is not surprising that the draft *Law on Associations* has not yet been submitted to the National Assembly for debate and approval, although it has been in the drafting stage for about 20 years. See Sidel, *Constitution of Vietnam*, *supra* note 37 at 131-159.

partners in state management.¹¹⁶ Given all these aspects of state management in Vietnam, it can be fairly concluded that the idea of viewing the state as a solution rather than as a problem remains dominant among the ruling elite in Vietnam.

3.4 THE VIETNAMESE CONCEPTS OF “LAW” AND “RULE OF LAW”

The concept of law in recent times in Vietnamese society has its own logic and history. As described by Gillespie, prior to the Doi Moi era, the concept of law in Vietnam was constructed around the following principles: (1) the party leads the state and society;¹¹⁷ (2) law is the will of the ruling class and is not above the state, but rather emanates from the state (i.e. an instrumental view of law);¹¹⁸ (3) individual rights give way to the collective public good; (4) virtue-rule (members of the party must exhibit a higher standard of morality and knowledge than ordinary people) is more strongly stressed than rule by law.¹¹⁹ These key principles were, to a large extent, the products of recycling some aspects of traditional ideology in pre-colonial Vietnamese society (including some elements of Confucianism) and newly imported Soviet legal philosophy.¹²⁰

Following this line of thinking, law played quite a minor role in Vietnamese society “compared with regulation through moral virtue, administrative measures, and self-regulation by village officials and families.”¹²¹ The concept of law perceived by

¹¹⁶ VCCI, *Report on Ministries’ Legal Development and Enforcement Assessment from 2005 to 2009* (Bao cao danh gia chat luong hoat dong xay dung vat hi hanh phap luat cua cac Bo lien quan den doanh nghiep: giai doan tu 2005 den 2009).

¹¹⁷ Gillespie further explains that the leadership of the CPV means “state power is [...] instrumental and top-down” and that “the people participate in government through their proxy, the Communist Party (and party dominated mass-organizations”. See Gillespie, *Transplanting Law Reform*, *supra* note 23 at 79-80.

¹¹⁸ Gillespie explains that this instrumental view of law means “there is no space in the core socialist legality for customary rules or natural rights” and that “law facilitated but never constrained state power.” *Ibid.* at 79.

¹¹⁹ Gillespie, “Juridification”, *supra* note 99 at 79-80.

¹²⁰ Gillespie, *Transplanting Law Reform*, *supra* note 23 at 39-68. According to Gillespie, the three key principles of Soviet political-legal ideology namely, “socialist legality” (*phap che xa hoi chu nghia*), “democratic centralism” (*tap trung dan chu*), and “collective mastery” (*lam chu tap the*) were, for the first time, incorporated into the *Constitution* of 1959. The Soviet principle of “democratic centralism” was regarded as the main organizational principle of the whole state apparatus. See Gillespie, *ibid.* at 61-62.

¹²¹ Gillespie, “Juridification”, *supra* note 99 at 78.

citizens as well as by the CPV and the state at that time was perhaps not substantially different from the commonly-held concepts of law during the feudal era, i.e. law was mainly equated with criminal provisions and provisions on how to organize the state apparatus. Other areas of law such as contract law, property law, tort law, and inheritance law were barely developed. Concepts of commercial law, merchants, companies, and freedom of business were simply non-existent.¹²²

This can be attributed to the special condition of Vietnam during the period of 1945 to 1986 when it had to cope with numerous long and devastating wars.¹²³ However, such a situation was also the product of the fact that, for a long time, especially before the Doi Moi period, political leaders in Vietnam did not really appreciate the proper role of laws in society.¹²⁴ In addition, this situation is also attributable to the Confucian legacy, “[...] the uneven success of French colonialism in ‘transforming’ the local legal system, and most recently, Soviet-inspired socialist conceptions of law.”¹²⁵

In line with this logic, for many decades since establishing the post-colonial regime, the NA did not, to any significant degree, present itself as a legislature or law-making body of the nation. The statistics show that only 28 laws were adopted by the NA during the 40 years of its existence prior to the CPV launching the Doi Moi Policy in 1986.¹²⁶ Actually, during certain periods (for example from 1966 to 1979), the NA did not pass any laws at all. The CPV’s directives, executive decrees and similar instruments were the mainstays of the legal system. MoJ was dismantled in 1960 and was re-established only in 1980. The law school was only reopened in 1979.¹²⁷

¹²² Actually, a similar phenomenon was also witnessed in most socialist countries at that time. See H. Patrick Glenn, *Legal Traditions of the World*, 4th ed. (Oxford: Oxford University Press, 2010) 348.

¹²³ The war against the French colonists from 1946 to 1954, the Vietnam War of 1955 to 1975, and the war against the Khmer Rouge and China in the late 1970s.

¹²⁴ This situation was not surprising in the context that the CPV visibly exerted its direct hegemony over the state institutions. Gainsborough notes that in this period, “the party did everything and [...] government institutions were relatively undeveloped.” This is also the period that “decision-making was quite centralized and in the hands of a narrow political elite.” See Gainsborough, *supra* note 54 at 164.

¹²⁵ Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Leiden: Martinus Nijhoff, 2007) at 247 [Nicholson, *Borrowing Court Systems*].

¹²⁶ See Appendix 8.

¹²⁷ Do Ngoc Thinh, *Role of Laws in the Process of Transforming a Centrally Planned Economy to a Market-based Economy (Vai tro cua phap luat trong qua trinh chuyen doi nen kinh te ke hoach hoa, tap trung, bao cap sang nen kinh te thi truong)* (Ph.D. Dissertation, Institute of State and Law, Hanoi, 2000) at 41-44 [unpublished]; Bergling, *supra* note 38 at 11.

The four key principles identified by Gillespie do not seem to have substantially changed in the present day. However, right after launching the Doi Moi Policy, with the presence of emerging market relations, the CPV started to question its former methods of governance and recognized the need to strengthen the proper role of law in society. Shortly after the Doi Moi Policy was launched in 1986, the party directed that “the management of the country should be performed through laws rather than moral concepts.”¹²⁸ In 1991, the concept of the “law-governed state” (*Nha nuoc phap quyen*)¹²⁹ was officially introduced by the CPV into the mainstream discourse in Vietnam. This concept was said to imitate the idea of *pravovoe gosudarstvo* (law-based state) of the Communist Party of the Soviet Union. Nguyen Duy Quy, the former Chairperson of the Vietnam Academy of Social Sciences, revealed that the original idea of the “law-governed state” was first introduced to the socialist system at the Federal Congress of the Communist Party of the Soviet Union from 28 June to 1 July 1988, and that this idea was soon subsequently diffused among top Vietnamese scholars.¹³⁰ At that time, the concept of the “law-governed state” was understood by Vietnamese scholars to mean the state should be organized in line with the following four principles: (1) the supreme status of law should be acknowledged and respected; (2) legislative, executive and judicial powers should be clearly delineated to create “checks and balances” amongst themselves; (3) the state should provide legal security to its citizens, and citizens are entitled to enjoy fundamental freedoms; and (4) the state should respect and faithfully implement international commitments.¹³¹

The principles of the “law-governed state” exerted influence upon the drafting process of the *Constitution* of 1992, a replacement for the former highly Soviet-inspired *Constitution* of 1980. The nature of the current state in Vietnam was redefined as “the

¹²⁸ Gillespie, “Juridification”, *supra* note 99 at 81.

¹²⁹ Actually, there are no consistent English translations for this term among legal scholars focusing on Vietnam. For example, Mark Sidel uses the term “State Governed by Law” while Gillespie and Penelope (Pip) Nicholson usually prefer the term “law-based state.” See Sidel, *Constitution of Vietnam*, *supra* note 37 at 120; Gillespie, *Transplanting Law Reform*, *supra* note 23 at 88; See also Penelope (Pip) Nicholson, “Vietnamese Jurisprudence: Informing Court Reform” in Gillespie & Nicholson, *supra* note 18, 159 at 178.

¹³⁰ Nguyen Duy Quy, *Renovation in Thinking and the Renovation Process in Vietnam (Doi moi tu duy va cong cuoc doi moi o Vietnam)* (Hanoi: Social Sciences Press, 2009) at 151.

¹³¹ *Ibid.*

State of the people, from the people, for the people.”¹³² This new definition of the nature of the state replaced the former provisions in the *Constitution* of 1980 (article 2) that “the Socialist Republic of Vietnam is a State of proletarian dictatorship.” The idea (strongly supported by former General Secretary Le Duan) of “the working people’s collective mastery” was formally discarded. In the 2001 amendment to the *Constitution* of 1992, the term “law-governed state” was officially institutionalized in the constitution of Vietnam. Article 2 of the current constitution provides that: “the State of the Socialist Republic of Vietnam is a socialist law-governed State of the people, from the people and for the people.” This article further states that

[...] all state powers belong to the people and are based on an alliance between the working class, the peasantry, and the intelligentsia. State powers are unified with an allocation of functions and coordination among state bodies in the exercise of legislative, executive and judicial powers.

The official introduction of the concept of a “law-governed state” into the constitution of Vietnam in 2001 as a means of making state operations subject to clear laws was regarded as an important political choice made by the current regime. This choice was made in reply to internal pressures (especially the emergence of a market economy, which requires a more stable and predictable legal framework, and the likely repetition of social unrest resulting from the abuse of state power, as happened in Thai Binh Province in 1997) and external pressures (especially to meet with standards imposed by Vietnam’s foreign trading partners through bilateral trade agreements or through the WTO).¹³³

Nowadays, the socialist law-governed state is widely considered one of the key elements in the new model of political governance in Vietnam.¹³⁴ The model of the socialist law-governed state in Vietnam is explained by leading Vietnamese legal

¹³² Article 2 of the *Constitution* of 1992.

¹³³ Matthieu Salomon & Vu Doan Ket, “Achievements and Challenges in Developing a Law-based State in Contemporary Vietnam: How to Shoe a Turtle?” in Gillespie & Chen, *supra* note 6, 134 at 136. Furthermore, Gillespie argues that *Nha nuoc phap quyen* is a rubric to open ideological space for imported Western legal rights without discarding socialist orthodoxies. See John Gillespie, “Developing a Decentred Analysis of Legal Transfers” in Penelope (Pip) Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008) 25 at 46.

¹³⁴ Nguyen Xuan Tung, “On the Concept of a Socialist Law-Governed State” (“Ve khai niem Nha nuoc phap quyen xa hoi chu nghia”) (2010) 4 J. of State & L. (Vietnam) 14 at 20.

scholars as having the following seven distinguishing characteristics:¹³⁵ (1) the state is “by the people, from the people and for the people”; all state powers belong to the people;¹³⁶ (2) state powers are unified with an allocation of functions and coordination among state bodies in the exercise of legislative, executive and judicial powers; (3) the supremacy of the constitution and laws in society is acknowledged and respected; all operations of the state must be based on the legal foundations of the constitution and laws; (4) the state has to act in the service of citizens, while citizens have to act responsibly towards the state and society; (5) the presence of a socialist-oriented civil society is respected; (6) the state will faithfully implement international commitments; and (7) the state is placed under the leadership of the CPV.¹³⁷ Some key characteristics of this state that differ from the liberal versions of the “rule of law” in Western countries include: (1) state powers are unified with an allocation of functions and coordination among state bodies in the exercise of legislative, executive and judicial powers (i.e. the principle of separation of powers is discarded);¹³⁸ and (2) the state is placed under the

¹³⁵ Nguyen Duy Quy & Nguyen Tat Vien, *supra* note 80.

¹³⁶ In the sense that all state apparati are instruments of the people. State power is the product of authorization from the people. No state body can self-define and self-claim its power, not even the NA. See Le Minh Thong, *et al.*, *Theoretical Foundations for Organization and Operation of the Political System in the Process of Socialism Construction in Vietnam (Co so ly luan ve to chuc va hoat dong cua he thong chinh tri trong qua trinh xay dung chu nghia xa hoi o Vietnam)* (Hanoi: National Political Press, 2007) at 237.

¹³⁷ Since 1980, the *Constitution* of 1980 (article 4) has expressly provided for the CPV to be the exclusive leading party in the political system of Vietnam. The current *Constitution of Vietnam* of 1992 (amended in 2001) still has a clear provision (article 4) setting out this special role of the CPV: “The Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faithful representative of the rights and interests of the working class, the toiling people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh thought, is the leading force of the State and society. All Party organizations operate within the framework of the Constitution and the law.” See Sidel, *Constitution of Vietnam*, *supra* note 37 at 87. Article 41 of the 2006 *Charter of the Communist Party of Vietnam* further explains that the party leads the state and socio-political organizations (such as the Fatherland Front, the Workers’ Union, the Women’s Union, and Farmers’ Associations) through its political programs, strategies, policies and guidelines. The leadership of the party is also secured by ideological education, organizational design, personnel arrangement, and by a monitoring system. The party recommends qualified cadres to run for or to be appointed to state organs or socio-political organizations. Members of the party working in state organs or social-political organizations must strictly follow party directives and guidelines. The exclusive leadership of the CPV is officially considered by mainstream scholars in Vietnam as “the fundamental and unshakeable operating principle of the Party and of the whole political system. It is the pillar of the operating mechanism of the whole political system in Vietnam.” See Dang, *supra* note 68 at 20.

¹³⁸ However, some legal scholars in Vietnam today argue that state powers are unified and the principle of separation of state powers among legislative, executive and judicial powers is not inconsistent. Accordingly, Vietnam should officially adopt the principle of separation of state powers in its design of the state apparatus. In line with this, checks and balances among state powers should be the key principle of state organization. See, for example, Le Minh Thong, *supra* note 136 at 364-366.

leadership of the CPV (i.e. no plurality of political parties or political pluralism is allowed).

The growing reliance by the CPV on laws to manage society is also represented by the fact that law-making activities in the Doi Moi era have increased at an unprecedented rate.¹³⁹ From 1987 to the end of 2009 (i.e. for 22 years), the NA produced 237 laws or legal codes, equal to more than eight times the number of the laws or legal codes adopted by the NA in the preceding 40 years. Currently, most economic, social and political domains are governed by laws or legal codes. The key laws and legal codes worth noting here include the *Civil Code* (1995 and 2005), the *Criminal Code* of 1999, the *Code of Criminal Procedure* of 2003, the *Code of Civil Procedure* of 2004, the *Labour Code* of 1994, the *Commercial Law* of 1997 and 2005, the *Law on Enterprises* of 1999 and 2005 (replacing the former *Law on Private Enterprises* and *Law on Companies* of 1990).¹⁴⁰ In addition to laws adopted by the NA, the Government of Vietnam and its ministries also issued thousands of decrees (*Nghi dinh*), and circulars (*Thong tu*) to provide detailed guidelines for the implementation of these laws.

Regarding the concept of law itself, the mainstream thinking about “law” in Vietnam is still based upon the teachings of Karl Marx on the class-based nature of law. This concept is based on Marx’ statement in his classic *Communist Manifesto* of 1848 about the nature of law in capitalist societies, in which law is “the will of your [bourgeoisie] class made into law for all, a will whose essential content is determined by

¹³⁹ William Neilson, “Vietnam’s Doi Moi Legal System: Pushing the Limits of Rapid Legal Change” (a Research Paper, University of Victoria, Victoria, B.C., December, 1994) [unpublished] at 1.

¹⁴⁰ Other important laws should also be included in this list, such as the *Maritime Code* (1990 and 2005), the *Law on Bankruptcy* (1993 and 2004), the *Law on the Environment* (1994 and 2005), the *Competition Law* of 2004, the *Law on Investment* of 2005 (replacing the former *Law on Foreign Investment* of 1987 as amended in 1989, 1992, and 1996; and the *Law on Domestic Investment* of 1994), the *Law on Land* (1987, 1993, 2003 and 2008), the *Law on Tourism* of 2005, the *Law on Intellectual Property* of 2005, the *Law on Electronic Transactions* of 2005, the *Law on the Prevention of and Fight against Corruption* of 2005, the *Law on Election of Deputies to the National Assembly* (1992, 1997 and 2001), the *Law on the Organization of the National Assembly* (1992 and 2001), the *Law on the Organization of the Government* (1992 and 2001), the *Law on the Organization of the People’s Courts* (1992 and 2002), the *Law on the Organization of the People’s Procuracy* (1992 and 2002), the *Law on Election of Deputies to People’s Councils* (1994 and 2003), the *Law on the Organization of People’s Councils and People’s Committees* (1994 and 2003), and the *Law on Inspection* of 2006. As noted by Gillespie, many of these laws, especially commercial laws, were drafted with technical assistance from bilateral donors (such as Japan, France, and Sweden) or multilaterals such as the World Bank, the ADB, and UNDP. These donors usually promoted neo-liberal economic law as a means of keeping the government from interfering in the market. See John Gillespie, “Developing a Decentred Analysis of Legal Transfers” in Nicholson & Biddulph, *supra* note 133, 25 at 46.

the material conditions of existence of your class.”¹⁴¹ In other words, law of any sort is merely “the will of the dominant class elevated into legislation” by being “precisely formulated and given universally binding force, becoming a rule of conduct binding upon all.”¹⁴² Law is, therefore, an instrument of the state (and in fact of the CPV) to govern society.¹⁴³ As the CPV holds exclusive leadership over the state and society,¹⁴⁴ one of the key functions of the law-making process is to turn the ideas in the policies of the CPV into laws to conform society to a socialist orientation.¹⁴⁵ However, the literature written by Vietnamese legal scholars in recent times has also emphasized the second aspect in the nature of law, i.e. the “social nature” (*ban chat xa hoi*) of law in the sense that law not only protects the interests of the ruling class (although this is the determinative character of law), it also protects the interests of other classes, with the extent of protection depending on the actual power structure in the society at each stage.¹⁴⁶ Dao Tri Uc, a leading jurist and mainstream legal scholar, explains that the analysis of law from the class perspective is accurate but “inadequate”. Law must acknowledge and protect not only the interests of the dominant class, but also of other social groups, which are compatible with the basic interests of the dominant class and the common interests of the whole population. In other words, law has a dual nature – a class-based nature and a

¹⁴¹ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 41.

¹⁴² Shirley Robin Letwin, *On the History of the Idea of Law* (Cambridge: Cambridge University Press, 2005) at 241.

¹⁴³ Bui Thi Bich Lien, “Legal Education and the Legal Profession in Contemporary Vietnam: Tradition and Modification” in Gillespie & Chen, *supra* note 6, 299 at 304; see also, Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008) at 141 [Sidel, *Law and Society in Vietnam*]. Sidel argues that “The key principles underlying the post-1986 reform of Vietnamese law and the legal system include a strong role for the state and an instrumentalist concept of law as serving state interests and priorities.”

¹⁴⁴ Article 4 of the *Constitution* of 1992 (as amended in 2001).

¹⁴⁵ Hoang Thi Kim Que, “Nature, Principles, Role and Fundamental Orientations for Development of Socialist Vietnamese Laws” (“Ban chat, nguyen tac, vai tro va phuong huong phat trien co ban cua phap luat Vietnam xa hoi chu nghia”) in Hoang Thi Kim Que, *supra* note 4, 336 at 343. This viewpoint seems substantially different from the widely held concept of law in Western countries that law is supposed to constitute “an autonomous body of rules independent and separate from [...] religion, morality, and other social norms”; it exists “to regulate the conduct not only of individuals but of the state as well” (i.e. to restrain state power). See Ugo A. Mattei, *et al.*, eds., *Schlesinger’s Comparative Law: Cases-Text-Materials*, 7th ed. (New York: Foundation Press, 2009) at 267.

¹⁴⁶ Hoang Thi Kim Que, “Origins, Nature, Attributes, and Fundamental Aspects of Law” (“Nguon goc, ban chat, cac thuoc tinh va cac moi lien he co ban cua phap luat”) in Hoang Thi Kim Que, *supra* note 4, 267 at 276.

social nature.¹⁴⁷ This argument opens the way for theoretically legitimizing the interests of newly-emerging Vietnamese capitalists, a product of the Doi Moi era.

In addition to the theory of the class-based nature of law, socialist legal positivism is also predominant among mainstream Vietnamese legal scholars.¹⁴⁸ The official textbook on state and law at Hanoi National University expressly states that “no violations of law could be justified by the reasonableness of such behaviours or by the claim that the existing law is already outdated or backward. The outdatedness of a law does not automatically lead to its invalidity.”¹⁴⁹ In other words, no forms of legal disobedience, including civil disobedience, are regarded as acceptable to mainstream legal thinking in Vietnam. In addition, the concept of “natural rights” has no legitimate position in Vietnamese mainstream legal thought. Rights (or legal rights) are seen as “state-granted rather than emanating from concepts of natural rights”.¹⁵⁰

It is important to note that a huge gap between “law in books” and “law in action” actually exists in Vietnam. Actual lived experience with law in Vietnam is usually different from what mainstream legal thinkers typically teach law students. The remarks by Tran Dinh Trien, a well-known, experienced lawyer, truly reflect this situation. In a newspaper interview about why enterprises in Vietnam lack incentives to employ lawyering services for their business operations, Trien remarked that “the common mentality among entrepreneurs is that if they have ‘problems’ with state authorities, they would use money to get what they want. Winning or losing depends on how much they

¹⁴⁷ Dao Tri Uc, “Constitution in the Social and National Life” (“Hien phap trong doi song xa hoi va quoc gia”) (2010) *J. of Legisl. Stud. (Vietnam)* online: NCLP <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/ly-luan-ve-nha-nuoc/hien-phap-trong-11oi-song-xa-hoi-va-quoc-gia>. This argument is widely accepted among mainstream Vietnamese legal scholars. For example, the textbook on state and law at Hanoi Law University states that “law is a phenomenon of dual nature, i.e. class nature and social nature. Both aspects exist at the same time and there is no law without class nature as well as no law without social nature.” See Le Minh Tam, *supra* note 100 at 63-64.

¹⁴⁸ In Gillespie’s words, socialist legal positivism is “an extreme manifestation of legal positivism” in the sense that “there is no space in socialist legality for customary rules or natural rights.” See Gillespie, *Transplanting Law Reform*, *supra* note 23 at 79. However, it does not seem that this view has been updated according to the recent legal developments in Vietnam. For example, article 14 of the 1995 *Civil Code* of Vietnam stipulates that customary rules can be used to fill the gaps in contractual agreements among private parties if there are relevant specific legal rules. Similar provisions are also found in article 3 of the *Civil Code* of Vietnam of 2005, article 4 of the *Commercial Law* of 1997 and article 5 of the *Commercial Law* of 2005. Article 6 of the *Law on Marriage and Family* of 2000 also recognizes the validity of customary rules in family matters.

¹⁴⁹ Pham Huu Nghi, “Legality” (“Phap che”) in Hoang Thi Kim Que, *supra* note 4, 521 at 534.

¹⁵⁰ Sidel, *Law and Society in Vietnam*, *supra* note 143 at 141.

could lobby. They do not want to handle their problems as stated by law.”¹⁵¹ However, this situation is not surprising in the context of the rampant corruption,¹⁵² cronyism, lack of transparency, and poor accountability of state officials that remain extensive in Vietnam.¹⁵³ In addition, the shortage of funds for public officials’ salaries (the salary of a public official coming from the state budget usually meets only about 30% of his/her daily expenditures)¹⁵⁴ is another important factor distorting the administration of law.¹⁵⁵

3.5 THE RISE OF THE NATIONAL ASSEMBLY

The National Assembly (NA) (*Quoc hoi*) assumes the role of the legislature in Vietnam.¹⁵⁶ It is a unicameral institution. According to the current constitution of Vietnam (the *Constitution* of 1992, as amended in 2001), the NA is the highest representative organ of the people and the highest state power organ in Vietnam.¹⁵⁷ Given that Vietnam follows a unitary structure of government rather than a federal one, the NA is the only organ with constitutional and legislative powers.¹⁵⁸ The NA exercises the power of supreme oversight of all activities of the state.¹⁵⁹ Unlike the case in China,

¹⁵¹ VietnamNet, “Bachelors of Law Do Not Know How to Draft a Will” (“Khi cu nhan luat khong biet viet di chuc”) (18 March 2010), online: VietnamNet <<http://www.vietnamnet.vn/giaoduc/201003/Khi-cu-nhan-luat-khong-biet-viet-di-chuc-899439/>>.

¹⁵² VietnamNet, “Fear of Losing Jobs When Fighting Corruption” (“Chong Tham nhung so mat chuc, mat quyen”) (8 September 2010), online: VietnamNet <<http://www.vietnamnet.vn/chinhtri/201009/Chong-tham-nhung-So-mat-chuc-mat-quyen-934275/>>. This article also mentions that corruption fighters face high risks of being revenged.

¹⁵³ Le Minh Thong, *supra* note 136 at 302-303. The authors of this book note at 303 that, “lack of transparency in state operations and lack of quality information about actual exercise of state power [...] currently exclude the possibility for the people to be the true master of state power”.

¹⁵⁴ Le Nhung, “Salary Policy Makers Do Not Live on Salary” (“Nguoi quyet cai cach lai khong song bang luong”) (12 September 2010), online: VietnamNet <<http://vietnamnet.vn/chinhtri/201009/Nguoi-quyet-cai-cach-lai-khong-song-bang-luong-934999/>>.

¹⁵⁵ According to one Report of the Inspectorate of the Government of Vietnam, from 1 January 2005 to 30 June 2009, ministries and local People’s Committees received 317,000 complaints from citizens regarding the exercise of state power in administration of law. Investigating these complaints, the authorities found unlawful exercise of state power in administration of law in about 45% of these cases. See Governmental Inspectorate, *Report No. 2280/BC-TTCP dated 4 August 2009 on the actual situation of implementation of Law on [Administrative] Complaints and Denunciations (from 2005 to 30 June 2009)* (*Bao cao so 2280/BC-TTCP ngay 4/8/2009 Tong ket thi hanh Luat Khieu nai, To cao (tu nam 2005 den 30/6/2009)*) at 2.

¹⁵⁶ It should be noted that Vietnam has a unitary structure of government (rather than a federal one).

¹⁵⁷ Article 83 of the *Constitution* of 1992 (as amended in 2001).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

members of the NA of Vietnam (currently 493 members)¹⁶⁰ are elected by direct universal suffrage.¹⁶¹ However, the democratic nature of this election remains a debated issue.¹⁶²

Prior to the Doi Moi era, the NA was considered simply a “rubber stamp” for decisions proposed by the Government or the party. At that time, the NA met for only three to six days each year.¹⁶³ Very few laws were adopted. In fact, from 1965 to 1980, the NA did not adopt a single law.

However, this picture no longer holds true since the Doi Moi era. The actual scope and status of the NA has gradually increased during the Doi Moi period.¹⁶⁴ Nowadays, the NA meets twice a year and each session lasts for four to five weeks.¹⁶⁵ Most of its operations are public and quite easy for the public media to access.¹⁶⁶ The sessions of direct questions and answers between members of the NA and members of the Government, including the Prime Minister, have been broadcast live on national television since 1994.¹⁶⁷ The basic role of the NA as a legislature is gradually emerging. Most of the time the NA spends is on debating and approving laws. As a result, the number of laws adopted by the NA has dramatically increased. From 1987 to 2009, the

¹⁶⁰ Phan Trung Ly, *Vietnamese National Assembly: Organization, Operation, and Renovation (Quoc hoi Vietnam: To chuc, hoat dong, va doi moi)* (Hanoi: National Press, 2010) at 235.

¹⁶¹ Matthieu Salomon, “Power and Representation at the Vietnamese National Assembly: The Scope and Limits of Political Doi Moi” in Balme & Sidel, *supra* note 19, 198 at 200.

¹⁶² Vu Thi Loan & Tong Duc Thao, “Renovating the CPV’s Leadership Method over Election of Members of National Assembly” (“Doi moi su lanh dao cua Dang doi voi cong tac bau cu dai bieu quoc hoi”), (2011) J. of Legisl. Stud. (Vietnam), online: NCLP <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/ly-luan-ve-nha-nuoc/111oi-moi-su-lanh-111ao-cua-111ang-111oi-voi-cong-tac-bau-cu-111ai-bieu-quoc-hoi>.

¹⁶³ Hy V. Luong, “Economic Growth and Governance Transformation in Vietnam” (Paper presented at the Vietnam Legal Culture Symposium, University of Victoria, Victoria, B.C., 27-29 March 2003); see also Sidel, *Constitution of Vietnam*, *supra* note 37 at 70-71.

¹⁶⁴ Sidel, *Constitution of Vietnam*, *supra* note 37 at 96.

¹⁶⁵ Hy, *supra* note 163.

¹⁶⁶ For many decades before 1986, meetings of the NA were held without public access. Deputies making speeches before the NA had to send their speeches in advance and waited for approval before reading. See Le Nhung – Thu Ha, “From Previously Approved Speeches to Live Broadcasting [of Meetings of the NA]” (“Tu phat bieu duoc duyet truoc toi truyen hinh truc tiep”) (8 January 2011), online: VietnamNet <<http://www.vietnamnet.vn/vn/chinh-tri/5563/tu-phat-bieu-duoc-duyet-truoc-den-truyen-hinh-truc-tiep.html>>.

¹⁶⁷ Le Nhung, “Man of 2010: Deputy Nguyen Minh Thuyet” (“Nhan vat 2010: Ban linh cua ong nghi Nguyen Minh Thuyet”) (5 January 2011), online: VietnamNet <<http://www.vietnamnet.vn/vn/chinh-tri/5215/nhan-vat-2010-ban-linh-cua-ong-nghi-nguyen-minh-thuyet.html>>.

NA adopted 237 laws, i.e. more than eight times the number of laws adopted in the 40 years prior to the Doi Moi period.

According to article 90 of the current constitution of Vietnam, the NA has its standing body, namely, “the Standing Committee of the National Assembly” (NASC). This important committee consists of the NA’s Chairperson, Vice-Chairpersons, and a number of other members elected by the NA who are usually heads of the NA’s specialized committees. NASC acts as the NA’s executive and the NA’s gate-keeper. It exercises many important powers such as: adopting ordinances (*Phap lenh*) – a kind of temporary law;¹⁶⁸ interpreting the constitutions or laws; supervising the activities of the Government, ministries and the State President; organizing referendums; and coordinating operations of other NA committees.¹⁶⁹

The NA has also set up a number of “specialized” committees to assist its operation. According to article 26 of the 2001 *Law on the Organization of the National Assembly* (as amended in 2007), the NA includes a number of specialized committees such as the Law Committee, the Judicial Committee, the Committee on Economy, and the Committee on Science, Technology and the Environment.¹⁷⁰ The key functions of NA committees are to scrutinize draft laws or reports submitted by the Government and oversee activities of the Government, the ministries, the court system, the prosecution system, and local governments.

To ensure the leadership of the CPV over the NA, most members of the NA are also members of the CPV. In fact, approximately 92% of the membership of the current

¹⁶⁸ Sidel, *Constitution of Vietnam*, *supra* note 37 at 52-3 & 98. In this book, at 31, Sidel also notes that NASC has existed since the *Constitution* of 1946 and was modelled after the Soviet Union’s experience. According to article 12(1) of the *Law on Laws* of 2008, ordinances issued by NASC “shall contain regulations on issues upon instruction by the NA. After a certain period of implementation, these issues shall be proposed to be developed into Laws for the NA to consider and decide.” In the current hierarchy of legal normative documents (LNDs) in Vietnam, ordinances are considered to be lower than laws (adopted by the NA) but higher than decrees (adopted by the Government).

¹⁶⁹ Article 91 of the *Constitution* of 1992 (as amended in 2001).

¹⁷⁰ Actually, there are nine NA committees, namely: (1) the NA’s Law Committee; (2) the NA’s Judicial Committee; (3) the NA’s Committee on Economy; (4) the NA’s Committee on Finance and Budget; (5) the NA’s National Defence and Security Committee; (6) the NA’s Committee on Culture, Education, Youth and Infancy; (7) the NA’s Committee on Social Issues; (8) the NA’s Committee on Science, Technology and the Environment; and (9) the NA’s Committee on External Relations (article 27 of the *Law on the Organization of the National Assembly* of 2001, as amended in 2007).

NA consists of members of the CPV.¹⁷¹ In addition, key positions in the NA (such as the Chairperson, Vice-Chairpersons, and heads of the NA's specialized committees) are usually occupied by members of the CPV's Central Committee. The NA's Chairperson also holds a membership in the Politburo. According to current party discipline, NA members holding membership in the CPV are expected to say "yes" to certain proposals put forward by the Government, which are decisions already made in advance by the Politburo.¹⁷² Regarding other government proposals, members of the NA have no political obligation to vote with the Government.¹⁷³ However, most members of the NA also hold positions in the central or local governments, and are usually regarded as inferior to the Prime Minister or ministers. This fact partially explains why members of the NA in Vietnam tend to be quite reluctant to say "no" to proposals made by the Government. In addition, members of the NA also tend to avoid "harsh" critiques when they make comments about the operations of the Government. The fact that NA members usually lack financial resources,¹⁷⁴ as well as the necessary expertise and skills for their jobs,¹⁷⁵ and the fact that the NA does not operate on a professional basis¹⁷⁶ and most of

¹⁷¹ VietnamNet, "Secret Vote to Ensure Consensus" ("Bo phieu kin ve duong sat cao toc de tao dong thuan") (17 June 2010), online: VietnamNet <<http://www.vietnamnet.vn/chinhtri/201006/Bo-phieu-kin-ve-duong-sat-cao-toc-de-tao-dong-thuan-916574/>>.

¹⁷² Such proposals usually relate to issues such as appointment of key governmental positions, matters of divergent opinions between the Government and the Standing Committee of the NA, matters relating to constitutional revisions or important laws, the annual law-making agenda of the NA, and the annual oversight agenda of the NA. See Tran Ngoc Duong & Ngo Duc Manh, *Operation and Organizational Model of the NA and the Government for Vietnam's Law-Governed Socialist State (Mo hinh to chuc va Phuong thuc hoat dong cua Quoc hoi, Chinh phu trong Nha nuoc phap quyen xa hoi chu nghia Vietnam)* (Hanoi: National Political Press, 2008) at 404.

¹⁷³ *Ibid.*

¹⁷⁴ Members of the NA do not have public budgets for maintaining their own offices of operation. They also have no public budgets for hiring assistants. Some members of the NA even use their own money to hire their assistants. See Thuy Chung "Four Years in the NA: A Look Back" ("Nhin lai 4 nam nghi trung") (2 March 2011), online: VietnamNet <<http://vietnamnet.vn/vn/chinh-tri/10079/dung-de-ai-do-nghi-minh-la-quan-xanh-.html>>.

¹⁷⁵ For every new term, only about 30% of remaining members of the NA are expected to run for re-election. New members of the NA "[...] usually do not know how to behave as [members] of the NA [...]" As a result, they tend to say 'yes' to the proposals drafted [by the Government]" See Le Nhung, "No Sanctions for Absence from the NA's Sessions" ("Chua co che tai cho vang hop hay luoi phat bieu") (14 March 2011), online: VietnamNet <<http://www.vietnamnet.vn/vn/chinh-tri/12304/chua-co-che-tai-cho-vang-hop-hay-luoi-phat-bieu.html>>.

¹⁷⁶ Nguyen Duy Quy & Nguyen Tat Vien, *supra* note 80 at 289.

its members (about 75%) are part-time members,¹⁷⁷ also helps to explain why the Government seems to exert such great influence over the NA's activities, including legislative activities.

However, this has not always been the case.¹⁷⁸ One very recent example is the debate at the NA to approve the proposal by the Government about a project to construct a bullet train system worth \$56 billion USD (approximately 50% of Vietnam's 2010 GDP) in June 2010. This project was very controversial in terms of its lack of economic efficiency. At the meetings of the NA in June 2010, the debate among members was very heated. Most of the relevant ministers and key members of government had to join in the debate and gave further explanation about the project to convince members of the NA. Finally, the Government tried to persuade the NA to vote in favour of the project. However, only 37% of NA members gave the "green light" to the project. In other words, the NA refused to permit the Government to carry out such an expensive project in the current Vietnamese and global economic climate. This event was widely noted as one of very rare occasions during which the Government completely failed to persuade the NA to ratify an important proposal.¹⁷⁹ After the rejection of the project, the General Secretary of the CPV stated that the fact that the NA did not give the green light to this project, despite the Government's submissions and explanations, is a "normal phenomenon" showing the democratic nature of the NA.¹⁸⁰ However, he also emphasized to members

¹⁷⁷ Hoang Ngoc Giao, *et al.*, *Research Report on Assessment of the Process of Formulating Laws and Ordinances: Problems and Solutions (Bao cao nghien cuu danh gia quy trinh xay dung Luat, Phap lenh: Thuc trang va giai phap)* (Hanoi: Labour and Society Press, 2008) at 25. Actually, before the Doi Moi era, all members of the NA worked part-time (*dai bieu kiem nhiem*). Only since 1992 have a number of NA members started to work full time in the NA's Law Committee and the NA's Committee on Economy. See Salomon, *supra* note 161 at 208.

¹⁷⁸ Another example is the case of the *Draft Law on the Capital* [of Vietnam], which was recently rejected by the National Assembly on 29 March 2011. This draft law was prepared by MoJ and the Hanoi People's Committee with the intention of creating a special administrative and budget mechanism for Hanoi (the capital of Vietnam). However, this draft law generated a divisive debate in the NA due to the fact that it could make Hanoi a special self-governing territory. In the end result, this draft law got only 35.9% of the vote in the NA, despite the fact that NASC urged NA members to vote for this draft law. See Le Nhung, "The Draft Law on Capital Was Rejected" ("Khong thong qua Luat Thu do") (29 March 2011), online: VietnamNet <<http://www.vietnamnet.vn/vn/chinh-tri/14563/khong-thong-qua-luat-thu-do.html>>.

¹⁷⁹ Hong Khanh, "The NA Did Not Give the Green Light to the Government's Bullet Train Project" ("Quoc hoi bac du an duong sat cao toc") (19 June 2010), online: VnExpress <<http://www.vnexpress.net/GL/Xa-hoi/2010/06/3BA1D27B/>>.

¹⁸⁰ VietnamNet, "The General Secretary [of the CPV]: Is It a Normal Event That the NA Has Not Yet Passed a Giant Project?" ("Tong bi thu: Quoc hoi chua thong qua du an lon la dieu binh thuong") (26 June 2010),

of the NA that “the State machinery of Vietnam is not run by the principle of separation of powers but it is run by the principle that it must be placed under the leadership of the Party.”¹⁸¹

To sum up, it seems that, in relation to the Government, today’s NA has become more politically significant and more active in asserting its constitutional powers. It is behaving more like a distinct political actor in relation to the Government. However, all of these observations on the rise of the NA should be understood keeping in mind that all operations of the NA are still placed under the leadership of the CPV and that the NA is still not expected to become a “professional” legislature operating on a full-time basis in the near future.¹⁸²

3.6 CENTRAL AND LOCAL GOVERNMENT

3.6.1 Government and Ministries

According to the *Law on the Organization of Government* of 2001, the Government in Vietnam is regarded as the executive body of the NA. It is also regarded as the highest state administrative agency in Vietnam.¹⁸³

The function of the Government is

[...] to exercise the unified management of the performance of the State’s political, socio-economic, defence, security and external relation tasks; to ensure the effectiveness of the State apparatus from the central to grassroots level; to ensure the respect for, and the observance of, the Constitution and laws; to promote the people’s mastery in the cause of building and defending the Fatherland, thus ensuring stability and improving the people’s material and spiritual lives.¹⁸⁴

The Government assumes the role of executing measures to “protect legitimate rights and interests of citizens [...] creating conditions for citizens to exercise their rights and fulfill

online: VietnamNet <<http://www.vietnamnet.vn/chinhtri/201006/Quoc-hoi-chua-thong-qua-du-an-lon-la-dieu-binh-thuong-918500/>>.

¹⁸¹ *Ibid.*

¹⁸² Le Minh Thong, *supra* note 136 at 299.

¹⁸³ Article 1 of the *Law on the Organization of the Government* of 2001.

¹⁸⁴ *Ibid.*

their obligations.”¹⁸⁵ It also assumes the role of protecting “property and interests of the State and the society.”¹⁸⁶

The Government is responsible to report to the NA on its activities. It has to report to NASC and the State President on its activities as well.¹⁸⁷ The Government’s organizational structure is composed of the Prime Minister, ministries, and the ministerial-level agencies. The NA decides on the establishment or abolition of ministries and ministerial-level agencies at the suggestion of the Prime Minister.¹⁸⁸

The Government is composed of the Prime Minister, deputy prime ministers, and ministers (or the heads of the ministerial-level agencies).¹⁸⁹ The Prime Minister is elected, relieved from office and dismissed by the NA at the suggestion of the State President.¹⁹⁰ The Prime Minister submits to the NA for ratification proposals on the appointment, removal from office, dismissal and resignation of deputy prime ministers and other ministers.¹⁹¹ Based on resolutions of the NA, the State President appoints, relieves from office, demotes, or approves the resignation of deputy prime ministers and other ministers.¹⁹² However, given that the CPV exercises its exclusive leadership over the state, it is noteworthy that all appointments of members of the Government are previously arranged by the CPV’s Central Committee and Politburo.¹⁹³

The Prime Minister is the head of the Government. The Prime Minister is responsible to the NA and reports on his/her work to the NA, the NA Standing Committee and the State President.¹⁹⁴ The deputy prime ministers assist the Prime Minister, performing tasks assigned by him/her. When the Prime Minister is absent, one deputy prime minister is authorized by the Prime Minister to direct the activities of the

¹⁸⁵ Article 112(5) of the *Constitution* of 1992 (as amended in 2001).

¹⁸⁶ *Ibid.*

¹⁸⁷ Article 109 of the *Constitution* of 1992 (as amended in 2001).

¹⁸⁸ *Ibid.*, article 114(2).

¹⁸⁹ Such as the Governor of the State Bank, the Chairperson of the Office of the Government, and the Chief Inspector of the Government Inspection Agency.

¹⁹⁰ Article 103(3) of the *Constitution* of 1992 (as amended in 2001).

¹⁹¹ *Ibid.*, article 114(2).

¹⁹² *Ibid.*, article 103(4).

¹⁹³ Tran & Ngo, *supra* note 172 at 404.

¹⁹⁴ Article 110 of the *Constitution* of 1992 (as amended in 2001).

government on the latter's behalf.¹⁹⁵ The deputy prime ministers are answerable to the Prime Minister and the NA for their assigned tasks. The Prime Minister always holds membership in the Politburo. Not all deputy prime ministers are members of the Politburo, but all of them are members of the Central Committee of the CPV.

Ministers are heads and leaders of their ministries (or ministerial-level agencies)¹⁹⁶ and take charge of a number of the Government's activities; they also take responsibility before the Prime Minister and the NA for nationwide state management over a branch or domain or for the jobs assigned to them. Most ministers are members of the Central Committee of the CPV. The Minister of National Defence and the Minister of Public Security are always members of the Politburo.

Although the constitution and the *Law on the Organization of the Government of 2001* do not require all ministers to be members of the NA,¹⁹⁷ in practice most of them are.¹⁹⁸

According to *Resolution 01/2007/NQ-QH12 dated 31 July 2007* and issued by the NA, the current Government of Vietnam consists of the Prime Minister, five deputy prime ministers, 18 ministers (heads of 18 ministries) and four heads of ministerial-level agencies.¹⁹⁹

¹⁹⁵ *Ibid.*

¹⁹⁶ Such as the State Bank, the Office of the Government, and the Government Inspection Agency.

¹⁹⁷ Article 110 of the *Constitution* of 1992 (as amended in 2001).

¹⁹⁸ Nguyen Hung, "Proposal to Reduce the Number of Government Members in the NA" ("De xuất giảm thành viên Chính phủ trong Quốc hội") (23 February 2011), online: VnExpress <<http://vnexpress.net/gl/xa-hoi/2011/02/de-xuat-giam-thanh-vien-chinh-phu-trong-quoc-hoi/>>.

¹⁹⁹ The 18 ministries include the: (1) Ministry of National Defence; (2) Ministry of Public Security; (3) Ministry of Foreign Affairs; (4) Ministry of Internal Affairs; (5) Ministry of Justice; (6) Ministry of Planning and Investment; (7) Ministry of Finance; (8) Ministry of Industry and Trade; (9) Ministry of Agriculture and Rural Development; (10) Ministry of Transportation; (11) Ministry of Construction; (12) Ministry of Natural Resources and the Environment; (13) Ministry of Information and Communication; (14) Ministry of Labour and Social Affairs; (15) Ministry of Culture, Sports and Tourism; (16) Ministry of Science and Technology; (17) Ministry of Education and Training; and (18) Ministry of Public Health. The four ministerial-level agencies include the: (1) Ethnic Committee; (2) State Bank of Vietnam; (3) Government Inspection Agency; and (4) Office of the Government (*Resolution 01/2007/NQ-QH12 dated 31 July 2007* and issued by the NA). It should be noted that the number of ministries, ministerial-level and governmental agencies has substantially decreased (there are currently 30, including eight governmental agencies) in comparison with number of these agencies in early days of the Doi Moi era (70 in 1986). This decrease is the result of many shuffles of governmental structure. See Truong Thi Hong Ha, "Improving Administrative Institutions to Meet the Requirements of Constructing a Socialist Law-Governed State" ("Hoan thien the che hanh chinh dap ung yeu cau xay dung nha nuoc phap quyen xa hoi chu nghia") (2010) *J. of Legis. Stud. (Vietnam)*, online: NCLP <http://www.nclp.org.vn/nha_nuoc_va_phap_luat/ly-luan-ve>.

Despite the fact that the Government and its ministries are regarded as the agencies in charge of executing the laws adopted by the NA,²⁰⁰ members of the Government also author most of the draft laws (about 98%)²⁰¹ submitted to and adopted by the NA.²⁰² The Government is also the body with the power to issue decrees and to provide detailed guidelines (interpretations) concerning general, ambiguous or unclear provisions in laws adopted by the NA or ordinances adopted by the Standing Committee of the NA.²⁰³ Ministries also have the authority to issue circulars to provide detailed guidelines for the implementation of laws, ordinances and decrees.²⁰⁴ It is a practice in Vietnam that most laws adopted by the NA require a large number of guiding decrees issued by the Government, or a large number of guiding circulars issued by ministries. For example, in respect of eight laws adopted by the NA in 2003, there were 113 matters requiring the Government and ministries to issue guiding LNDs (i.e. decrees and circulars).²⁰⁵ The *Ordinance on Settlement of Administrative Offenses* of 1995 required 48 decrees issued by the Government in order to provide detailed implementation provisions.²⁰⁶

3.6.2 Local Government

Vietnam is not a federal state. The idea that local government also assumes a share in sovereignty is not recognized. Therefore, local government is expected to be inferior to the central government under the principle of democratic centralism (*tap trung dan chu*). Local government in Vietnam is organized via a three-tiered structure, namely:

nha-nuoc/hoan-thien-the-che-hanh-chinh-111ap-ung-yeu-cau-xay-dung-nha-nuoc-phap-quyen-xa-hoi-chu-nghia>.

²⁰⁰ Articles 115 and 116 of the *Constitution* of 1992 (as amended in 2001)

²⁰¹ Tran & Ngo, *supra* note 172 at 316.

²⁰² Actually, the Government has the power to submit draft laws to the NA for adoption as stipulated in article 112(2) of the *Constitution* of 1992 (as amended in 2001).

²⁰³ *Ibid.*, article 115.

²⁰⁴ *Ibid.*, article 116.

²⁰⁵ Hoang Ngoc Giao, *supra* note 177 at 64.

²⁰⁶ Hoang Van Tu, “Criteria for Ascertaining a Good and Quality Law” (“Cac tieu chi de danh gia mot dao luat tot va co chat luong”) (2003) 3 J. of State & L. (Vietnam) 16 at 18.

provincial government, district government and commune government.²⁰⁷ This structure is shaped in accordance with the way administrative territories are delineated in Vietnam. The whole country is divided into 59 provinces and four cities with provincial-equivalent status with clear boundaries, populations and budgets. Each province is divided into many districts (or cities run by the provinces). There are about 700 districts throughout the nation. Each district is divided into many communes (or wards in urban areas). The total number of communes or wards in Vietnam is more than 11,000.²⁰⁸ In rural communes, people usually live in villages which are usually self-regulated by their own covenants (*huong uoc*).²⁰⁹

The local government of each level consists of a People's Council and a People's Committee.²¹⁰ Members of the People's Councils in a locality are elected by constituents of that locality.²¹¹ Members of the People's Committee in a locality are elected by the People's Council in that locality.²¹² People's Councils and People's Committees are regarded as local state bodies in charge of implementing laws, ordinances, decrees, circulars and other legal documents issued by the central government.²¹³ People's Councils can issue their resolutions and People's Committees can issue their decisions or directives to provide guidelines for the implementation of LNDs issued by higher state

²⁰⁷ Article 118 of the *Constitution* of 1992 (as amended in 2001) and article 4 of the *Law on the Organization of People's Councils and People's Committees* of 2003.

²⁰⁸ General Statistics Office of Vietnam, "The Number of Administrative Units by 31 December 2009" (So don vi hanh chinh co den 31/12/2009), online: GSO <<http://www.gso.gov.vn/default.aspx?tabid=386&idmid=3&ItemID=9837>>.

²⁰⁹ Le Hong Son, "New 'Huong uoc' and Its Role in Social Management" in (2003) 8 Vietnam L. & Legal Forum 31 at 31-32. Actually, village covenants are now uniformly regulated by the Ministry of Justice, the Ministry of Culture and Information, and the Standing Board of the Central Committee of the Vietnam Fatherland Front's *Joint Circular No. 03/2000/TTLT/BTP-BVHTT-BTTUBTWMTTQVN dated 31 March 2000 guiding the compilation and implementation of rural conventions and rules of villages, hamlets and population clusters*. The circular states that its purpose is to preserve and develop "the fine customs and habits and the cultural traditions in the community and the better management of the State by law." The drafting and approval procedures are minutely detailed to ensure conformity with law and "fine customs and habits". The adoption of this circular can be seen as part of the CPV's effort to standardize a previously customary source of village conduct rules promoting social stability and local dispute resolution with the CPV's oversight.

²¹⁰ Articles 119 and 124 of the *Constitution* of 1992 (as amended in 2001).

²¹¹ *Ibid.*, article 119.

²¹² *Ibid.*, article 123.

²¹³ *Ibid.*, articles 119 and 123.

bodies.²¹⁴ People's Committees are also in charge of dealing with inspection, complaints and denunciations, and the dissemination of legal information in their localities.²¹⁵

In accordance with the constitutional principle of democratic centralism, local People's Councils are placed under the supervision of the higher People's Councils and the NA, and are under the direction of the Government. Local People's Committees are placed under the direction of higher People's Committees. Provincial People's Committees are placed under the direction of the Government.²¹⁶

The apparatus of the commune People's Committee is not divided into separate divisions. Instead, there are a number of full-time (*chuyen trach*) public servants working as assistants to leaders of this committee to handle a number of administrative activities such as registration of births, marriages, and deaths; land surveying; and mediating disputes among members of communes. The apparatus of the district People's Committee is more "professionalized". Each district People's Committee has a significant number of public servants working in specialized departments (*Phong*), such as the Office of the District People's Committee, the Department of the Economy, the Department of Legal Affairs, and the Department of Natural Resources and the Environment.²¹⁷ The provincial People's Committee usually has more specialized departments in comparison with the district People's Committee. The names of provincial departments (*So*) usually correspond to the names of the national ministries in charge of the same domains or sectors. For example, the provincial People's Committee usually has the following departments: the Department of Public Security, the Department of Planning and Investment, the Department of Finance, the Department of Justice, the Department of Industry and Trade, the Department of Science and Technology, and the Department of Natural Resources and the Environment.²¹⁸

During the past more than two decades, both the central and local governments underwent many substantial reforms. The most notable recent reform was the

²¹⁴ *Ibid.*, articles 120 and 124.

²¹⁵ Articles 82-118 of the *Law on the Organization of People's Councils and People's Committees* of 2003.

²¹⁶ *Ibid.*, article 7.

²¹⁷ Article 7 of *Decree 14/2008/ND-CP dated 4 February 2008 providing for organization of specialized departments of district People's Committees*.

²¹⁸ *Ibid.*, Article 8.

implementation of the Overall Program on State Administrative Reform, carried out from 2001-2010, with the main goal of

[...] successfully building a democratic, clean, strong, professional, modern, effective, and efficient public administration system which operates in line with the principle of the socialist law-governed State under the leadership of the Party; and of constructing the force of state officials and public servants sufficiently qualified to meet the requirement of national development.²¹⁹

This program is also expected to transform the existing Vietnamese administration from “a system based primarily on administrative fiat to a more rights-based law [...] and from secrecy and omnipotence to transparency and accountability.”²²⁰

However, to date, this administrative reform program is far from meeting its initial objectives. The decision-making processes of administrative authorities remain non-transparent,²²¹ as Matthieu Salomon & Vu Doan Ket note: “civil servants are much more accountable to their home institution, their hierarchy, their boss [...] than they are to ‘national laws’ [...] decisive incentives are still produced by political and personal legitimacies.”²²² Administrative authority is “privatized” for the self-interest of numerous public officials.²²³ Corruption remains rampant.²²⁴ In addition, localism is widely seen. Many provincial governments try to extend their authority by issuing LNDs which give

²¹⁹ The Prime Minister’s *Decision 136/2001/QĐ-TTg dated 17 September 2001 ratifying the Overall Program on Administrative Reform for the years 2001-2010*.

²²⁰ Salomon & Vu, *supra* note 133, 134 at 134.

²²¹ It is worth noting that Vietnam has not adopted any law on the citizen’s right to access to information on operation of the state authorities. See Ngo Duc Manh, *et al.*, *Report on Transparency in Vietnam: A Comparative Study in Reference to the US-Vietnam Trade Agreement and the WTO’s Treaties (Bao cao nghien cuu Cong khai, minh bach hoa o Vietnam: So sanh tham chieu voi Hiep dinh thuong mai Vietnam-Hoa Ky va cac quy dinh cua To chuc thuong mai the gioi)* (Hanoi: National Political Press, 2006) at 148-149.

²²² Salomon & Vu, *supra* note 133, 134 at 145.

²²³ *Ibid.*

²²⁴ This situation is also openly admitted by the CPV. For example, in a recent interview with the public media, Vu Tien Chien – Chairperson of the Office of the Central Steering Committee on the Prevention of and Fight against Corruption (an organization under the direct control of the CPV) – openly admitted that, despite the fact that, during the period of 2005-2010, the political direction of the party and the state of Vietnam seems to be more positive, the “fight against corruption remains limited and weak” and “the presence of corruption remains complicated, occurring in many branches, at various levels and in numerous sectors [...] causing serious public concerns.” This fight “actually fails to meet its initial goals [set in 2005] of curbing and gradually getting corruption situation under control.” See HAVN, “Mr. Vu Tien Chien: The Actual Results are a Reliable Test for the Policy of Fighting against Corruption” (“Ong Vu Tien Chien: Chi co thuc tien moi kiem nghiem tinh dung dan va hieu qua cua cac hoat dong phong chong tham nhung”) (2 February 2011), online: CPV <http://www.cpv.org.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30501&cn_id=444992>.

them more powers than they are assigned by the central government.²²⁵ For example, in 2005, the central government (especially the Ministry of Planning and Investment and the Ministry of Finance) discovered that 33 provincial governments issued provisions on investment incentives exceeding the ceiling limits allowed by the central government.²²⁶ In 2010 alone, MoJ and its affiliate local agencies found more than 7,000 LNDs to have been issued in an unlawful manner (i.e. failing to meet the requirements of the *Law on Laws* of 2008). In some provinces, more than 50% of issued LNDs were found to be unlawful.²²⁷

3.7 THE COURT SYSTEM IN VIETNAM

According to the current constitution of Vietnam and the 2002 *Law on the Organization of the People's Courts*, the court system in Vietnam consists of the Supreme People's Court, the Provincial People's Courts, the District People's Courts and military courts. The courts are empowered to resolve criminal, civil, marriage and family, labour, economic and administrative cases and to settle other matters as prescribed by law.²²⁸

As an instrument of the socialist regime, the courts are required to protect “the socialist legality; to protect the socialist regime and the people's mastery; to protect the property of the State and collectives; to protect the lives, property, freedom, honour and dignity of citizens.”²²⁹ Through their activities, courts are expected to contribute to educating citizens in loyalty to the state, in strict observance of the law, in respect for

²²⁵ Hoang Quoc Long, “On Necessity to Merge the Present Law on Laws” (“Su can thiet cua viec hop nhat Luat ban hanh van ban quy pham phap luat”) (1 December 2010), online: MoJ <http://moj.gov.vn/ct/tintuc/lists/nghin%20cu%20trao%20i/view_detail.aspx?ItemID=2816>.

²²⁶ Vietbao, “The Race to Attract Investors” (“Cuoc chien ganh giat cac nha dau tu”) (27 April 2005), online: Vietbao <<http://vietbao.vn/Kinh-te/Cuoc-chien-gianh-giat-cac-nha-dau-tu/10908061/87/>>.

²²⁷ Duc Minh, “About 7,000 Legal Normative Documents Were Found to Be Illegal” (“Phat hien gan 7000 van ban co dau hieu trai phap luat”), Law Newspaper of Ho Chi Minh City (22 December 2010), online: Phapluattp <<http://phapluattp.vn/20101221104915596p0c1013/phat-hien-gan-7000-van-ban-co-dau-hieu-trai-phap-luat.htm>>.

²²⁸ Article 127 of the *Constitution* of 1992 (as amended in 2001); articles 1 and 2 of the *Law on the Organization of the People's Courts* of 2002.

²²⁹ Article 126 of the *Constitution* of 1992 (as amended in 2001).

social conduct and in the struggle to prevent and combat crimes and other offenses.²³⁰ The Vietnamese court system does not have judicial review power. It has no powers to challenge decisions of the NA, the Government, or the Prime Minister. However, decisions relating to the application of laws issued by local administrative authorities (such as provincial, district or commune People's Committees) and ministries can be directly challenged through the court system.²³¹

Prior to Doi Moi period, the court system in Vietnam was modelled after the court system in the Soviet Union.²³² Accordingly, this system had the following characteristics (as correctly pointed out by Penelope Nicholson): (1) the party influenced judicial appointments and the handling of cases; (2) the courts applied both law and policy; (3) the Supreme People's Court reported to the NA; (4) there was no MoJ from the early 1960s to the late 1970s; (5) close cooperation existed between procuracies and courts; (6) judges were elected for five-year terms (or shorter terms for lower courts) and could possibly be re-elected; (7) there was an appeal system; (8) "People's Assessors" were used in deciding all first-instance cases; (9) judges sat alone to resolve appeal cases; (10) there was an obligation on both judges and People's Assessors to demonstrate "revolutionary morality" in order to be appointed; (11) upper-level courts had a duty to educate lower-level courts; (12) there was a duty to educate the masses about the role of law.²³³

The court system of present-day Vietnam is not substantially different from that described above by Nicholson, at least in the following respects: (1) the party influences judicial appointments; (2) the courts apply both law and policy; (3) the Supreme Court reports to the national parliament; (4) there is close cooperation between procuracies and courts; (5) there is an appeal system; (6) People's Assessors are used in deciding all first-instance cases; (7) judges sit alone to resolve appeal cases; (8) there is an obligation on both judges and People's Assessors to demonstrate "revolutionary morality" in order to

²³⁰ Article 1 of the *Law on the Organization of the People's Courts* of 2002.

²³¹ Article 30 of the *Law on Administrative Procedure* of 2010. Actually, this power was stipulated beginning in 1996 in articles 11 and 12 of the *Ordinance on Administrative Procedure* of 1996.

²³² Per Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience* (Umea, Sweden: Umea University, 1999) at 53; see also, Penelope (Pip) Nicholson, "Comparative Law and Legal Transplants between Socialist States: A Historical Perspective" in Lindsey, *supra* note 105, 143 at 146.

²³³ Nicholson, *ibid.* at 146.

be appointed; (9) upper-level courts have a duty to educate lower-level courts; (10) there is a duty to educate the masses about the role of law. The influence of party organizations over decisions of the court is still sometimes reported by the newspapers, although this practice is severely criticized by the public.²³⁴ Judges are now appointed by the Chief Justice of the Supreme People's Court or by the State President, rather than being elected by local people's councils.²³⁵

However, in terms of structure, the current court system is considerably different from the system prior to the Doi Moi era. Before the Doi Moi period, the court system had only two special divisions, Civil Court and Criminal Court, to resolve two types of cases: respectively, civil disputes or matters, and criminal cases. Following the introduction of the market economy in Vietnam in 1986, a number of new forms of disputes have arisen in Vietnam, such as labour disputes, commercial disputes and disputes between citizens and administrative agencies. These new forms of disputes are said to be better resolved by judges who specialize in these areas.²³⁶ As a result, a number of new, specialized courts were created in Vietnam: economic courts (1994), labour courts (1996) and administrative courts (1996).²³⁷ All of these courts have been incorporated into the current court system in Vietnam. Accordingly, in the structures of the provincial People's Courts and the Supreme People's Court, there are a number of specialized courts, i.e. Civil Court, Criminal Court, Economic Court, Labour Court, and Administrative Court.²³⁸ Criminal courts are empowered to resolve criminal cases. Administrative courts are empowered to resolve disputes between private parties and administrative agencies over the decisions of administrative agencies (usually the

²³⁴ Sidel, *Constitution of Vietnam*, *supra* note 37 at 168.

²³⁵ Article 25(6) of the *Law on the Organization of the People's Courts* of 2002; article 103(8) of the *Constitution* of 1992 (as amended in 2001).

²³⁶ Nicholson, *Borrowing Court Systems*, *supra* note 125 at 248.

²³⁷ According to *Report No. 210/TANDTC dated 18 November 2009 on 12 years of resolving administrative cases by the court system (Bao cao so 210/TANDTC ngay 18/11/2009 tong ket thuc tien 12 nam hoat dong giai quyet cac vu an hanh chinh cua nganh Toa an nhan dan)* (at 3-4) issued by the Supreme People's Court of Vietnam, the number of administrative cases (i.e. legal suits brought by private parties to challenge decisions of administrative authorities) submitted to the court system for resolution was as follows: 282 cases in 1998; 408 cases in 1999; 539 cases in 2000; 803 cases in 2001; 1,308 cases in 2002; 1,458 cases in 2003; 1,746 cases in 2004; 1,361 cases in 2005; 1,232 cases in 2006; 1,686 cases in 2007; and 1,399 cases in 2008. The total number of administrative cases submitted to the court system from 1998 to the end of 2008 was 12,222 cases.

²³⁸ Articles 23(1) and 30 of the *Law on the Organization of People's Courts* of 2002.

decisions of local governments). Labour courts are empowered to resolve disputes arising from labour relations (such as employment contracts and labour strikes). Economic courts are empowered to resolve disputes relating to contracts between businesses or matters relating to the organization of enterprises (such as relations among shareholders, liquidation, and bankruptcy). Civil courts are empowered to resolve the remaining disputes among private parties (such as disputes relating to property, contracts between individuals, torts, and family matters).²³⁹

However, there are no specialized divisions or specialized courts in district People's Courts. Therefore, district People's Courts have the power to hear all kinds of disputes and cases, as stipulated in the *Code of Criminal Procedure* of 2003 and the *Code of Civil Procedure* of 2004.

Since 2005, the *Code of Civil Procedure* of 2004 has been applied to resolve disputes among private parties (including economic disputes, civil disputes and labour disputes). However, a 2010 report of the Supreme People's Court shows that the dominant case load of the court system regarding private disputes is that of civil lawsuits (i.e. divorce cases, property disputes, inheritance disputes, civil contract disputes, and tort cases). The number of economic lawsuits (i.e. commercial contract disputes and bankruptcies) and labour lawsuits is extremely small in comparison with the number of other civil lawsuits. For example, in 2005, 134,332 new civil lawsuits were submitted to the courts for resolution. The numbers for 2006, 2007, and 2008 were 143,404, 164,428, and 166,663 civil lawsuits, respectively. As for economic lawsuits, in 2005, there were 1,260 new lawsuits submitted to the courts for resolution. The numbers for 2006, 2007, and 2008 were 2,498, 4,287, and 5,384 economic lawsuits, respectively. As for labour lawsuits, in 2005, there were 950 new lawsuits submitted to the courts for resolution. The numbers for 2006, 2007, and 2008 were 820, 1,022, and 1,709 labour lawsuits, respectively.²⁴⁰

Overload is widely seen in the court system in Vietnam. According to the Chief Justice of the People's Supreme Court, even when staff and judges of the court systems

²³⁹ *Ibid.*, article 30.

²⁴⁰ The Supreme People's Court, *Report No. 9/BC-TANDTC dated 9 August 2010 on the implementation of the Code of Civil Procedure of 2004 (Bao cao tong ket 5 nam thi hanh Bo luat to tung dan su)* at 4-9.

work seven days a week, the system is only able to handle 76% of its total workload. Currently, the case load for each judge is 150 cases per year. Put another way, each judge has only two days to examine and try each case. As a result, it is very difficult for judges to avoid the shortcoming of producing low-quality judgments. In addition, poor salaries and allowances also prevent the court system from recruiting new staff and new judges. Many courts in large cities, as well as in rural and mountainous areas, face a shortage of staff and judges. Furthermore, the court system of Vietnam is not immune from problems of corruption.²⁴¹

3.8 BRIEF CONCLUSIONS

From a historical and cultural perspective, it is fair to say that Vietnam has, for centuries, been receiving and adapting foreign ideas, foreign knowledge, foreign religions, and foreign values. In other words, the diffusion of foreign knowledge, ideas, and legal rules is not a strange or new phenomenon in Vietnam. Traces of legal transplanted can be seen in almost all important new changes in the Vietnamese legal system, throughout the pre-colonial era, the colonial era, the pre-Doi Moi era, and the Doi Moi era. In fact, it seems that there are no legal institutions (whether the NA, the Government, or the court system) and no key policy innovations in Vietnam that have escaped the influence of foreign ideas.

Given this history, the current legal system of Vietnam is not simply a product of the Doi Moi era. It also reflects the lingering legacies of the political model existing before the Doi Moi era, i.e. the political regime based on the exclusive leadership of the CPV, following the principle of democratic centralism. In this model, the NA remains a relatively weak institution in exercising its mandate as a real legislature. Given that the administrative system has many problems in terms of competence, accountability, transparency, localism, and integrity, it seems that the NA is not very well-prepared for checking the hegemony of Vietnam's government, ministries and local governments.

²⁴¹ VietnamNet, "The Workload of the Court System is beyond Its Capacity" ("Nganh toa an lam pho phac cung khong het viet") (20 March 2010), online: VietnamNet <<http://www.vietnamnet.vn/chinhtri/201003/Nganh-toa-an-lam-pho-phac-cung-khong-het-viec-899765/>>.

Furthermore, the view that law emanates from the state and is an instrument of the state remains dominant. Laws are usually seen as instruments to perpetuate and strengthen party and state powers, rather than as methods to ensure they are being kept in check.²⁴² The party and the state have not been clear in their positions about the hegemony of state power. It seems that mainstream thinking still regards the presence of state power in society as an effective solution to social problems rather than as a problem in itself. As a result, there is still heavy reliance on criminal and administrative law approaches and the drafting of multiple LNDs to regulate state administration. No clear signals are available to suggest that this viewpoint will soon be altered. In this context, it is fair to say that the rule of law remains an ideal rather than a reality in Vietnam, although its absence generates many serious challenges for the effective implementation of laws.

In the next chapter, I will analyze how the general characteristics of the Vietnamese legal system mentioned in this chapter have been expressed in the area of consumer protection prior to the adoption of the CPL of 2010.

²⁴² Salomon, *supra* note 161 at 201.

Chapter 4

CONSUMER PROTECTION IN VIETNAM BEFORE THE ADOPTION OF THE *CONSUMER PROTECTION LAW*

This chapter analyzes the actual situation regarding the legal provisions on consumer protection in Vietnam prior to the adoption of the *Consumer Protection Law* (CPL) in November 2010. This chapter shows that these provisions constituted a regime of consumer protection in which there was no recognition of the idea that the consumer should be regarded as a weaker party in relationships with traders and should be given a higher level of protection. It also shows that the regime of consumer protection prior to the adoption of the CPL was designed on the traditional model of state economic management in Vietnam, in which the state played a leading role in consumer protection and consumer empowerment was usually ignored. However, in order to provide a clearer picture of the changes and continuities between the key provisions in the CPL¹ and the previous consumer protection provisions, this chapter focuses on provisions relating to key issues stipulated in the new CPL, i.e. provisions on unfair commercial practices, consumer contracts and enforcement mechanisms. This chapter also argues that new consumer policies adopted in the new CPL did not develop in a vacuum. Instead, they developed in an environment of already existing policies. This phenomenon has also been widely observed in many other countries.²

4.1 A BRIEF HISTORY OF CONSUMER PROTECTION IN VIETNAM

Simple legal rules to ensure fairness and honesty in market relations between sellers (especially dealers and retailers) and buyers (consumers) were first drafted many centuries ago in Vietnam. For example, the well-known *Hong Duc Criminal Code* of the

¹ These are analyzed in Chapters 5 and 6.

² Werner Jann & Kai Wegrich, "Theories of the Policy Cycle" in Frank Fischer, Gerald J. Miller & Mara S. Sidney, *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (New York: CRC Press, 2007) 43 at 45.

15th century³ contained a number of provisions that could be regarded as consumer protection measures.⁴

As criminal provisions, these provisions reflected a traditional Vietnamese view of law and the state in feudal times. Accordingly, the state saw itself as inherently good and assumed the role of benevolent protector of the general public.⁵ Penal laws (as a symbol of the presence and exercise of state power) were regarded as the primary solution to social problems. Self-help measures were usually ignored. The use of criminal provisions also reflected the intention of the state to promote traditional moral principles of feudal Vietnamese society such as “do not deceive others” and “do no cause harm to others.” These moral principles were also similar to teachings of Confucius about the virtues of *Nhan* (benevolence towards other people) and *Tin* (faithful treatment of others; building trust and keeping promises).⁶

Despite the existence of these provisions in the *Hong Duc Criminal Code* (or the *Le Code*) as early as the 15th century, modern Vietnamese consumer protection law actually emerged only about two decades ago. The emergence of consumer protection

³ This code was originally written in ancient Chinese characters. It was translated into modern Vietnamese characters in 1991 by the Institute of History in Vietnam. See Historical Institute [of Vietnam], *National Criminal Code – The Le Code (Quoc trieu hinh luat – Luat hinh trieu Le)* (Ho Chi Minh City: Ho Chi Minh City Press, 2003).

⁴ Here is a sample of provisions from the code relating to the sale of goods:

Article 187: “In the markets of the capital, villages, or hamlets, those who disregard the official measurements of weight, length, or volume and privately modify measurement instruments used in the buying or selling of merchandise shall be demoted or condemned to penal servitude.”

Article 191: “Those who manufacture for sale cotton, silk, or articles of common use of defective or adulterated nature or of insufficient length or width shall receive fifty strokes of the light stick and be demoted one grade. The substandard articles and materials shall be confiscated. (‘Defective’ means lacking in strength and ‘adulterated’ means impure or of inexact composition.). Responsible supervisory officials and heads of the guilds concerned who fail to discover the wrongdoing or condone it shall be fined, demoted, or dismissed. Any informer and any person who arrests the offenders shall receive a reward commensurate with the gravity of the circumstances. If substandard articles or materials have been delivered to the government, the punishment shall be increased one degree.”

Article 523: “Whoever adulterates gold, silver, or articles made of these metals in order to sell them shall be condemned to penal servitude. The adulterated items shall be confiscated.”

Extracted from Nguyen Ngoc Huy & Ta Van Tai, *The Le Code: Law in Traditional Vietnam*, vol. 1, (Athens, OH: Ohio University Press, 1987) at 155-156, and 245

⁵ It was not a coincidence that, in feudal times in Vietnam, there was a widely-held concept that state officials were “fathers” and “mothers” of ordinary people (*Quan chi phu mau*).

⁶ Nguyen Minh Doan, *Role of Law in Society (Vai tro cua phap luat trong doi song xa hoi)* (Hanoi: National Political Press, 2009) at 169-170.

provisions was mainly associated with the marketization process; when Vietnam shifted from a centrally planned economy to a market economy beginning in 1986, consumers were gradually liberalized to become more autonomous players in the new game of market interactions.

Actually, until 1992, few provisions on consumer protection existed in the legal system. Legal provisions on consumer protection in this period were mainly of a criminal or administrative nature.⁷ Such employment of criminal laws for the purpose of consumer protection again seems to repeat the inertia of the traditional view of the state as the benevolent protector of the general public.⁸ In addition, it is noteworthy that these provisions seemed to mainly target activities of private sectors which were not officially promoted prior to the Doi Moi era.⁹ Actually, in the early days of the Doi Moi era, such views on the private sector prevailed and were quite influential among many state officials.¹⁰ It was not a coincidence that the *Law on Private Enterprises* of 1990 and the

⁷ For example, article 5 of the *Ordinance on Sanctioning Crimes of Speculation, Smuggling, Dealing in Fake Goods, and Illegal Business* of 1982 stipulated that persons who made or traded in fake goods could be fined and sentenced to five years of imprisonment. In serious circumstances, criminals could be punished with life imprisonment and confiscation of property. Article 167 of the *Criminal Code* of 1985 repeated almost all of the contents of article 5 of the *Ordinance* of 1982 and even stipulated that violators could be sentenced to death. Article 170 of the *Criminal Code* of 1985 criminalized the behaviour of deceiving customers through employing inaccurate measurement instruments. Violators could be sentenced to seven years of imprisonment.

⁸ Actually, in the Vietnamese feudal era, the state (king) was regarded as a favour-grantor and protector of the people. In relations between the state (the king and his governing apparatus) and the public, the state stood in a higher position and was not subject to supervision or critique from the public. This view of the state was explicitly discarded in all constitutions of modern Vietnam. However, in daily life, for a long time prior to the Doi Moi era (and it is clear that this legacy still lingers), the state was portrayed as the protector of the people. Although the constitution officially declares that the people are the master of the state, the actual relationship tends to reflect the reverse. See Ta Duy Anh, "People and the State" ("Dan va Chinh phu"), in Nguyen Huu Huong & Le Hung, eds., *Stories of Today (Chuyen thoi chung ta dang song)* (Hanoi: Knowledge Press, 2007) 23 at 24; see also Martin Gainsborough, *Vietnam: Rethinking the State* (London: Zed Books, 2010) at 168. Gainsborough notes that the state in Vietnam today remains "strongly paternalistic".

⁹ For example, in one decree in 1981 (*Decree No. 227/CP dated 2 June 1981*), the Prime Minister requested the Ministry of Internal Trade (one of the predecessors of the present MoIT) to "strengthen the management of prices [...] in free market [...] fighting against [private] speculators." This decree also requested the Provincial People's Committees to "implement all necessary administrative measures such as forcing private commercial units to register their business activities, register their quality of products and register the price of their products with Market Control Agencies [...] Local authorities have to strengthen inspections and strictly address violations and force private commercial units to reduce their products' prices to reasonable levels, preventing them from taking advantage of shortage of goods to freely increase the price and exploit consumers."

¹⁰ John Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam" (2002) 51 I.C.L.Q. 641 at 661. According to Gillespie, private sectors were usually depicted by public officials and public media as "incompetent", "fraudulent" and "corrupt".

Law on Companies of the same year explicitly stipulated the obligations of private businesses to respect consumer rights,¹¹ while laws on state-owned enterprises (1995) and cooperatives (1996) were silent on this topic.

Given this fact, the term “protection of consumers’ rights and interests” (*bao ve quyen va loi ich cua nguoi tieu dung*) or, in short, “consumer protection” was used for the first time in the Vietnamese legal system in 1990 in the *Ordinance on Quality of Goods*.¹² This ordinance linked the activities of state management of quality of goods with activities of consumer protection. Article 2 of this ordinance expressly stated that

[...] *the state encourages and creates favourable conditions* for organizations and/or individuals to secure and lift up the quality of goods; protecting rights and interests of consumers. Organizations and/or individuals shall be responsible for the quality of goods produced or marketed by them [emphasis added].

This ordinance also reinforced the message of the criminal law of Vietnam on prohibiting traders from trading in fake goods or deceiving customers.¹³

In 1992 (i.e. six years after the legalization of the private sector and the market economy following the creation of the Doi Moi Policy in 1986), the constitution first made a declaration that consumer protection policy was to be formulated by the state.¹⁴

¹¹ Article 25(4) of the *Law on Private Enterprises* of 1990 states that owners of private enterprises shall “ensure the quality of goods in accordance with the registered standards”. Article 13(3) of the *Law on [Private] Companies* of 1990 also states that (private) companies shall “ensure the quality of goods in accordance with the registered standards”. It is interesting that this obligation was not expressly stipulated in the *Law on State-owned Enterprises* of 1995 or in the *Law on Cooperatives* of 1996. This created an impression that only private enterprises and private companies should be placed under stricter supervision by the state authorities.

¹² Adopted by the Standing Committee of the National Assembly (NASC) on 27 December 1990. According to article 7 of this ordinance, the Directorate for Standards, Metrology, and Quality (STAMEQ) (under the State Committee on Science – predecessor of the current Ministry of Science and Technology) was assigned to enforce this ordinance. This ordinance was specified by *Decree No. 327/HDBT dated 19 October 1991* and many other LNDs issued by the State Committee on Science such as *Decision No. 19/QD dated 24 February 1992 on goods subject to registration of quality*; *Decision No. 399/QD dated 10 June 1992 on procedures for sanctioning administrative offenses relating to quality of goods*; and *Decision No. 400/QD dated 10 June 1992 on inspection of quality of goods*.

¹³ Article 5 of this ordinance states that “dealing in fake goods and all fraudulent practices relating to quality of goods are strictly prohibited.” These provisions were later retained in the *Ordinance on Quality of Goods* of 1999. Article 8 of this 1999 ordinance states that “it is strictly prohibited for behaviours of producing goods failing to meet the standards as required by the law and behaviours of provision of inaccurate information or inaccurate advertisements or other fraudulent practices relating to quality of goods.”

¹⁴ Specifically, article 28 of the *Constitution* of 1992 contains a commitment from the state that “all illegal activities of production and business, causing harm to the interests of the state, legitimate rights and interests of the collective and citizens must be strictly dealt with in accordance with the law. The state shall maintain a policy of protection of interests and rights of producers and consumers.”

Until the first CPL was adopted in November 2010, legal rules relevant to consumer protection evolved substantially thanks to law reform initiatives following the adoption of the new *Constitution* of 1992. These legal rules were stipulated in many codes, laws and ordinances and their accompanying guiding legal normative documents (LNDs) such as the *Civil Code* of 1995 (amended in 2005),¹⁵ the *Commercial Law* of 1997 (amended in 2005),¹⁶ the *Criminal Code* of 1999,¹⁷ the *Ordinance on Quality of Goods* of 1999 (amended and incorporated into the *Law on Quality of Products and Goods* of 2007¹⁸),¹⁹ the *Ordinance on Advertisement* of 2001,²⁰ the *Ordinance on Price*

¹⁵ This code was drafted by MoJ. This code is said to be visibly modelled after the *Civil Code* of Japan (1896), with certain references to the *Civil Code* of Germany (2002), the *Civil Code* of France (1804), the *Civil Code* of Soviet Russia (1922), and the Chinese *Civil Law* (1987). See Nguyen Quoc Vinh, *Freedom of Contract: A Leading Principle in Contract Law of Economically Developed Countries and Its Absence in Contract Law of Vietnam* (Ph.D. Dissertation, Meiji Gakuin University, Tokyo, Japan, 2006) at 171-172 [unpublished]; see also John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam* (Farnham, UK: Ashgate, 2006) at 161-162.

¹⁶ This law was drafted by the Ministry of Trade (now MoIT) with extensive technical assistance from multilateral and bilateral donors such as the World Bank, the Asian Development Bank, United Nations development programs, France, and Japan. See William A.W. Neilson, “Competition Laws for Asian Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (New York: Routledge, 2006) 291 at 308; see also John Gillespie, “Developing a Decentred Analysis of Legal Transfers” in Penelope (Pip) Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008) 25 at 46 [Gillespie, “Decentered Analysis”]. The Ministry of Trade was regarded as the agency in charge of enforcing this law (or conducting state management of commercial activities as stipulated in this law) (article 246 of the *Commercial Law* of 1997 and article 8 of the *Commercial Law* of 2005).

¹⁷ This code was drafted by MoJ in a close consultation with the Ministry of Public Security, the Supreme People’s Procuracy, and the Supreme People’s Court. This code is said to be significantly modelled after the *Criminal Code* of the former Soviet Russia (1960) and the current *Criminal Code* of Russia (1997). See Nguyen Thi Anh Van, “Skills of Using Comparative Law to Draft Legal Normative Documents” (“Ky nang su dung Luat hoc so sanh trong cong tac soan thao van ban quy pham phap luat”) in Nguyen Dinh Loc, et al., *Manual for Enhancing the Skills of Drafting Legal Normative Documents (Tai lieu boi duong nghiep vu xay dung van ban quy pham phap luat)* (Hanoi: Judicial Press, 2008) 68 at 92.

¹⁸ This incorporation was aimed at *enhancing state management* of the quality of goods in a socialist-oriented market economy, and at meeting the requirements of acceding to the WTO. It was drafted with references to laws of the EU, Sweden, Denmark, Germany, Finland, Latvia, the United States, China, and South Korea. See Government, *Submission Report No. 99/TTr-CP dated 9 June 2006 on the draft Law on Quality of Products and Goods (To trinh so 99/TTr-CP ngay 9/6/2006 ve Du an Luat chat luong san pham, hang hoa)* at 4-6.

¹⁹ These ordinances and laws were drafted by the Ministry of Science and Technology. The Ministry of Science and Technology is also assigned as the main ministry in charge of enforcing these documents.

²⁰ This ordinance was drafted by the Ministry of Culture and Information (now, the Ministry of Culture, Sports and Tourism). The Ministry of Culture, and Sports and Tourism is currently in charge of enforcing this ordinance. The purpose of this ordinance is “to enhance the efficacy of state management of advertisement; to protect the legitimate rights and interests of consumers and organizations and/or individuals in advertising activities; to contribute to socio-economic development” [emphasis added]. See the preamble of the *Ordinance on Advertisement* of 2001. This ordinance was specified by Decree

of 2002,²¹ the *Ordinance on Dealing with Administrative Offenses* of 2002,²² the *Ordinance on Food Safety* of 2003²³ (amended and incorporated into the *Law on Food Safety* of 2010²⁴),²⁵ and the *Competition Law* of 2004.²⁶

Among these laws, provisions about the obligation of traders and businesses to respect the commercial interests of consumers are found in numerous important laws.²⁷ Violations of consumers' interests are subject to administrative sanctions and criminal

No. 24/2003/ND-CP dated 13 March 2003 (which replaced a former decree on advertisement, i.e. *Decree No. 194/CP dated 31 December 1994 on advertisement in the territory of Vietnam*). *Decree No. 24/2003/ND-CP* was further specified by numerous ministries' decisions, circulars, and joint circulars such as *Circular No. 43/2003/TT-BVHTT* issued by the Ministry of Culture and Information dated 13 July 2003; *Joint Circular No. 01/2004/TTLT/BVHTT-BYT* of the Ministry of Culture and Information and the Ministry of Public Health dated 14 January 2004; and *Circular No. 67/2004/TT-BTC* of the Ministry of Finance dated 7 July 2004.

²¹ This ordinance was drafted by the Ministry of Finance. The Ministry of Finance is currently in charge of enforcing this ordinance. This ordinance was specified by *Decree No. 170/2003/ND-CP dated 15 December 2003* (which was later amended by *Decree No. 75/2008/ND-CP dated 9 June 2008*). It was further specified by *Circular No. 104/2008/TT-BTC* of the Ministry of Finance dated 13 November 2008.

²² It is noteworthy that the first *Ordinance on Dealing with Administrative Offenses* was adopted in 1989. This ordinance was replaced by the *Ordinance on Dealing with Administrative Offenses* of 1995. The ordinance of 1995 was replaced by the current *Ordinance on Dealing with Administrative Offenses* of 2002 (as amended in 2007 and 2008). This ordinance was drafted by MoJ. The preamble of this ordinance states that the purpose of this ordinance is to “prevent and combat administrative offenses, contributing to securing the public security and order, protecting the interests of the State, the legitimate rights and interests of organizations and/or individuals, *strengthening the socialist legality and enhancing the efficacy of state management*” [emphasis added].

²³ The preamble of this ordinance clearly stated that the purpose of this ordinance was to “enhance state management of food safety.”

²⁴ The rationales for this incorporation were to “enhance state management of food safety” and to meet requirements of the WTO accession in 2007 (especially to meet requirements of the WTO treaties such as *Agreement on Technical Barriers to Trade*, *Agreement on Sanitary and Phytosanitary Measures*, and *Agreement on Trade-Related Aspects of Intellectual Property Rights*. See Government, *The Submission Report of the Government of Vietnam No. 159/TTr dated 6 October 2009 on the draft Law on Food Safety (To trính so 159/TTr ngày 6/10/2009 về Dự án Luật An toàn thực phẩm)* at 4-5.

²⁵ This law was drafted by the Ministry of Public Health. The Ministry of Public Health is currently in charge of enforcing this law.

²⁶ Other laws include the *Law on Enterprises* of 1999 and 2005, the *Law on Electricity* of 2004, the *Law on Pharmacy* of 2005, the *Law on Tourism* of 2005, and the *Law on Standards and Technical Regulations* of 2006.

²⁷ See article 632 of the *Civil Code* of 1995, which states that “individuals, legal persons and other subjects producing and/or trading in goods which fail to meet standards of food, pharmacy or other goods, causing damage to consumers, shall be liable to pay compensation”; article 9(1-3) of the *Commercial Law* of 1997, which was later replaced by article 14 of the *Commercial Law* of 2005, stipulates that traders conducting commercial activities are obliged to provide consumers with sufficient and truthful information on the goods and/or services they trade in or provide and take responsibility for the accuracy of such information. Traders conducting commercial activities must be responsible for the quality and lawfulness of the goods and/or services they trade in or provide.

penalties according to the nature, extent and consequences of the violations. Traders causing harm to other people are responsible to pay compensation.²⁸

In addition, a number of laws had important specific provisions regarding consumer rights. For example, article 9(4) and (5) of the first *Commercial Law* of 1997 expressly stipulated that:

Consumers may establish an organization²⁹ in order to protect their legitimate interests in accordance with the provisions of law.³⁰ In the event that a consumer's interests are infringed upon, he/she/it has the right to file a complaint with the competent State authority or initiate legal action in court against the merchant in accordance with the provisions of law.³¹

This provision was not retained in the *Commercial Law* of 2005 as this provision was already contained in the *Ordinance on Protection of Consumers' Rights and Interests* (CPO) of 1999. In addition, in 2005, the function of "state management" of consumer protection had already been assigned to the Ministry of Trade – the drafting ministry of the *Commercial Law* of 2005. Accordingly, the Ministry of Trade became the ministry in charge of enforcement of both the CPO of 1999 and the *Commercial Law* of 2005.

However, it is noteworthy that most of these laws were drafted with the key intention of providing regulatory instruments or legitimizing the state management³²

²⁸ See article 321 of the *Commercial Law* of 2005. Actually, the Government has issued many guiding LNDs regarding administrative sanctions for violations of commercial law. For example, one of the very first decrees dealing with administrative offenses in the area of commercial activities was *Decree No. 01/CP dated 3 January 1996 on dealing with administrative offenses in the area of commercial activities* (as amended by *Decree No. 01/2202/ND-CP dated 3 January 2002*). This decree was replaced by *Decree No. 175/2004/ND-CP dated 10 October 2004 on dealing with administrative offenses in the area of commercial activities*. *Decree No. 175/2004/ND-CP* was then replaced by *Decree No. 06/2008/ND-CP dated 16 January 2008 on dealing with administrative offenses in commercial activities*. *Decree No. 06/2008/ND-CP* was further detailed by MoIT's *Circular No. 15/2008/TT-BCT dated 2 December 2008*. *Decree No. 06/2008/ND-CP* was recently amended by *Decree No. 112/2010/ND-CP dated 1 December 2010*.

²⁹ It is worth noting that the first consumer protection association was Vinastas (although it was not totally similar to consumer associations in developed countries due to its affiliation with Fatherland Front in Vietnam). Vinastas was set up in Vietnam in 1988 and it assumed the mission of consumer protection in 1991, i.e. six years before the adoption of the *Commercial Law* of 1997. See section 4.5.3.

³⁰ The phrase "in accordance with the provisions of law" implied that the right to set up a consumer association is not a natural right but a right emanating from the state. This remains the official position of the current regime in Vietnam. See Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008) at 141.

³¹ Baker & McKenzie, *The Commercial Law of the Socialist Republic of Vietnam* (Hong Kong: Asia Information Associates, 1997) at 8 & 10.

³² As widely noted by foreign observers, laws in Vietnam are drafted to perpetuate the CPV and the state's surveillance and control of non-state sectors and to consolidate and entrench state power rather than to constrain it. See Neilson, *supra* note 16 at 308-309. Neilson further notes that even the *Commercial Law*

status of ministries in the new context – the emergence of a market economy in a globalized world and the requirements of the construction of a law-governed state in Vietnam.³³ In this context, except for few exceptional cases (such as perhaps, the adoption of the *Law on Quality of Products and Goods* of 2007³⁴), consumer protection was usually not regarded as the primary or initial purposes of these laws. Rather, these new measures followed the traditional path of empowering the state to regulate and oversee the consumer marketplace without granting self-help rights and powers to consumers to claim for losses caused by the unwarranted actions of traders and other merchants. In addition, all of the above-mentioned laws relating to consumer protection were drafted and implemented independently from one another rather than as part of a smoothly coordinated system. These laws were, in many cases, employed by ministries as instruments to advance and legitimize their departmentalism.³⁵ Therefore, it is not surprising that many guiding legal normative documents (LNDs) deriving from these laws are inconsistent with one another³⁶ and relevant ministries have many problems coordinating their joint efforts for the purpose of consumer protection.³⁷ Given that laws

was drafted with the purpose of asserting the state supervision of all commerce rather than with the purpose of facilitating business transactions as widely understood in developed countries.

- ³³ In the sense that state management has to be based on legal foundations originating from laws adopted by the National Assembly (NA). See section 3.4.
- ³⁴ One of the purposes of adoption of this law is “to maximize protection of consumers’ rights and interests through a mechanism of tight and comprehensive control of quality of goods [...] including strong measures from the State towards violations of law on quality of goods [...]” See Government, *Submission Report No. 99/TTr-CP dated 9 June 2006 on the draft Law on Quality of Products and Goods (To trinh so 99/TTr-CP ngay 9/6/2006 ve Du an Luat chat luong san pham, hang hoa)* at 4.
- ³⁵ Nguyen Duy Quy & Nguyen Tat Vien, *Vietnam’s Law-Governed Socialist State of the People, from the People, and for the People: Theory and Practice (Nha nuoc phap quyen XHCN Viet Nam cua dan, do dan, vi dan: Ly luan va thuc tien)* (Hanoi: National Political Press, 2008) at 256.
- ³⁶ It is widely known that the *Ordinance on Price* of 2002 has many provisions inconsistent with the *Law on Competition* of 2004 (in terms of fines applicable to the same violation). Many decrees regarding violations of consumers’ rights were found to be conflicting. For example, for the same violation of selling expired food products, article 26 of Decree 06 (2008) stipulates that violators can be fined up to 30 million VND (equal to \$1,500 USD) while article 15 of Decree 45 (2005) stipulates that violators can be fined up to only 15 million VND (equal to \$750 USD).
- ³⁷ Nguyen Hung Dung, a member of the EG of the CPL (who is also Director of the Department of Market Control - MoIT) revealed at a workshop held on 11 June 2008 by VCAD in Hanoi that “at present, regarding controlling flows of goods on the market and consumer protection, there are more than 10 types of relevant authorities. However, there remains the situation that for achievements, they all claim their share, but for failures or problems, no authorities are held responsible”. See Nguyen Hung Dung (Director of Market Control Department - MoIT), “Actual Situation of Violations of Consumer Rights and Arising Problems” (“Thuc trang vi pham phap luat bao ve quyen loi nguoi tieu dung – nhung van de dat ra”) (Paper presented at the workshop “The Reality of Implementation of Consumer Protection Laws and Orientations

and their guiding LNDs are usually drafted by ministries without a central drafting or internal integrity review office, these internal conflicts or redundancies might be said on occasion to be predictable. Despite the fact that MoJ is regarded as the Government's gate-keeper in ensuring the consistency of the legal system,³⁸ it seems that its real role is not as significant as was seemingly intended by the drafters of the *Law on Laws*.

4.2 THE CPO OF 1999³⁹

Prior to the adoption of the CPL, the highest LND specifically dealing with consumer protection was the *Ordinance on Protection of Consumers' Rights and Interests* (the CPO). This ordinance was adopted by NASC on 27 April 1999 and took effect on 1 October 1999.⁴⁰

This ordinance was said to be the product of the long-lasting lobbying efforts⁴¹ of Vinastas – the national association of professionals and consumers working in the area of standards, measurements, and consumer protection.⁴² This ordinance was also sponsored by the Ministry of Science and Technology (the ministry from which most members of

for Drafting the CPL" held by VCAD and the STAR-Vietnam Project in Hanoi, 11 June 2008) [unpublished].

³⁸ Articles 29(a) and 63 of the *Law on Laws* of 1996 (as amended in 2002); articles 36 and 63 of the *Law on Laws* of 2008.

³⁹ It is noteworthy that ordinances are usually regarded as a kind of temporary law. Article 12(1) of the *Law on Laws* of 2008 states that ordinances "shall contain regulations on issues upon instruction by the National Assembly. After a certain period of implementation, these issues shall be proposed to be developed into laws." Also in accordance with article 2 of this law, ordinances occupy a lower position in comparison with laws but a higher one in comparison with decrees in the hierarchy of LNDs. As a temporary law, an ordinance is adopted with the intention that a new law will be drafted to replace it soon. Nevertheless, in reality, many ordinances last for a long time and they are replaced by other ordinances rather than by new laws. For example, the *Ordinance on Dealing with Administrative Offenses* was first adopted in 1989 and it was replaced by a new ordinance in 1995, then by another ordinance in 2002. The *Ordinance on Dealing with Administrative Offenses* of 2002 remains in force today after being partially amended in 2007 and 2008. The draft *Law on Dealing with Administrative Offenses* (drafted by MoJ) is still pending.

⁴⁰ Actually, this ordinance was initially scheduled to be adopted in 1994 according to the NA's *Resolution dated 23 June 1994 on law-making activities for the second half of 1994*.

⁴¹ I obtained this information from a member of Vinastas while doing fieldwork interviews in Hanoi on 23 August 2010.

⁴² On Vinastas, see section 4.5.3.

the executive board of Vinastas originally came).⁴³ The CPO will exist until 1 July 2011 when it will be replaced by the newly-adopted CPL.

Like many other ordinances adopted by NASC, this ordinance is quite short.⁴⁴ It has only 30 articles divided into six chapters.⁴⁵ Actually, the CPO does not have any provisions governing specific transactions between consumers and businesses, nor does it have any specific remedies to deal with offenses against consumers. The self-help system for consumers is also poorly designed. Provisions on consumer rights in this ordinance are simply declaratory, without concrete effective and enforceable mechanisms. Within this format, the CPO was expected to have a number of subordinate guiding LNDs to concretize its construction.⁴⁶

However, this ordinance has made a significant contribution in representing certain interests of consumers at least in the following aspects:

⁴³ Actually, until the adoption of the CPO in 1999, no ministries or agencies in Vietnam were expressly designated by law to assume the specific mandate of consumer protection.

⁴⁴ For example, the *Ordinance on Quality of Goods* of 1999 and the *Ordinance on Measurement* of 1999 had only 38 and 41 articles, respectively.

⁴⁵ These six chapters are as follows: Chapter 1 “General Provisions” (articles 1 to 7); Chapter 2 “Rights and Responsibilities of Consumers” (articles 8 to 13); Chapter 3 “Responsibilities of Organization and/or Individuals Carrying on Production and/or Business in Goods and/or Services” (articles 14 to 17); Chapter 4 “State Management of Protection of Consumers’ Rights and Interests” (articles 18 to 21); Chapter 5 “Handling Complaints, Denunciation and Dealing with Violations” (articles 22 to 28); and Chapter 6 “Implementation Articles” (articles 29 to 30). It is quite difficult to trace the origins of ideas in the CPO from a legal transplantation perspective due to my inability to access information about the process of drafting this ordinance. However, the structure of the CPO is quite similar to the structure of China’s *Law on Protection of Consumers’ Rights and Interests* of 1993. Specifically, China’s law has 55 articles divided into eight chapters as follows: Chapter 1 “General Provisions” (articles 1 to 6); Chapter 2 “Rights of Consumers” (articles 7 to article 15); Chapter 3 “Obligations of Operators” (articles 16 to 25); Chapter 4 “State Protection of Consumers’ Lawful Rights and Interests” (articles 26 to 30); Chapter 5 “Consumers’ Organizations” (articles 31 to 33); Chapter 6 “Settlement of Disputes” (articles 34 to 39); Chapter 7 “Legal Responsibility” (articles 40 to 53); and Chapter 8 “Supplementary Provisions” (articles 54 to 55). See China’s *Law on Protection of Consumers’ Rights and Interests*, online: Lehman Law < <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/consumer-protection/law-of-the-peoples-republic-of-china-on-protection-of-the-rights-and-interests-of-the-consumers-1994.html>>. According to a news update from Winston & Strawn LLP, a law firm in China, this law is also undergoing a revision. As a result, it is very likely that consumer protection techniques widely used in Western countries such as cooling-off periods, protection of consumer privacy, and prohibition of unfair commercial practices will be introduced into the Chinese legal system soon. See Winston & Strawn LLP, *Greater China Law Update*, September 2010, online: Winston < http://www.winston.com/siteFiles/Publications/CLU_Sept2010.pdf>.

⁴⁶ That is why this ordinance was later specified by Decree 69 (2001) and then by Decree 55 (2008).

- It provides a legal definition of “consumer” as⁴⁷ “a person purchasing and/or using goods and/or services for the purpose of consumption and/or living activities of individuals, families and organizations.”⁴⁸
- It stipulates that consumer protection is the responsibility of all individuals and organizations in society.⁴⁹ This provision seems to discard the idea that consumer protection is the state’s exclusive mandate and opens the door for Vinastas and its provincial consumer protection associations to legitimately participate in consumer protection.
- It provides a list of consumer rights somewhat similar to the eight basic consumer rights acknowledged by the United Nations⁵⁰ and Consumer International (CI).⁵¹ According to articles 8, 9, 10, and 11 of this ordinance, consumers are acknowledged to have the following rights: (1) the right to choose; (2) the right to information; (3) the right to be safe; (4) the right to get compensation; (5) the right to lodge complaints, denunciations or take legal action; (6) the right to consumer education; (7) the right to participate in law-making activities relating to consumer protection; and (8) the right to set up consumer protection organizations. However, these eight rights are declaratory rather than “enforceable rights”. They can be implemented only when they are specified by guiding LNDs. In absence of such detailed LNDs, it is very likely that they do not advance any benefits for consumers in real terms.
- The ordinance also does not neglect to note some consumers’ obligations, such as the obligation to self-protection, the obligation to fully follow use instructions of

⁴⁷ In fact, the word “consumer” (*nguoì tieu dung*) was found in some LNDs well before the Doi Moi era. However, this term was not defined as a legal term until the adoption of the CPO.

⁴⁸ Article 1 of the CPO. It is interesting that, after a long-lasting and heated debate about the concept of “consumer” during the drafting of the CPL, the final definition of “consumer” in this law is exactly the same as the definition of “consumer” in the CPO.

⁴⁹ Article 2 of the CPO.

⁵⁰ United Nations, *United Nations Guidelines for Consumer Protection* (as expanded in 1999), online: UN <http://www.un.org/esa/sustdev/publications/consumption_en.pdf>.

⁵¹ Consumers International, “Consumer Rights”, online: Consumers International <<http://www.consumersinternational.org/who-we-are/consumer-rights>>. Accordingly, the eight basic consumer rights are: (1) the right to satisfaction of basic needs; (2) the right to safety; (3) the right to be informed; (4) the right to choose; (5) the right to be heard; (6) the right to redress; (7) the right to consumer education; and (8) the right to a healthy environment.

goods and services, the obligation to refrain from consuming environmentally harmful goods or unsafe goods, and the obligation to report offenses of businesses to authorities.⁵² These provisions seem to loyally reflect Vietnam's principle of the duality of rights and obligations as stated in the constitution: the rights and obligations of each citizen are inseparable.⁵³

- It stipulates a list of obligations of businesses and other suppliers of goods and services in their transactions with consumers (articles 14, 15, 16, and 17) such as the obligation to announce the standard of goods and services and the obligation to live up to these announced standards; the obligation to ensure accurate measurement; the obligation to create accurate and truthful advertisements; the obligation to provide use instructions to consumers; the obligation to promptly handle consumer complaints; the obligation to perform warranty commitments; the obligation to listen to comments from consumers; the obligation to refund consumers' money or compensate consumers' damages as stipulated by the law. However, such obligations and responsibilities are not enforceable without referring to other LNDs or without specifying LNDs.

Against the background of the early years of the Doi Moi era, when the idea that the state was the protector of the public remained visibly influential among the ruling elites of Vietnam, "state management" was widely seen as the solution to pathologies of the emerging market economy, and the inertia of this thinking was also incorporated in the CPO of 1999.⁵⁴ It is, therefore, not surprising that this ordinance has a separate chapter⁵⁵ on "state management" of consumer protection. This chapter was designed in a quite traditional format.⁵⁶ Accordingly, the Government assumes the role of uniform state

⁵² Articles 12 & 13 of the CPO.

⁵³ Article 51 of the *Constitution* of 1992. This traditional approach is retained in the adopted CPL (articles 8 and 9). According to Mark Sidel, this traditional approach was found in the *Constitution* of 1946 (articles 4 & 5) and strengthened in the *Constitution* of 1959 (article 38), and it was basically retained in the *Constitution* of 1980 (article 54) and in the *Constitution* of 1992 (article 51). See Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Oxford: Hart, 2009) at 51, 76 and 96.

⁵⁴ This seems to be consistent with what Gainsborough described as reasserting state control over an alleged market economy, all in the name of the state's overriding duty to protect the public interest and maintain powers in ministries down to the district level. See Gainsborough, *supra* note 8 at 168-170.

⁵⁵ Chapter 4 contains four articles (articles 18 to 21).

⁵⁶ See section 3.3.

management of consumer protection. One ministry is to be designated as the ministry assisting the Government to carry out this mandate.⁵⁷ However, the ordinance does not name the specific ministry assuming this role.⁵⁸ The ordinance also stipulates that other ministries (within their regular mandates) shall carry out consumer protection activities relating to their branches or sectors.⁵⁹ The local government (People's Councils and People's Committees of all levels) shall carry out consumer protection activities in their localities (administrative territories).⁶⁰ The concept of "state management of protection of consumers' rights and interests" is explained by the ordinance to include activities such as the formulation and implementation of LNDs on consumer protection; the education and dissemination of relevant legal information; inspection; and dealing with violations.⁶¹

Despite the fact that the CPO was adopted on 27 April 1999 and took effect on 1 October 1999, it took more than two years for the Government to issue a decree giving guidelines and concretizing the provisions of this ordinance. This is *Decree No. 69/2001/ND-CP dated 2 October 2001* (Decree 69). This short decree consists of only 24 articles⁶² and assigns the Ministry of Science and Technology as the ministry in charge of

⁵⁷ Article 19 of the CPO.

⁵⁸ Perhaps, at the time of adopting this ordinance, the Government was not certain which ministry would be suitable to be in charge of consumer protection. That was why article 19 of the CPO authorized the Government to issue a decree to set forth the specific ministry in charge of consumer protection. Article 20(2) of this ordinance also authorizes the Government to issue a decree to stipulate the concrete tasks and mandates of other ministries involved in consumer protection. Decree 69 (2001) was the product of this legislative delegation.

⁵⁹ Article 20 of the CPO.

⁶⁰ Article 20 of the CPO. Actually, before this ordinance was adopted, articles 7(3), 23(6), and 33(3) of the 1996 *Ordinance on Concrete Tasks and Mandates of the People's Councils and People's Committees of Each Level* already stipulated that Provincial People's Committees and District People's Committees were to implement measures to protect consumers' rights and interests in their localities.

⁶¹ Article 18 of the CPO defines state management to include the following activities: (1) enacting and implementing LNDs on protection of consumers' rights and interests; (2) formulating and implementing policies on protection of consumers' rights and interests; (3) directing and coordinating consumer protection activities of ministries and local governments; (4) providing training and education to cadres on protection of consumers' rights and interests; (5) providing propaganda, education, and dissemination of legal rules and relevant knowledge about protection of consumers' rights and interests; (6) conducting international cooperation in the field of protection of consumers' rights and interests; (7) inspecting and checking the compliance of legal rules on consumers' rights and interests; (8) handling consumer complaints and consumers' denunciations; (9) dealing with offenses relating to protection of consumers' rights and interests.

⁶² This decree had 6 chapters as follows: Chapter 1 "General Provisions" (articles 1 to 3); Chapter 2 "Implementing the Protection of Consumers' Rights and Interests" (articles 4 to 7); Chapter 3 "State Management of the Protection of Consumers' Rights and Interests" (articles 8 to 13); Chapter 4 "Consumer

state management of consumer protection activities in Vietnam.⁶³ This decree also stipulates the authority of relevant ministries⁶⁴ and the provincial governments (provincial People's Committees) in state management of consumer protection.⁶⁵ No provisions on the roles of district governments or commune governments in consumer protection are found in this decree.⁶⁶ However, the decree acknowledges the role of consumer protection organizations in helping consumers to handle their complaints.⁶⁷

Despite being the document which details the provisions of the CPO, Decree 69 failed to provide a detailed mechanism or forums for consumers to exercise their rights, including their right to lodge complaints against offending businesses. Perhaps this was one of the reasons why the CPO and its guiding decree have been almost unknown or very unpopular among the public.⁶⁸ The Vice-Director of Hanoi's Department of Market Management, Vuong Chi Dung, openly stated a seminar held by VCAD in March 2009 that "consumers don't know much about the legal provisions on consumer rights."⁶⁹ According to a survey report by Vinastas presented at the seminar, 59% of consumers interviewed could not identify specifically what kinds of rights they had as consumers.⁷⁰

Approximately two years after the Ministry of Science and Technology was officially assigned as the ministry in charge of state management of consumer protection activities, the Government changed its mind and decided to shift this function to another ministry, i.e. the Ministry of Trade (the predecessor of the current MoIT) via *Decree No.*

Protection Organizations" (articles 14 to 16); Chapter 5 "Settlement of Complaints and Denunciations and Handling of Violations" (articles 17 to 21); and Chapter 6 "Implementation Provisions" (articles 22 to 24).

⁶³ Article 8 of Decree 69.

⁶⁴ Article 11 of Decree 69.

⁶⁵ Article 13 of Decree 69. Accordingly, the provincial Department of Science, Technology and Environment assisted the Provincial People's Committee to exercise this mandate.

⁶⁶ It seems that this decree was inconsistent with provisions in the CPO regarding this issue. However, it also seems that no-one – certainly, no state authorities in Vietnam – discovered and critiqued this inconsistency.

⁶⁷ Article 14 of Decree 69.

⁶⁸ VCAD, *Report on Actual Implementation of Consumer Protection Laws and Orientation for Drafting the CPL (Bao cao tong ket cong tac thuc thi phap luat bao ve nguoi tieu dung va dinh huong xay dung Luat BVQLNTD)* (Report presented at the workshop "The Reality of Implementation of Consumer Protection Laws and Orientations for Drafting the CPL" held by VCAD and STAR-Vietnam Project in Hanoi, 11 June 2008) at 19; see also VietnamNet, "Consumers Blind to Rights" (17 March 2009), online: VietnamNet <<http://english.vietnamnet.vn/social/2009/03/836561/>>.

⁶⁹ VietnamNet, *ibid.*

⁷⁰ *Ibid.*

29/2004/ND-CP dated 7 January 2004. VCAD was established by this decree as a department operating under the direction of the Minister of Trade. The function of consumer protection on the provincial level was also shifted from provincial departments of science and technology to provincial departments of trade (the predecessor agency of the current provincial departments of industry and trade) in 2005 in accordance with *Joint Circular No. 08/2005/TTLT/BTM-BNV*.⁷¹ In addition, to implement article 49 of the *Competition Law* of 2004,⁷² on 9 January 2006, the Government issued *Decree No. 06/2006/ND-CP* naming VCAD as the competition authority in charge of this law⁷³ and

⁷¹ This circular was jointly issued on 8 April 2005 by the Ministry of Trade and the Ministry of Internal Affairs. It was replaced by MoIT and the Ministry of Internal Affairs' *Joint Circular No. 07/2008/TTLT-BCT-BNV* dated 28 May 2008 on functions, tasks and mandates of specialized organs on industry and trade of provincial levels and district levels. However, the provisions in the former *Joint Circular No. 08/2005/TTLT-BTM-BNV* dated 8 April 2005 regarding consumer protection were wholly retained.

⁷² It was hoped the adoption of the *Competition Law* in 2004 would contribute to promoting a more competitive market economy in Vietnam in favour of consumers. This law (article 4) openly stipulates that enterprises (privately-owned, foreign-invested or state-owned) enjoy freedom of competition within the legal framework. This law also expressly prohibits enterprises from setting up or joining in agreements to manipulate the markets (article 8), abusing their dominant market positions (article 13), joining in a merger to create dominant market enterprises (article 18) or conducting unfair competition practices (article 39). According to article 118 of this law, for acts of violating the provisions on competition restriction agreements, abuse of dominant position in the market, abuse of monopoly positions or economic concentrations, the agencies with sanctioning competence may impose fines of up to 10% of total turnover earned by the violating organizations or individuals in the fiscal year preceding the year in which they committed the violations. According to article 35 of *Decree No. 120/2005/ND-CP* dated 30 September 2005 on dealing with legal violations in the area of competition, violators of prohibitions against fraudulent or misleading advertisement can be fined up to 50 million VND (equal to \$2,500 USD). The *Competition Law* of 2004 was drafted by the Ministry of Trade with technical assistance from the United Nations Development Program (UNDP) and the United Nations Conference on Trade and Development (UNCTAD). It was drafted with references to competition laws of more than 30 jurisdictions around the world, including the EU, the United States, Japan, South Korea, and Taiwan. See Tran Anh Son (Deputy Director of VCAD) "The Progress of Drafting Competition Law", online: JFTC <<http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/TranAnh.pdf>>; see also Neilson, *supra* note 16, at 303; Alice Pham, "The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration" (2005-2006) 26 *Nw. J. Int'l L. & Bus.* 547-563 at 551. The record of implementation of this law remains poor. See KT & DT, "Five Years of Implementation of the Competition Law: It Still Barks, but Doesn't Bite" ("Thuc thi Luat Canh tranh: 5 Nam van chi gio cao danh khe") (28 April 2010), online: Vietnam Economic Forum <<http://vef.vn/2010-04-28-thuc-thi-luat-canhh-tranh-5-nam-van-chi-gio-cao-danh-khe->>.

⁷³ The *Competition Law* of 2004 has been specified by a number of important decrees and guiding LNDs such as *Decree No. 116/2005/ND-CP* dated 15 September 2005 providing for details of implementation of the Competition Law; *Decree No. 120/2005/ND-CP* dated 30 September 2005 on dealing with legal violations in the area of competition; *Decree No. 110/2005/ND-CP* dated 24 August 2005 on [state] management of multi-level sales; *Decree No. 05/2006/ND-CP* dated 9 January 2006 on establishing and stipulating the function, tasks, and organizational structure of the Competition Council; *Decree No. 06/2006/ND-CP* dated 9 January 2006 on the function, tasks and organizational structure of the Vietnam Competition Administration Department (VCAD); the Ministry of Trade's *Circular No. 19/2005/TT-BTM* dated 8 November 2005 providing guidelines on a number of contents in *Decree No. 110/2005/ND-CP*; the Ministry of Finance's *Decision No. 92/2005/QD-BTC* dated 9 December 2005 on stipulating the level of

in charge of consumer protection. The decree further stipulated that a Consumer Protection Bureau be set up as a part of VCAD.⁷⁴ Thus, it can be said that the idea of establishing an agency in charge of both competition and consumer protection policies⁷⁵ was partially realized. However, only when *Decree No. 55/2008/ND-CP dated 24 April 2008*⁷⁶ (Decree 55) was adopted to replace the former Decree 69 (2001), was the function of consumer protection fully assigned to VCAD.

Even so, the assignment of consumer protection authority to MoIT (and to VCAD) did not significantly empower VCAD as an agency in charge of consumer protection. The instruments available to VCAD as stipulated in Decree 55 (2008) are quite limited. VCAD has no power to conduct independent investigations concerning violations of consumer law. VCAD is also not allowed to impose any kind of administrative sanctions upon traders violating consumer laws.⁷⁷ The key mandate assumed by VCAD is to provide mediation between consumers and traders at the request of consumers and to provide consumer education services. VCAD does not have sufficient power to assert its role as a leading national consumer protection agency. Perhaps such defects in the current model of state management of consumer protection were one of the reasons driving VCAD to accelerate the drafting of the CPL.

fees for granting registration certificates for multi-level sales activities; the Ministry of Trade's Decision No. 20/2006/QD-BTM dated 17 May 2006 issuing forms of decisions on dealing with competition cases.

⁷⁴ This division remains a part of VCAD.

⁷⁵ The model of having one central agency in charge of both competition and consumer policies is seen in many countries such as the United States (the Federal Trade Commission), the United Kingdom (the Office of Fair Trading), and Australia (the Australian Competition and Consumer Commission).

⁷⁶ This decree had 36 articles (12 articles greater than the number of articles in Decree 69) divided into six chapters as follows: Chapter 1 "General Provisions" (articles 1 to 5); Chapter 2 "Responsibilities of Organizations and/or Individuals Conducting Business in Goods and/or Services (Traders)" (articles 6 to 10); Chapter 3 "Consumer Protection Organizations" (articles 11 to 14); Chapter 4 "Settlement of Complaints and Denunciations" (articles 15 to 23); Chapter 5 "State Management of Protection of Consumers' Rights and Interests" (articles 24 to 34); and Chapter 6 "Implementation Provisions" (articles 35 to 36).

⁷⁷ Except for the power to investigate and impose fines upon deceptive advertisers as stipulated in article 42 of *Decree No. 120/2005/ND-CP*. According to this article, the Director of VCAD can give warnings to violators, impose fines upon violators, confiscate instruments employed by violators, and force violators to publish correct advertisements.

4.3 REGULATION OF UNFAIR COMMERCIAL PRACTICES

Actually, before the adoption of the CPL, the existing legal system of Vietnam already had certain provisions regulating what are known in developed countries as “unfair commercial practices” or “unfair trade practices”. These provisions were usually the result of the process of legitimizing the presence of state power in the emerging market economy in Vietnam. As Vietnamese law-makers conducted large-scale borrowing of legal ideas from developed countries, as well as from neighbouring countries, to meet the need of “managing” the emerging market economy⁷⁸ and to show their determination to integrate with the international community, it is very likely that these provisions have been materially influenced by foreign legislative experience.⁷⁹

4.3.1 Advertising Regulation

Commercial advertisement was not known in the centrally planned economy of Vietnam prior to the Doi Moi era. At that time, state-owned enterprises did not have to compete for consumers and they had no incentives to inform consumers of their products or services through commercial advertisements. However, this situation changed with the emergence of the market economy. In this developing economy, advertisement is one of the essential channels through which enterprises compete and provide necessary information to consumers.

Advertisement has been, therefore, subject to state management since the early days of the Doi Moi era.⁸⁰ The Ministry of Culture and Information⁸¹ (now the Ministry

⁷⁸ Gillespie, “Decentered Analysis”, *supra* note 16 at 46.

⁷⁹ However, due to the difficulty in accessing information on the adoption of such provisions, tracing the origins of these provisions to see whether or to what extent they are products of legal transplantation is beyond the reach of this dissertation.

⁸⁰ Private enterprises’ right to advertise had been stipulated in the *Law on Private Enterprises* of 1990 (article 18) and the *Law on Companies* (article 26). The *Ordinance on Quality of Goods* of 1990 prohibited enterprises from “advertising that their goods [met] the registered standards while the registration has not been completed” (article 20(3)). To implement these documents, Ministry of Culture, Information and Tourism and the State Committee on Science (the predecessor of the Ministry of Science and Technology) issued *Circular No. 1191/TT-LB dated 29 June 1991 on management of advertisements*. According to this circular, all commercial advertisements were placed under close supervision of state authorities with a series of licenses and permissions. Violators of these provisions could be fined up to 1 million VND (equal to \$ 100 USD at that time) according to article 38 of *Decree No. 327/HDBT dated 19 October 1991*

of Culture, Sports and Tourism) and the Ministry of Trade (now the Ministry of Industry and Trade) share the burden of state management of advertisement activities.

Accordingly, the Ministry of Culture, Sports and Tourism is in charge of advertisements⁸² while the Ministry of Industry and Trade is in charge of commercial advertisement.⁸³

These two ministries' state management mandates overlap somewhat and it is therefore not surprising that they have been engaged in a long-lasting struggle to delineate their authority. However, their conflict remains unresolved.⁸⁴

Decree No. 194/CP dated 31 December 1994 prohibited enterprises and advertisers from providing inaccurate information about goods, services and traders. This prohibition was repeated in the first *Commercial Law* of 1997.⁸⁵ All such prohibitions are still retained in the current legal provisions on advertisement and commercial activities.⁸⁶

detailing the Ordinance on Quality of Goods of 1990. Those providing inaccurate advertisement relating to medicines and healthcare services could be fined up to 2 million VND (equal to about \$200 USD at that time) (articles 8 and 14 of *Decree No. 341/HDBT dated 22 September 1992 on administrative sanctions on legal violations in the area of health care*).

⁸¹ *Decree No. 194/CP dated 31 December 1994 on advertisement in the territory of Vietnam.*

⁸² *Decree No. 178/2007/ND-CP dated 3 December 2007 on the function, tasks, mandates and organizational structure of the Ministry of Culture, Sports and Tourism.*

⁸³ *Decree No. 95/CP dated 4 December 1993 on the function, tasks and mandates of the Ministry of Trade; Decree No. 189/2007/ND-CP dated 27 December 2007 on the function, tasks, mandates and organizational structure of the Ministry of Industry and Trade.*

⁸⁴ Tran Thi Bach Duong, *Improving the Vietnamese Commercial Laws in the Context of International Integration (Hoan thien phap luat thuong mai Vietnam trong qua trinh hoi nhap kinh te quoc te)* (Ph.D. Dissertation, The Institute of State and Law, Hanoi, 2007) at 152-157 [unpublished]. It is worth noting that the Ministry of Culture and Information was the sponsoring ministry of the *Ordinance on Advertisement* of 2001, while the Ministry of Trade was the sponsoring ministry of the *Commercial Law* of 1997 and 2005. Perhaps these two ministries advanced two conflicting interests. See also Ministry of Culture, Sports and Tourism, *Submission Report No. 147/TTr-BVHTTDL dated 21 July 2010 on the draft Law on Advertisement (To trinh so 147/TTr-BVHTTDL ngay 21/7/2010 ve Du an Luat Quang cao)* at 8-9.

⁸⁵ Articles 5(1) and 6(7) of *Decree 194/CP* and articles 9(3) and 192 of the *Commercial Law* of 1997.

⁸⁶ For example, article 5 of the *Ordinance on Advertisement* of 2001 prohibits the following conduct: making false advertisements; advertising products and/or goods which are not yet permitted for circulation and/or services which are not yet permitted for provision by the time of advertisement; and advertising goods and/or services, which are banned by law from business or from advertisement. Article 45(3) of the *Competition Law* of 2004 prohibits enterprises from "issuing false or misleading information to customers about the following: (a) Prices, quantities, quality, utilities, designs, categories, packages, date of manufacture, use duration, goods origin, manufacturers, places of manufacture, processors, places of processing; (b) Usage, mode of servicing, warranty duration; (c) Other false or misleading information." Article 14 of the *Commercial Law* of 2005 (replacing the *Commercial Law* of 1997) states that "traders conducting commercial activities are obliged to provide consumers with sufficient and truthful information on goods and/or services they trade in or provide and take responsibility for the accuracy of such information [...] Traders conducting commercial activities must be responsible for the quality and lawfulness of goods and/or services they trade in or provide." Article 8(9) and (10) of the *Law on Quality of Products and Goods* (adopted on 21 November 2007) also prohibits producers, importers or sellers from

False advertisement is usually regarded as an administrative offense. For example, article 48 of Decree 31 (2001)⁸⁷ stipulates that those who provide inaccurate advertisements can be fined up to 20 million VND (equal to \$1,000 USD). In addition, article 35 of Decree 120 (2005)⁸⁸ stipulates that those providing misleading or fraudulent advertisements relating to prices, quantity, quality, effect, benefits, etc. for the purpose of unfair competition can be fined up to 50 million VND (equal to \$2,500 USD). In reality, the creators of a number of misleading or fraudulent advertisements were reported as having been fined in accordance with these decrees. For example, from 2006 to 2008, nine enterprises were investigated by VCAD regarding provision of misleading information or fraudulent advertisements concerning their products. Some of these enterprises were fined about 40 million VND (equal to about \$2,000 USD).⁸⁹

False advertisement can also be regarded as a criminal offense. Actually, the crime of “false advertisement” was, for the first time, stipulated in the *Criminal Code* of 1999 (article 168). Violators can be fined up to 50 million VND (equal to \$2,500 USD) and sentenced to up to three years of imprisonment.⁹⁰ However, there are no reported cases in which false advertisers were dealt with through criminal proceedings.⁹¹

“Giving untruthful information or advertisement or committing fraudulent acts related to product and goods quality or goods origin” and “concealing information on the products’ and goods’ capability of causing danger to humans, animals, plants, assets or the environment.”

⁸⁷ Decree No. 31/2001/ND-CP dated 26 June 2001 on sanctioning administrative offenses in the field of culture and information. This decree was later replaced by Decree No. 56/2006/ND-CP dated 6 June 2006 on sanctioning administrative offenses in the field of culture and information; however, the provision in article 48 of Decree 31 was wholly retained in article 51 of Decree 56.

⁸⁸ Decree No. 120/2005/ND-CP dated 30 September 2005 on sanctioning law violations in the field of competition.

⁸⁹ See VCAD Website News, “A Number of Unfair Competition Cases Handled by VCAD” (“Mot so vu viec canh tranh khong lanh manh do Cuc quan ly canh tranh xu ly”), online: Quan ly canh tranh <http://www.qlct.gov.vn/Modules/CMS/Upload/31/2009_3_23/Bao%20cao%20dieu%20tra.pdf>

⁹⁰ Article 168 of the *Criminal Code* of 1999.

⁹¹ Nguyen Van Nam, *Criminal Liability for Crimes in Violation of Economic Management Order in Vietnamese Criminal Law (Trach nhien hinh su doi voi cac toi xam pham trat tu quan ly kinh te trong luat hinh su Vietnam)* (Ph.D. Dissertation, Institute of State and Law, Hanoi, 2008) at 124 [unpublished].

4.3.2 Mandatory Label Regulation

Mandatory label regulation requires certain consumer products to state their ingredients, components or relevant information on their labels or packages. Despite the fact that mandatory label regulations have existed for many decades in many countries, this type of regulation was issued in Vietnam only very recently. The first mandatory label regulation was issued via Decision 178 (1999) of the Prime Minister.⁹² The current LND on this matter is Decree 89 (2006)⁹³ on labels of goods. According to this decree, each commodity marketed to consumers must, in principle, bear a label containing clear information on the name of the commodity, the name and address of the producers or importers of the commodity, the place of production, the contents of the commodity, etc. The decree also divides marketed products into 50 types of goods requiring different levels of mandatory information. For example, for packaged foodstuff products, labels are required to show ingredients, use duration, and proper warnings on food safety, while other products may not necessarily need this information. According to Decision 178, the Ministry of Trade was authorized to enforce mandatory label regulation. However, Decree 89 changed this policy by shifting this authority from the Ministry of Trade to the Ministry of Science and Technology.⁹⁴

Inaccurate or improper labelling is regarded as an administrative offense under Vietnamese law. For example, according to article 26 of Decree 06 (2008),⁹⁵ sellers of goods having expired use dates can be fined up to 30 million VND (equal to \$1,500 USD) depending on the value of the expired goods. Violators are required to recall their goods and have them destroyed. According to article 23 of Decree 54 (2009),⁹⁶ sellers of goods without mandatory labels or with worn-out labels can be fined up to 2 million

⁹² *Decision No. 178/1999/QĐ-TTg dated 30 August 1999 on issuing regulations on labelling applicable to domestic goods and goods for import and export.*

⁹³ *Decree No. 89/2006/ND-CP dated 30 August 2006 on labels of goods.*

⁹⁴ It is noteworthy that the Ministry of Science and Technology is the ministry in charge of enforcing the *Law on Standards and Technical Regulations* of 2006, the *Law on Quality of Products and Goods* of 2007, and legislation on measurements and weights.

⁹⁵ *Decree No. 06/2008/ND-CP dated 16 January 2008 on dealing with administrative offenses in commercial activities.*

⁹⁶ *Decree No. 54/2009/ND-CP dated 5 June 2009 on sanctioning administrative offenses in the fields of standards, measurement, and quality of products and goods.*

VND (equal to about \$100 USD). According to article 24 of this decree, sellers of imprecisely labelled goods can be fined up to 1 million VND (equal to \$50 USD). In addition, according to article 25 of this decree, sellers of goods with insufficient mandatory labelling can be fined up to 5 million VND (equal to \$250 USD). Violators are required to recall their goods for re-labelling.

In practice, thousands of violations relating to improper labelling are discovered annually by Vietnam's Market Control Agencies (*Luc luong quan ly thi truong*).⁹⁷

4.3.3 Quality Standard Regulation

Quality standard regulation requires that goods and services to be marketed must satisfy certain minimum quality or safety standards. Businesses marketing non-conforming goods or services can be fined or prosecuted. Examples include regulations for standards governing production, processing, distribution, and retail sale of food products for consumer consumption. The strict enforcement of these kinds of regulations can help to prevent consumers from being exposed to low-quality or dangerous goods or services.

The *Law on Quality of Products and Goods* of 2007⁹⁸ stipulates that producers are entitled and required to announce the quality standard of their goods (article 9(1)) and have to secure the accuracy of information regarding the quality of their goods (article 10(3)). Article 8 of this law also prohibits the following practices:

- Manufacturing products, importing, exporting, selling, purchasing, exchanging or marketing products or goods which fail to comply with relevant technical regulations;
- Deliberately supplying untrue or forged results of testing, examination, inspection, verification and certification of product and goods quality;
- Forging or illegally using standard-conformity or regulation-conformity stamps or other signs of product and goods quality;

⁹⁷ Nguyen Hung Dung, *supra* note 37.

⁹⁸ According to article 68 of this law, the Ministry of Science and Technology is entrusted to enforce this law.

- Replacing, fraudulently exchanging, adding or reducing ingredients or additives of, or mixing impurities with products and goods, thus reducing their quality compared with announced applicable standards or relevant technical regulations;
- Manufacturing or processing products and goods with raw materials or materials banned from use for the production or processing of those products and goods.

According to articles 12 and 14 of Decree 54 (2009),⁹⁹ producers that fail to announce or disclose the quality standards of their goods can be fined up to 2 million VND (equal to \$100 USD). Producers that fail to produce their products in compliance with their announced standards can be fined to 5 million VND (equal to \$250 USD). For certain types of goods that the Government requires must conform to mandatory standards, producers that fail to produce these goods in compliance with such mandatory standards can be fined up to 30 million VND (equal to \$3,000 USD).

However, producing shoddy products has not yet been criminalized in Vietnamese law, except for in the case of producing fake or counterfeited goods. As for producing or trading in fake goods, article 156 of the current *Criminal Code* of 1999 states that individuals participating in manufacturing and/or trading in fake goods can be subject to a maximum penalty of 15 years of imprisonment. According to articles 157 and 158 of the *Criminal Code* of 1999, individuals manufacturing and/or trading in counterfeited foodstuffs or medicines can be even sentenced to death. The offenders may alternatively be subject to fines of up to 50 million VND (equal to \$5,000 USD), the confiscation of part or all of the impugned property, a ban from holding certain posts, practicing certain occupations or holding certain jobs for one to five years.

In reality, quite a few violations regarding counterfeited goods have been prosecuted through criminal proceedings. The statistics from the People's Supreme Court show that in the period 2000-2006, 426 criminal charges of such kinds (including 167 cases relating to counterfeited foodstuffs and 33 cases relating to counterfeited animal feed) were brought before the courts.¹⁰⁰

⁹⁹ Decree No. 54/2009/ND-CP dated 5 June 2009 on sanctioning administrative offenses in the fields of standards, measurement, and quality of products and goods.

¹⁰⁰ Nguyen Van Nam, *supra* note 91.

4.3.4 Weight and Measurement Regulation

Weight and measurement regulation was found in the legal system of Vietnam even before the Doi Moi era.¹⁰¹ Generally, this type of regulation usually requires traders to guarantee the accuracy of weights and measures relating to goods and services, with the purpose of preventing consumers from being confused or deceived by traders. The current weight and measurement regulation is found in the *Ordinance on Measurement of 1999*¹⁰² and its specifying LNDs.¹⁰³ It is worth noting that the Ministry of Science and Technology is entrusted to conduct “state management” of measurement through the nation.¹⁰⁴

Employing inaccurate weight and measurement instruments is usually regarded as an administrative offense. According to article 7 of Decree 54 (2009),¹⁰⁵ retailers of goods employing inaccurate weight and measurement instruments can be fined up to 6 million VND (equal to \$300 USD). In practice, thousands of violations relating to inaccurate weights and measurements are annually discovered and their perpetrators fined by the Vietnamese Market Control agencies.¹⁰⁶

Employing inaccurate weights and measurements can also be regarded as a criminal offense, especially when violators repeat behaviour which was previously sanctioned by an administrative fine. For example, article 162 of the *Criminal Code of 1999* states that offenders can be sentenced for up to seven years of imprisonment and fined up to 30 million VND (equal to \$1,500 USD). However, in reality, only a very few violations regarding inaccurate measurement have been prosecuted through criminal

¹⁰¹ *Ordinance 08/SL dated 20 January 1950 on Measurement.*

¹⁰² This ordinance was adopted on 6 September 1999, replacing the former *Ordinance on Measurement of 1990.*

¹⁰³ For example, *Decree No. 06/2002/ND-CP dated 14 January 2002* and *Decree No. 54/2009/ND-CP dated 5 June 2009.*

¹⁰⁴ Article 26 of the *Ordinance on Measurement of 1999.*

¹⁰⁵ *Decree No. 54/2009/ND-CP dated 5 June 2009 on sanctioning administrative offences in the fields of standards, measurement, and quality of products and goods.*

¹⁰⁶ Nguyen Hung Dung, *supra* note 37.

proceedings. The statistics from the People’s Supreme Court show that in the period 2000-2006, only 10 criminal charges of such kinds were brought before the courts.¹⁰⁷

The above analysis of provisions on unfair commercial practices shows the traditional approach of state management of misleading market practices in Vietnam. This approach relies mainly on the efforts of the state in fighting misleading market practices. The role of relevant business associations (such as advertising associations or sector business associations) and consumer protection associations is usually ignored. The key instrument of state management is inspection and imposition of administrative fines or criminal prosecution. It is hard to accurately evaluate the real efficacy of this approach. As noted by MoIT¹⁰⁸ and the NA’s Committee for Science, Technology and the Environment,¹⁰⁹ unfair commercial practices have become more and more pervasive; however, it seems that the traditional approach to ensuring honesty in marketplace does not produce the desired outcome.

4.4 REGULATION OF CONSUMER CONTRACTS

Unlike the situation in Canada and other developed countries, the concept of “consumer contract” is officially unknown in the current Vietnamese legal system. Before 1 January 2006 (when the new *Civil Code* and the new *Commercial Law* of 2005 took effect),¹¹⁰ there existed only two concepts of contract, namely, “civil contract” (*hop dong dan su*) and “economic contract” (*hop dong kinh te*) in the Vietnamese legal

¹⁰⁷ Nguyen Van Nam, *supra* note 91.

¹⁰⁸ Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers’ Rights and Interests (To trinh so 28/TTr-CP ngay 8/4/2010 ve Du an Luat Bao ve quyen loi nguoi tieu dung)* at 1.

¹⁰⁹ CSTE, *Verification Report No. 981/UBKHCMNT12 of the CSTE dated 13 May 2010 on the draft of the CPL (Bao cao tham tra so 981/UBKHCMNT12 ngay 13/5/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)* at 2.

¹¹⁰ One of the reasons driving the process of drafting and adopting the *Civil Code* of 2005 and the *Commercial Law* of 2005 to replace the *Civil Code* of 1995 and the *Commercial Law* of 1997 respectively was to enhance the compatibility of Vietnam’s contract rules and relevant legal terms with its trading partners’ legal systems for promotion of international commercial activities. This was in the context of Vietnam acceding to the WTO and globalization. See Le Thi Bich Tho, *Void Economic Contracts (Hop dong kinh te vo hieu)* (Hanoi: National Political Press, 2004) at 214; see also Dinh Thi Mai Phuong, *et al.*, *Contents and Key New Elements of the Civil Code of 2005 (Noi dung va nhung diem moi co ban cua Bo luat dan sun am 2005)* (Hanoi: National Political Press, 2006) at 23.

system.¹¹¹ A civil contract was defined as any enforceable agreement between equal parties in order to create property or personal rights or obligations.¹¹² An economic contract was defined as a written contract between two juridical persons or between a juridical person and an individual with business registration.¹¹³ From the definition, it is not difficult to discern that these two terms overlap.¹¹⁴ For example, a contract between two corporations to supply parts or materials can be regarded as an economic contract but it can also be regarded as a civil contract.

However, pursuant to the applicable law before 1 January 2006, economic contracts and civil contracts were considered two totally distinct types of contracts¹¹⁵ and were regulated by two different laws, respectively, the *Civil Code* of 1995 and the *Ordinance on Economic Contracts* of 1989. It is worth noting that these two laws were, in many cases, inconsistent with each other. For example, the statute of limitations for initiating a lawsuit relating to a dispute arising from an economic contract was six months, as stipulated by the *Ordinance on Economic Contracts*, while the limitation period for a lawsuit relating to a dispute arising from a civil contract was two years as stipulated by the *Civil Code*. The maximum penalty for breach of an economic contract was 12% of the contract value as stipulated by the *Ordinance on Economic Contracts*,¹¹⁶ while the maximum penalty for a breach of a civil contract was 5% of the contract value as stipulated by the *Civil Code* of 1995.¹¹⁷ Meanwhile, there were no official mechanisms to resolve conflicts between these two laws.

¹¹¹ Cameron McCullough, *Foreign Direct Investment in Vietnam* (Hong Kong: Sweet & Maxwell Asia, 1998) at 70.

¹¹² Article 394 of the *Civil Code* of 1995.

¹¹³ Article 1 of the *Ordinance on Economic Contracts* of 1989.

¹¹⁴ Traditionally, the distinction was based on the premise that economic contracts are contracts for the sale of goods or services for business use, whereas civil contracts relate to the sale of goods or services for purely personal or family use. See McCullough, *supra* note 111 at 70; see also Le Thi Bich Tho, *supra* note 110 at 24.

¹¹⁵ Actually, the distinction between economic contracts and civil contracts was regarded as the legacy of importing the Soviet Union's economic and civil laws into Vietnam prior to the Doi Moi era. See Le Minh Toan, *et al.*, *Vietnamese Economic Law (Luat Kinh te Vietnam)* (Hanoi: National Political Press, 2006) at 407-408.

¹¹⁶ Article 29 of the *Ordinance on Economic Contracts* of 1989.

¹¹⁷ Article 378 of the *Civil Code* of 1995.

This situation became even worse when the first *Commercial Law* of 1997 was adopted with the purpose of regulating contractual relationships among merchants or between a merchant and his/her partners (including any buyers of goods or services).¹¹⁸ This law also failed to address its relationship to the *Civil Code* of 1995 or to the *Ordinance on Economic Contracts*.

The legal community in Vietnam has had a long-lasting and heated debate about solutions to the above-mentioned problems.¹¹⁹ This debate lasted for more than 10 years (since the first *Civil Code* was adopted in 1995) until the concept of “economic contract” was officially repealed when the *Ordinance on Economic Contracts* was declared by the NA to cease its effectiveness on 1 January 2006.¹²⁰ Accordingly, the new concept of “civil contract” in the new *Civil Code* of 2005 is considered a concept broadly defined to cover all types of contractual relationships in society.¹²¹ The new *Commercial Law* of 2005 is expressly considered a special law of the *Civil Code*.¹²² The new *Commercial Law* is expressly designed to regulate relationships among merchants. This law will take priority over the *Civil Code* when there are differences between them regarding a particular matter. As for contracts between merchants and consumers, they are, in principle, governed by contract rules in the *Civil Code* of 2005.¹²³ However, consumers can elect to apply the *Commercial Law* if they prefer.¹²⁴ Disputes arising from a contract

¹¹⁸ Articles 1 and 46 of the *Commercial Law* of 1997.

¹¹⁹ Pham Duy Nghia, *Vietnamese Business Law in Transition* (Hanoi: World Press, 2002) at 40-47. Pham regards this debate as a consequence of the reception of the Soviet economic law theory into Vietnam in the early 1960s. See also Nguyen Viet Ty, *Orientations for Improvements of Economic Laws Given the Existence of the Civil Code (Phuong huong hoan thien phap luat kinh te trong dieu kien co Bo luat dan su)* (Ph.D. Dissertation, Hanoi Law University, Hanoi, 2002) at 8-59 [unpublished]; Le Thi Hoang Oanh, *Commentary on New Provisions in the Commercial Law [of 2005] in the Context of Economic Integration (Binh luan cac van de moi cua Luat Thuong mai trong dieu kien hoi nhap)* (Hanoi: Judicial Press, 2007) at 9-15; Dinh Thi Mai Phuong, et al., *Contents and Key New Elements of the Civil Code of 2005 (Noi dung va nhung diem moi co ban cua Bo luat dan sun am 2005)* (Hanoi: National Political Press, 2006) at 21.

¹²⁰ NA’s Resolution No. 45/2005/QH11 dated 14 June 2005.

¹²¹ Article 1 of the *Civil Code* of 2005.

¹²² Article 4(3) of the *Commercial Law* of 2005.

¹²³ Nguyen Van Thanh, “Necessary Contents in the CPL” (“Cac noi dung can co trong Luat bao ve quyen loi nguoi tieu dung”) (Paper presented at the workshop “Consumer Protection Law in Vietnam – Reality and Orientation for Improvement” (“Phap luat bao ve nguoi tieu dung o Vietnam – thuc trang va huong hoan thien”) Hanoi Law University, Hanoi, 10 September 2010). Nguyen is a legal expert working for VCAD and one of the drafters of the CPL.

¹²⁴ Article 1(3) of the *Commercial Law* of 2005.

are to be submitted to and resolved through the people's district courts and senior civil courts in accordance with the ordinary civil procedure stipulated in the *Code of Civil Procedure* of 2004.¹²⁵

However, the contract rules in the *Civil Code* of 2005 are designed with the key purpose of regulating contracts between private parties of equal footing.¹²⁶ The *Civil Code* does not extend any special treatment to consumer contracts corresponding to the fact that these contractual relationships are between two parties of, *de facto*, unequal footing. The *Civil Code* does not have any special rules exclusively applicable to door-to-door sales, distance sales or sales of used goods.

The *Civil Code* of 2005 provides for numerous important contract rules relevant to transactions between traders and consumers, especially rules relating to sale of property.¹²⁷ Here are some examples:

Conformity of goods in transaction: The *Civil Code* of 2005 requires that the property in a transaction must satisfy such requirements as: (1) matching the description or the sample; (2) being reasonably fit for the purpose for which they were sold; (3) being of merchantable quality and durability. More concretely, article 444 (2) of the *Civil Code* of 2005 expressly states that “the seller must secure that the object for sale conforms to the descriptions on its package, trademark or to the sample that has been selected by the purchaser.” Articles 436 and 437 of this code allow buyers to refuse to accept the delivery of goods which do not conform with the description in the contract. In addition, article 444 (1) of the *Civil Code* of 2005 states that

[...] the seller must secure the use value or properties of an object for purchase and sale; if after the purchase, the purchaser discovers a defect that devaluates or reduces the use value of the object already purchased, he/she/it must promptly notify the seller of the defect upon the detection thereof and is entitled to request the seller to repair or change the defective or devalued object and compensate for damages, unless otherwise agreed upon.

¹²⁵ Nguyen Van Thanh, *supra* note 123.

¹²⁶ Hoang The Lien, *et al.*, *Scientific Commentary on the Civil Code of 2005 (Binh luan khoa hoc Bo luat dan su nam 2005)*, vol. 1 (Hanoi: National Political Press, 2008) at 18.

¹²⁷ In accordance with articles 163 and 167 of the *Civil Code* of 2005, goods and chattels, land, and houses are all regarded as “property”.

However, the seller will not be liable for defects in the following cases: (1) the purchaser knew or must have known about the defect when purchasing the object; (2) the object was auctioned or sold at a second-hand shop; and (3) the purchaser is at fault in causing the defects of the object. Actually, most of the above provisions in the *Civil Code* of 2005 were already stipulated in the *Civil Code* of 1995.¹²⁸

Standard contract: The *Civil Code* of 2005 addresses the inequality of bargaining power only in the case of standard contracts. A standard contract is defined by the code as a contract which contains provisions prepared by one party and given to the other party for reply within a reasonable period of time; if the offeree gives its reply of acceptance, the offeree shall be considered as having accepted the entire contents of the standard contract offered by the offeror.¹²⁹ Article 407(2) and (3) of the *Civil Code* of 2005 also stipulates a number of legal constraints to prevent the strong contracting party from exploiting the weaker party.¹³⁰ Concretely, article 407(2) states that

[...] in cases in which a standard contract contains ambiguous provisions, the offeror of the contract shall bear the adverse consequences of the interpretation of such provisions.¹³¹

In addition, article 407(3) stipulates that

[...] in cases in which a standard contract contains provisions exempting the liability of the offeror of the standard contract, while increasing the responsibility or abolishing the legitimate interests of the other party, such provisions shall be void, unless otherwise agreed upon.¹³²

However, it is noteworthy that the requirement for clarity of language and terms used in contracts between traders and consumers was not clearly stated in the *Civil Code* or in other laws prior to the adoption of the CPL. In addition, the requirement that detailed information about key terms be contained in a contract between a trader and a

¹²⁸ See articles 423 & 437 of the *Civil Code* in Baker & McKenzie & Clifford Chance, *Civil Code of the Socialist Republic of Vietnam* (Hong Kong: Asia Information Associated, 1996) at 146-150.

¹²⁹ Article 407(1) of the *Civil Code* of 2005.

¹³⁰ Similar provisions are widely found in contract law in developed countries. See K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3d ed., trans. Tony Weir (Oxford: Clarendon Press, 1998) at 338-345. This is not a surprise because the *Civil Code* of Vietnam is certainly a product of legal transplantation from civil codes in a number of developed countries such as Japan, France, and Germany. See *supra* note 15.

¹³¹ Translated by author. Similar provisions were also contained in the *Civil Code* of 1995 (article 406).

¹³² Translated by author. Compared with the *Civil Code* of 1995, this provision is new.

consumer was also absent. No special contract rules relating to consumer transactions such as door-to-door sales, distance sales, and sales of used goods exist.

Misrepresentation: Concerning the solution to information asymmetry between merchants and consumers, the Vietnamese law has certain relevant provisions. Article 15 of the CPO expressly stipulates that traders “must ensure truthful information, advertisement of their goods, services; publicize the price of goods, services; [...] provide clear instructions relating to the use of goods, service to the consumer.” The *Civil Code* of 2005 also contains certain important provisions about this matter. Article 6 of the code requires that “in civil relations, the parties must act in goodwill and honesty in establishment and performance of civil rights and obligations; neither party shall deceive the other party.” Articles 131 and 132 of the *Civil Code* of 2005 make the contract voidable when mistakes or deceptive practices exist. Article 131 states concretely that

[...] when a party has entered into a transaction based on a misunderstanding of its contents due to negligent misrepresentation of the other party, this party shall have the right to request the other party to change the contents of such transaction; if the other party does not accept, this party shall have the right to request the court to declare the transaction invalid [translated by author].

Article 132 states that the party participating in a civil transaction due to being deceived shall have the right to request the court to declare such civil transaction invalid.

Therefore, according to the above provisions, in theory, misrepresentation by merchants can be grounds for making consumer contracts voidable. However, in order to escape from a contract, consumers are directed by the *Civil Code* to request the court to declare the contract invalid; otherwise the contract is presumed to be lawful and enforceable. This requirement is clearly a burden for consumers because they usually hesitate to take such actions, especially in transactions with a trivial value, and especially in the absence of courts following simplified civil procedure.

As for a sale of goods contract, article 442 of the *Civil Code* of 2005 obligates the seller to provide information and use instructions for buyers. It further states that “if the seller fails to perform this obligation, the purchaser shall be entitled to request the seller to perform it; if the seller still declines to perform it, the purchaser shall be entitled to cancel the contract and demand compensation for damages.” A similar provision was also contained in article 435 of the *Civil Code* of 1995.

In theory, all the said provisions of the *Civil Code* can be applied by the court or mediators to resolve disputes between traders (especially sellers) and consumers. However, as there is only very limited public access to court judgments and the courts do not have a statistical system to record the actual application of these provisions, there are no public reports on how the said provisions of the *Civil Code* are applied in reality. During the process of drafting the CPL, the DC of the CPL consulted with the Supreme People's Court and they were informed that the court system in Vietnam had not received any lawsuits filed by consumers to enforce their rights as stipulated in the CPO or the *Civil Code*.¹³³ It seems that provisions relevant to transactions between consumers and merchants in the *Civil Code* do not have real significance in advancing consumers' interests.

As consumers do not rely on the court system to advance their rights, it is reasonable to forecast that court-based self-help consumer rights or remedies inserted in the CPL might experience a similar fate to that found under the *Civil Code*.

4.5 ENFORCEMENT OF CONSUMER PROTECTION PROVISIONS

4.5.1 Private Enforcement

The mechanism of enforcement of consumer protection laws in Vietnam is a mixed mechanism of private and public enforcement. However, private enforcement is reported relatively rarely. As previously mentioned, at the request of the DC of the CPL during the process of drafting the CPL, the Supreme People's Court of Vietnam informed the DC that almost no lawsuits from consumers were submitted to the court system for resolution.¹³⁴ According to the current *Code of Civil Procedure* of 2004, all lawsuits brought by consumers (based on contract rules or tort rules) against traders due to

¹³³ I obtained this information from a member of the EG of the CPL on 23 August 2010 during fieldwork interviews in Hanoi, Vietnam; see also VietnamNet, "Consumer Complaints: Millions of Complaints, a Few Replies" ("Keu kien tieu dung: Chuc trieu chiec dui, duoc vai tieng trong") (15 March 2010), online: VietnamNet <<http://vietnamnet.vn/bvkh/201003/Keu-kien-tieu-dung-Chuc-trieu-chiec-dui-duoc-vai-tieng-trong-898828/>> [VietnamNet, "Consumer Complaints"].

¹³⁴ *Ibid.*

violations of consumer laws shall follow the normal civil procedure.¹³⁵ According to the normal civil procedure rules, consumers may have to wait four to six months for a trial date.¹³⁶ Given the excessive caseload of the current court system,¹³⁷ consumers may thus have to wait for years to get their final judgments executed. Consumers have to deposit their court fees in advance. Consumers also assume the burden of proof. This regime of civil procedure is widely seen as unfriendly to consumers, especially individual consumers in cases of low value.¹³⁸ In other words, there are no summary or fast-track procedures for consumer claims under this code or under other LNDs.¹³⁹

In early 2010, a social survey was conducted by Phan The Cong, a lecturer at the Hanoi University of Commerce, involving 583 randomly selected consumers in urban Hanoi. The survey found that 75% of consumers stated that, if their consumer rights were infringed upon, they would simply ignore the infringement and would not lodge complaints or file lawsuits against the perpetrators.¹⁴⁰ The interviewees explained that they did not opt for filing lawsuits because they even did not know where to submit their petitions (37.24% of the interviewees) or they thought they were unlikely to get fair compensation (46.68% of the interviewees). Most of them felt helpless in initiating lawsuits against offending traders.¹⁴¹

4.5.2 Public Enforcement

Public enforcement of consumer protection laws is mainly borne on the shoulders of a number of ministries and provincial People's Committees. This form of public

¹³⁵ Article 33 of the *Code of Civil Procedure* of 2004.

¹³⁶ Article 179 of the *Code of Civil Procedure* of 2004.

¹³⁷ See section 3.7.

¹³⁸ Tuong Duy Luong, "Role of Courts in Consumer Protection" ("Mot so van de ve vai tro cua Toa an trong viec bao ve quyen loi nguoi tieu dung") in Tuong Duy Luong, *Civil Law and Practice of Implementation (Phap luat dan su va thuc tien xet xu)* (Hanoi: National Political Press, 2009) at 306-326. Luong is currently the Vice-Chief Justice of the Supreme People's Court of Vietnam.

¹³⁹ However, as stipulated in article 19 of Decree 55 (2008), consumers can lodge their complaints with a provincial Department of Industry and Trade or with VCAD for mediation services. According to article 13(1)(a) of Decree 55 (2008), consumers can also lodge their complaints with Vinastas or its provincial consumer protection associations for mediation services.

¹⁴⁰ VietnamNet, *supra* note 133.

¹⁴¹ *Ibid.*

enforcement basically follows the traditional model of state management in Vietnam in which state authorities use the following key policy instruments: information policies (dissemination of legal provisions and relevant information); licensing systems;¹⁴² inspection systems; and administrative sanctions of offending businesses. Criminal prosecution is also initiated for certain offenses related to consumer protection, such as dealing in counterfeited goods or deceiving customers. However, criminal prosecution is, *de facto*, not the key instrument. Certain business practices violating consumer rights are never prosecuted, despite the fact that they may be quite pervasive. False advertisement and producing sub-standard products are good examples.¹⁴³

Although most ministries are involved in consumer protection activities (due to their sector management mandates), there are three important ministries directly involved in the operation of consumer goods and services markets: MoIT, the Ministry of Public Health and the Ministry of Science and Technology.¹⁴⁴

As analyzed in section 3.2, MoIT is entrusted to be the ministry in charge of state management of consumer protection.¹⁴⁵ VCAD is the agency assisting the Minister of Industry and Trade to carry out this mandate. However, as noted previously, VCAD does not have many instruments at hand for exercising its authority. In fact, VCAD has only

¹⁴² It has been widely noted that the licensing system in Vietnam is both theoretically and *de facto* unfriendly to potential or new entrants to the market. In other words, it is highly protective of existing businesses (i.e. state-owned enterprises and existing private enterprises know how to get around the licensing system). The philosophy of the licensing system in the early days of the Doi Moi era was that “enterprises are allowed to do business only with the boundary explicitly granted by the State”; this has recently changed to “enterprises are allowed to do anything not explicitly prohibited by law”. See Pham Chi Lan, “Establishing Legal Frameworks for Business: Memorable Periods” (“Tao lap moi trong phap ly cho kinh doanh: nhung chang duong dang nho”) in Dao Xuan Sam & Vu Quoc Tuan, eds., *Doi Moi in Vietnam: Looking and Thinking (Doi moi o Vietnam: Nho lai va suy ngam)* (Hanoi: Knowledge Press, 2008) 173 at 190. The struggle between advocates for economic liberalism (mainly experts working for the Vietnam Chamber of Commerce and Industry (VCCI) and the Ministry of Planning and Investment of Vietnam) and opponents (who want to retain the traditional model of state economic management) in the late 1990s and early 2000s was vividly described in Vu Quoc Tuan, “Development of the Business Community – Some Thinking on a Process” (“Phat trien doanh nghiep – suy nghi ve mot qua trinh”) in Dao & Vu, *ibid.* This struggle resulted in repeals of 111 types of business licenses which were deemed by the Prime Minister to be unreasonable. However, the remaining nearly 300 types of business licenses were still kept at the suggestion of relevant ministries.

¹⁴³ See section 4.3.1.

¹⁴⁴ Other ministries worth noting include the Ministry of Culture, Sports and Tourism (which enforces the *Ordinance on Advertisement* of 2001), the Ministry of Finance (which enforces the *Ordinance on Price* of 2002), the State Bank of Vietnam (which enforces the laws on banking), the Ministry of Transportation (which enforces the laws on public transportation services).

¹⁴⁵ Article 24 of Decree 55.

the instrument of information policy and the instrument of providing conciliation between consumers and traders. VCAD is not authorized to conduct investigations against violators and impose administrative sanctions upon offending businesses (although it has the power to impose administrative sanctions upon traders which use deceptive advertisements, as stipulated in the *Competition Law* of 2004). In addition, VCAD faces difficulties in terms of lacking personnel and financial resources to implement what little authority it does have concerning consumer protection. Until the CPL was drafted in mid-2008, the VCAD Consumer Protection Bureau had only five employees. At present (in early 2011), this division has only 10 staff members. VCAD's annual budget for consumer protection activities is only 280 million VND (equal to \$14,000 USD).¹⁴⁶

In addition to VCAD, MoIT's Department of Market Control and its affiliated local organizations (at the provincial and district levels) possess powerful tools in being able to directly attack specific violations of consumer rights. This department and its affiliated local organizations (with about 6,000 staff) is entrusted to investigate many kinds of specific violations against consumer rights, such as improper labelling, selling expired products, and producing or selling counterfeited goods. Specifically, from 2003 to 2007, this force dealt with 48,732 cases in which traders sold shoddy products or counterfeited goods. The number of cases increased year by year. For example, the number of cases dealt with by the market control force in 2003 was 5,808; and this number in 2004, 2005, 2006, and 2007 was 5,977, 8,739, 12,885, and 15,323 respectively. Violators were given administrative sanctions such as fines, withdrawal of business licenses, and destruction of counterfeited or shoddy products. From 2003 to 2007, this market control force also discovered and dealt with 57,939 other violations of consumer rights such as improper labelling, and employment of wrong weights or measures.¹⁴⁷

According to the current laws in Vietnam, the Ministry of Science and Technology is entrusted to implement a number of important laws relevant to consumer

¹⁴⁶ I obtained this information by interviewing a legal drafter of the CPL on 10 September 2010 in Hanoi.

¹⁴⁷ Nguyen Hung Dung, *supra* note 37.

protection, i.e. the *Law on Standards and Technical Regulations* of 2006¹⁴⁸ and the *Law on Quality of Products and Goods* of 2007.¹⁴⁹ Article 68(2) of the *Law on Quality of Products and Goods* of 2007 states that the Ministry of Science and Technology “shall be responsible to the Government for unified state management of quality of products and goods”. This mandate includes formulating national strategies and plans for improving quality of goods; monitoring and reviewing the situation of management of quality of goods throughout the country; supervising businesses’ observance of the law on quality of goods; settling complaints and denunciations about, and handling violations of, the law on the quality of goods.¹⁵⁰

According to article 70(2)(a) of the *Law on Quality of Products and Goods*, the Ministry of Health is in charge of state management of the quality of foods, pharmaceuticals, cosmetics, and pharmaceutical materials. The Ministry of Health implements this authority based on the *Law on Pharmacy* of 2005,¹⁵¹ the *Law on Examining and Curing Diseases* of 2009,¹⁵² and the *Law on Food Safety* of 2010.¹⁵³ The

¹⁴⁸ This law replaced a number of provisions on standards in the *Ordinance of Quality of Goods* of 1999. This law was specified by *Decree No. 127/2007/ND-CP dated 1 August 2007* (as amended by *Decree No. 67/2009/ND-CP dated 3 August 2009*).

¹⁴⁹ This law was specified by many LNDs such as *Decree No. 132/2008/ND-CP dated 31 December 2008 providing for detailed implementation of the Law on Quality of Products and Goods* (as amended by *Decree No. 67/2009/ND-CP dated 3 August 2009*); *Decree No. 54/2009/ND-CP dated 5 June 2009 on sanctioning administrative offenses in the fields of standards, measurement, and quality of products and goods*; and *Circular No. 24/2009/TT-BKHCN dated 31 December 2009 providing for guidelines on a number of articles in Decree No. 54/2009/ND-CP*.

¹⁵⁰ Article 69 of the *Law on Quality of Products and Goods* of 2007.

¹⁵¹ Article 6(2) of the *Law on Pharmacy* of 2005 states that “the Ministry of Health is responsible to the Government for exercising state management of pharmacy.” The *Law on Pharmacy* of 2005 was specified by *Decree No. 79/2006/ND-CP dated 9 August 2006 stipulating detailed implementation of the Law on Pharmacy* [Decree 79]. The Ministry of Public Health also issued many circulars to implement Decree 79, such as *Circular No. 02/2007/TT-BYT dated 24 January 2007*; *Circular No. 09/2010/TT-BYT dated 28 April 2010 on management of pharmacy quality*; *Circular No. 38/2010/TT-BYT dated 7 September 2010 on inspection of state management of pharmacy*; and *Circular No. 42/2010/TT-BYT dated 15 December 2010 on advertisement of pharmacy*.

¹⁵² Article 5(2) of the *Law on Examining and Curing Diseases* of 2009 states that “the Ministry of Health is responsible to the Government for exercising state management of examination and curing of diseases.”

¹⁵³ Article 61(2) of the *Law on Food Safety* of 2010 states that “the Ministry of Health is responsible to the Government for exercising state management of food safety.” The *Law on Food Safety* of 2010 replaced the former *Ordinance on Food Safety* of 2003. These two legal documents provide legal foundations for the Ministry of Public Health and its Provincial Departments of Public Health to maintain and run a comprehensive licensing system aimed at restaurants and vendors of street food. Accordingly, all restaurants (regardless of their size) have to obtain “certification of food safety” in order to operate. However, this licensing system, which controls market entry with the purpose of consumer protection, has far from proved its effectiveness. The weak implementation of this system is widely reported. For example,

Ministry of Health and relevant local departments of health have also encountered a huge shortage of funds for the implementation of laws. A 2009 report of the Ministry of Public Health¹⁵⁴ reveals that the entire state budget for public activities in the area of food safety for the years 2006-2008 was 329 billion VND (equal to about \$16,000,000 USD). In other words, in the period 2006-2008, the average annual budget that the government spent on public activities in the area of food safety for each person in Vietnam was 1,000 VND (equal to about five cents USD).¹⁵⁵ This report also notes that this level was equal to only 1/15th of the budget for similar activities in Thailand and was only equal to 1/136th of the budget for similar activities in the United States. The report also reveals that spending for public activities in the area of food safety was usually not a priority in the budgets of the local governments. Very few provincial governments provided their own money for these kinds of activities. They simply waited for grants from the central government.¹⁵⁶ As a result, the annual average spending on public activities in the area of food safety for each province (in the period 2004-2008) was 145.4 million VND (equal to about \$10,000 USD) of which 48.8 million VND (i.e. 33.56% of the total budget) was spent on investigations and check-ups; 36.5 million VND (i.e. 25.1% of the total budget) was spent on buying necessary instruments and chemicals for food tests; 60.1 million VND (41.33% of the total budget) was spent on communication activities on food safety and relevant legal provisions.¹⁵⁷ The report also reveals that there was a significant gap between local governments and the central government's priority of resolving food safety problems. Local governments tended to downplay the significance of this task despite the directive from the central government. They did not update and enforce the central government's newly issued LNDs unless directly receiving detailed requests from the

after four years of running this licensing system, only 6.1% of a total number of 212,772 restaurants were granted certificates of food safety. The remaining 93.9% (i.e. about 200,000 restaurants) still operated without certificates of food safety. See Ministry of Public Health, *Report on the Socio-Economic Impacts of the Draft Law on Food Safety (Bao cao danh gia tac dong kinh te-xa hoi Du an Luat An toan thuc pham)* (Hanoi, August 2009) at 10.

¹⁵⁴ Ministry of Public Health, *Report on the Actual Situation of Implementation of Legal Provisions on Food Safety (Bao cao tong ket tinh hình thực hiện pháp luật về vệ sinh an toàn thực phẩm)* (Hanoi, July 2009).

¹⁵⁵ *Ibid.* at 7.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

central government.¹⁵⁸ The report further notes that many provincial leaders simply regarded food safety as an unimportant issue, as they were also not held accountable for any food safety problems occurring in their localities.¹⁵⁹ This actual experience of enforcing legal provisions on food safety may provide an indication of future challenges in enforcing the CPL once it is adopted.

4.5.3 Vinastas and its Provincial Consumer Protection Associations

In addition to public authorities, consumer protection associations in Vietnam also have certain roles in enforcing the relevant consumer protection laws. In Vietnam, the only national consumer advocacy association designed to protect consumer interests is Vinastas. Vinastas was established in 1988 with the original name “Vietnam Science and Technique Association of Standardization, Metrology and Quality” and did not have a consumer protection function until 1991. It became a member of Consumers International (CI) in 1992.¹⁶⁰ Currently, consumer protection and consumer education represents about 80% of Vinastas’ activities, while the remaining 20% is concerned with standardization activities.¹⁶¹ While conducting my fieldwork in Hanoi on 6 September 2010 for this dissertation, I was told by a member of the executive board of Vinastas that Vinastas was “a kind of NGO”. However, in reality, this association was a product of initiatives of retired state officials. It operates as a member and under the auspices of the Vietnam Union of Science and Technology Associations (Vusta) – a member of the Vietnam Fatherland Front.¹⁶² In addition to Vinastas, approximately 40 provincial consumer

¹⁵⁸ *Ibid.* at 22.

¹⁵⁹ *Ibid.*

¹⁶⁰ Do Gia Phan, “Consumer Protection Activities and Experience in Resolution of Consumer Complaints” (“Hoat dong bao ve nguoi tieu dung va kinh nghiem giai quyet khieu nai”) (Lecture to the Training Workshop on “Capacity Building for the Implementation of Consumer Protection Laws”, Hai Phong, Vietnam, 26-29 September 2006). This workshop was held by VCAD with assistance from the United States Agency for International Development (USAID) and the US Federal Trade Commission. At that time, throughout Vietnam, there were only 27 provincial consumer protection associations. In late 2010, this number had increased to 40.

¹⁶¹ Virgine Diaz Pedregal & Muriel Figuié, “Consumer Protection in Vietnam”, online: CIRAD <http://agents.cirad.fr/pjjimg/muriel.figuie@cirad.fr/Consumer_protection_in_Vietnam.pdf>.

¹⁶² The Vietnam Fatherland Front is a national CPV-led coalition of mass organizations. It assumes a very important position in the political system of Vietnam as expressly stipulated in article 9 of the *Constitution*

protection organizations have been set up in Vietnam. They each have their own legal personalities, but they usually join with Vinastas as members of this national association.

Vinastas has a very limited budget of only \$19,000 USD per year¹⁶³ although it is quite prominent in the media.¹⁶⁴ One of the key tactics employed by Vinastas to advance its position is to mobilize support from the public media and to urge the public media to report consumers' concerns and voices, especially in scandals affecting many consumers, such as scandals involving poor quality milk, gas station operators cheating customers, and taxi drivers rigging meters in order to overcharge fares.¹⁶⁵ Vinastas also frequently sends petitions to the state authorities urging them to carry out regular inspections and implement consumer protection provisions.¹⁶⁶ Vinastas and its affiliated provincial consumer protection organizations also provide mediation services for consumers. However, these services are possible only when businesses or traders voluntarily cooperate.¹⁶⁷ Vinastas and its affiliated organizations do not promote boycotting strategies due to being afraid of the social consequences that might arise if Vinastas encouraged consumers to boycott a product: "the involved business [might] go bankrupt. That means thousands of workers could be out of jobs."¹⁶⁸

of 1992 (as amended in 2001) that the Vietnam Fatherland Front and its member organizations constitute the political base of the current regime and that:

The Front fosters the tradition of national unity, strengthens political and moral cohesion among the people, takes part in building and consolidating the people's power, and together with the Government protects the legitimate rights of the people, encourages the people to exercise their rights and to respect the Constitution and the law, and monitors the activities of the state agencies, elected deputies, state officials and employees. The State creates favourable conditions for the Fatherland Front and its member organizations to work efficiently.

See *Constitution of the Socialist Republic of Vietnam*, online: Vietnam Laws <[http://www.vietnamlaws.com/freelaws/Constitution92\(aa01\).pdf](http://www.vietnamlaws.com/freelaws/Constitution92(aa01).pdf)>. See also Sidel, *Constitution of Vietnam*, *supra* note 53 at 141.

¹⁶³ Pedregal & Figuié, *supra* note 161.

¹⁶⁴ Virginie Diaz Pedregal & Nguyen Ngoc Luan, "Is Fresh Milk Powered Milk? The Controversy over Packaged Milk in Vietnam" in Adam Lindgreen, Martin K. Hingley & Joelle Vanhamme, eds., *The Crisis of Food Brands: Sustaining Safe, Innovative and Competitive Food Supply* (London: Gower, 2009) 65 at 79.

¹⁶⁵ VietnamNews, "Vinastas Determined to Keep Consumers' Rights in Spotlight" (13 October 2008), online: VietnamNews <http://www.vietnamnews.biz/Vinastas-determined-to-keep-consumers-rights-in-spotlight_887.html>.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

4.5.4 Outcomes of Enforcement

As for outcomes of enforcement of consumer protection provisions, the statistics from relevant organizations and authorities seem to provide quite a poor picture, indicating the unpopularity of public authorities and consumer protection organizations as reliable resources for consumers who need meaningful assistance. According to the statistics of VCAD's Consumer Protection Bureau, in 2009, VCAD received and handled only 50 consumer complaints.¹⁶⁹ Most of these complaints related to warranty problems. Every year, Vinastas and its provincial associations received only about 1,000 complaints from consumers. In 2009, Hanoi's Department of Market Control received 45 complaints from consumers. Also in this year, no consumer complaints were submitted to the court system for decision.¹⁷⁰ In comparison to the nearly 1,000,000 consumer complaints that the news website VietnamNet claimed that they received in 2009,¹⁷¹ the number of complaints lodged by consumers to the official consumer protection system (such as VCAD, Vinastas and relevant organizations) looks strikingly small. In a country of 87 million people with hundreds of millions of consumer transactions occurring every day, it seems that the number of consumer complaints received by the official consumer protection system is far from truly representing the actual consumer problems occurring in the Vietnamese economy. Perhaps there are other reasons for this in addition to the fact that VCAD is too young to become popular among consumers, and that Vinastas and its provincial consumer protection organizations are in want of financial resources and personnel. For example, because Vietnamese public authorities remain widely known for their lack of transparency, accountability, responsiveness and capacity, it is very likely that the current official consumer protection system has not yet gained the trust of consumers and the general public.¹⁷² Public anger and the demands of citizens who have had bad consumer experiences have not been effectively transformed into concrete actions, nor have they generated desirable changes in the behaviour of businesses.

¹⁶⁹ VietnamNet, "Consumer Complaints", *supra* note 133.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* However, it is quite difficult to verify the reliability of this figure.

¹⁷² Pedregal & Nguyen, *supra* note 164 at 67.

However, to improve the current system of consumer protection enforcement and make it more responsive, perhaps not only psychological barriers need to be removed, but a deeper reform of the current state apparatus is also necessary.

4.6 BRIEF CONCLUSIONS

By examining the consumer protection provisions in Vietnam prior to the adoption of the CPL, a number of conclusions can be drawn as follows:

First, consumer protection provisions have evolved in Vietnam over the past two decades. Both private law (especially contract and tort) and public law measures are employed for the purposes of consumer protection. However, private law measures were widely noted as ineffective at producing actual impacts in fighting against violations of consumer rights. A complete absence of consumer cases before the court system illustrates this situation. Public law measures were mainly designed in accordance with the traditional model of state management in Vietnam. Accordingly, the state assumed the central role in consumer protection through a system of market surveillance by multiple ministries and local administrative authorities. Administrative sanctions were widely used to deter violations of consumer rights. However, administrative sanctions were generally seen as too lenient.¹⁷³ Furthermore, most public authorities and consumer protection organizations face huge shortages of resources and lack effective coordination to be able to deliver desirable protection to consumers.¹⁷⁴

Second, most laws or ordinances relevant to consumer protection were designed according to the traditional Vietnamese format, in which the specific messages of laws and ordinances are clarified only through multiple guiding LNDs issued by the Government and ministries. This approach in formulating legal provisions occasionally entails inconsistencies and overlaps among relevant LNDs. It also fails to provide a stable legal foundation for effective coordination among relevant state authorities.

¹⁷³ Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers' Rights and Interests (To trình so 28/TTr-CP ngay 8/4/2010 ve Du an Luat Bao ve quyen loi nguoi tieu dung)* at 3.

¹⁷⁴ *Ibid.* at 3-4.

Third, the whole system of consumer protection provisions in Vietnam prior to the adoption of the CPL had been designed without duly considering the fact that consumers are vulnerable market participants. Basically, consumers were not entitled to any special protection measures corresponding to their weak status in market transactions.

Fourth, despite the Government's statement in its April 2010 report to the NA on the necessity of adopting the CPL – “the adoption of the CPO [in 1999] is an important turning point in consumer protection activities in Vietnam and this event shows the due care of the party and the state [regarding consumer protection] [...]”¹⁷⁵ – the examination in this chapter tends to confirm the argument that the Vietnamese legal system has long ignored or marginalized the need to effectively address consumer problems. As a result, it is not surprising that the consumer protection provisions existing before the adoption of the CPL were in need of being reformed, especially those provisions relating to key issues such as the concept of “consumer”, unfair commercial practices, consumer contracts, consumers' access to justice, and state management of consumer protection.

In Chapter 5, I will trace the process of drafting the CPL to see how such key policy issues were addressed in reality by MoIT, the Government, the NA and relevant stakeholders.

¹⁷⁵ *Ibid.* at 2.

Chapter 5

THE DRAFTING OF THE *CONSUMER PROTECTION LAW*

On the afternoon of 17 November 2010, the CPL was officially adopted by the National Assembly (NA) with the approval of 99.5% of 408 members present (only two members voted against).¹ From the time the initial draft was completed by the Editing Group (EG)² to the time the CPL was officially approved, the CPL had undergone seven official drafts³ as the result of interactions among various state authorities, interest groups and agents. The number of articles in each draft changed substantially over time and decreased from 81 articles in the initial draft to 66 articles in Draft 5 (the Government submitted this to the NA in April 2010) and to 51 articles in the adopted CPL in November 2010.⁴ The fact that the draft CPL became slimmer after each new draft seems to suggest that the number of articles successfully defended by the drafting ministry (the Ministry of Industry and Trade – MoIT) and legal drafters each time the draft was submitted to authorities or the public for deliberation became fewer and fewer. However, the actual situation is more complex than this initial impression suggests.

In this chapter, I analyze the actual process of drafting and adopting the CPL in Vietnam from the time it was proposed (initiative stage) to the time it was finally approved. As a collective decision-making process, this process involved the actions of various participants, including but not limited to the behaviours and choices of legal

¹ This law was officially promulgated by the State President on 30 November 2010.

² On 23 September 2008.

³ See Appendix 6 for timelines of each draft of the CPL and Appendix 7 for detailed timeline of drafting the CPL.

⁴ This degree of emasculation is quite noticeable, although emasculation of other draft laws is not uncommon. For example, differences between the number of articles in drafts submitted to the NA for first debate and the number in the adopted version can be illustrated as follows: the *Law on Health Insurance* of 2008 decreased from 59 articles to 52 articles; the *Law on Urban Planning* of 2009 decreased from 81 articles to 76 articles; the *Law on Management of Public Debt* of 2009 decreased from 55 articles to 49 articles. However, for many draft laws, the number of articles slightly increased during the National Assembly stage of debate and adoption. For example, the *Law on Quality of Products and Goods* of 2007 increased its number of articles from 65 articles to 72 articles; the *Law on Examining and Curing Diseases* of 2009 increased from 81 articles to 91 articles; the *Law on Food Safety* of 2010 increased from 62 articles to 72 articles; the *Law on Commercial Arbitration* of 2010 increased from 75 articles to 82 articles. This information was collected from the NA's website, online: NA <www.na.gov.vn>.

drafters, relevant state authorities, and other stakeholders. In this chapter, I also attempt to explain the roles and effects of the immediate political, social, legal cultural and constitutional constraints, including the requirements of the *Law on Laws* (LoL)⁵ and the realities of Vietnam's legal culture, on the final formulation of the CPL.

Due to the fact that the process of drafting and adopting the CPL was expected to strictly follow the requirements in the LoL, a meaningful discussion of the drafting of the CPL is not plausible without a brief discussion of the LoL. Nevertheless, it should be noted that the time of drafting and adopting the CPL was unique in the sense that the process of drafting this law was governed by both the LoL of 1996 (as amended in 2002)⁶ and the LoL of 2008.⁷ The reason is that this process started in March 2008 and ended in November 2010, while the LoL of 1996 (as amended in 2002) was in effect until 31 December 2008, before the LoL of 2008 took effect on 1 January 2009.⁸

5.1 AN OVERVIEW OF THE LAW-MAKING PROCESS IN VIETNAM

In the context of the many political, social and economic transformations of the Doi Moi era,⁹ the law-making process in Vietnam has also been undergoing substantial reform for the past two decades. Prior to the start of the Doi Moi era in 1986 and for several years afterwards, executive decrees and similar instruments were the mainstays of the legal system. The NA, as previously noted, played a relatively insignificant role in the law-making system. Laws played a minor role in society,¹⁰ compared to party directives

⁵ "LoL" is an abbreviation for the *Law on Promulgation of Legal Normative Documents* (*Luat Ban hanh van ban quy pham phap luat*). This statute is commonly referred to as the *Law on Laws*.

⁶ This law was specified by *Decree No. 161/2005/ND-CP dated 27 December 2005 providing details and implementation guidance on a number of articles in the Law on Promulgation of Legal Normative Documents and the Law Amending and Supplementing the Law on Promulgation of Legal Normative Documents* [Decree 161].

⁷ This law was specified by *Decree No. 24/2009/ND-CP dated 5 March 2009 providing details and implementation guidance for the Law on Promulgation of Legal Normative Documents* [Decree 24].

⁸ As a result, until the time Draft 1 was completed, the process of drafting the CPL was basically governed by the LoL of 1996 (as amended in 2002) and its guiding Decree 161. Beginning with Draft 2, the process of drafting and adopting the CPL was governed by the LoL of 2008 and its guiding Decree 24.

⁹ See section 3.2.

¹⁰ See section 3.4.

and executive legal normative documents (LNDs)¹¹ which, in turn, were often applied or interpreted inconsistently by local authorities.¹² Policy-making and law-making activities were usually not well-researched or well-structured.¹³ Even today, Vietnam still has a very complex legal system corresponding to a very complicated and multi-level state apparatus in which many state authorities have the power to produce legal rules.¹⁴ It is, therefore, not surprising that the number of LNDs produced by the state apparatus is almost uncountable and that these LNDs are occasionally inconsistent with each other. This situation generates an ongoing concern for ensuring the ordering and the consistency of the whole legal system.¹⁵

The first LoL was adopted in 1996 as an instrument to address this concern. In addition, it also aimed at creating a more rational, timely and transparent process for developing and improving each individual law and the whole legal system.¹⁶ This law was partially revised in 2002 and finally replaced by the LoL of 2008, in the hopes that it

¹¹ Such as government Decrees and Resolutions; Prime Minister's Decisions and Directives; ministers' Circulars, Directives, and Decisions.

¹² See section 3.4.

¹³ Nguyen Duy Quy, *Renovation in Thinking and the Renovation Process in Vietnam (Doi moi tu duy va cong cuoc doi moi o Vietnam)* (Hanoi: Social Sciences Press, 2009) at 318.

¹⁴ The following state bodies have the power, within their mandate, to say "this is the law" by issuing legal normative documents (LNDs): the NA, NASC, the State President, the Government, the Prime Minister, more than 22 ministries, the People's Supreme Court, the People's Supreme Procuracy, 63 provincial People's Councils, 63 provincial People's Committees, about 700 district People's Councils and 700 district People's Committees, and about 11,000 commune-level People's Councils and 11,000 commune-level People's Committees. According to article 1 of the LoL of 1996, there are 25 types of LNDs in the legal system of Vietnam. The hierarchy of these LNDs is shown in Appendix 1. See also Appendix 2 for the hierarchy of the LNDs as stipulated in article 1 of the LoL of 2008.

¹⁵ It is widely noted by Vietnamese legal scholars that the LNDs issued by the Government, ministries and local governments shadow the existence of the NA's laws. See Nguyen Duy Quy & Nguyen Tat Vien, *Vietnam's Law-Governed Socialist State of the People, from the People, and for the People: Theory and Practice (Nha nuoc phap quyen XHCN Viet Nam cua dan, do dan, vi dan: Ly luan va thuc tien)* (Hanoi: National Political Press, 2008) at 256. The authors of this book emphasize that "unfortunately, these guiding LNDs usually advance or privilege self-interests of the ministries or local governments rather than focus on securing the public interest. Actually, the shadow of guiding LNDs is so big that people do not pay attention to the existence of laws adopted by the NA."

¹⁶ William A.W. Neilson, "Vietnam's Doi Moi Legal System: Pushing the Limits of Rapid Legal Change" (a Research Paper, University of Victoria, Victoria, BC, December, 1994) at 13 [Neilson, "Pushing the Limits"]; see also NA Law Committee, *Verification Report No. 102/UBPL12 dated 3 November 2007 to verify the draft Law on Promulgation of Legal Normative Documents (as amended) (Bao cao tham tra so 102/UBPL12 ngay 3/11/2007 ve Du an Luat Ban hanh van ban quy pham phap luat (sua doi))* at 2.

could better realize its intended goals:¹⁷ producing a desirable legal system to meet the requirements of state management and international economic integration.¹⁸

From a legal transplantation perspective, many provisions in the LoL are also products of voluntary and selective transplantation. In the early 1990s, the government of Vietnam looked to international donors and Western countries to gather experience in designing its legislative process. Canada has been one of the pioneering countries providing this technical assistance¹⁹ through a number of widely-known programs such as the Vietnam-Canada Legislation Drafting and Management Program (1994-1996) funded by CIDA,²⁰ the Vietnam Drafting and Promulgation Program (1996-1998),²¹ and a recent CIDA-funded Legal Reform Assistance Project (LERAP) (2002-2008).²² Perhaps this is one of the reasons why the steps and procedures of the law-making

¹⁷ Problems with the LoL of 1996 (as amended in 2002) were extensively documented in many research reports published in Vietnam. For example, see Hoang Ngoc Giao, *et al. Research Report on Assessment of the Process of Formulating Laws and Ordinances: Problems and Solutions (Bao cao nghien cuu danh gia quy trinh xay dung Luat, Phap lenh: Thuc trang va giai phap)* (Hanoi: Labour and Society Press, 2008) [Hoang, *Formulating Laws and Ordinances*]; see also MoJ, Program 909, *Renovating the Process of Formulating, Adopting and Enhancing the Quality of Legal Normative Documents (Doi moi cong tac xay dung, ban hanh va nang cao chat luong van ban quy pham phap luat)* (Hanoi: Judicial Press, 2008). These two research reports extensively document many problems such as legal drafters lacking the expertise, time and incentives to do their jobs as drafters; drafting ministries not allocating sufficient budgets for legislative activities; and the existence of poorly-designed drafts.

¹⁸ NA Law Committee, *supra* note 16 at 2.

¹⁹ Carol V. Rose, “The ‘New’ Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study” (1998) 32:1 *Law & Soc’y Rev.* 93 at 113. The author notes that Canada has been involved in offering technical assistance since 1993. Other foreign technical assistance worth noting includes that of Sweden, the EU and the United States. For example, USAID’s Vietnam Competitiveness Initiative (VNCI) recently worked closely with Vietnam’s MoJ to introduce a regulatory impact assessment (RIA) system into Vietnam. See VNCI, “More Rigorous Policy-Making through Regulatory Impact Assessment (RIA) Improves Responsiveness to Citizens in Vietnam’s Legal System”, online: VNCI <<http://www.vnci.org/content/more-rigorous-policy-making-through-regulatory-impact-assessment-ria-improves-responsiveness>>.

²⁰ The Canadian International Development Agency.

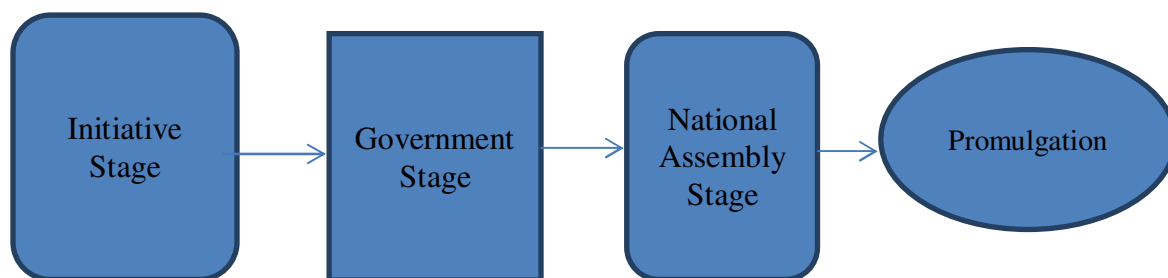
²¹ This program was funded by the Asia Foundation and the United Nations Development Programme (UNDP).

²² See Dang Hoang Oanh, “Legal and Judicial Cooperation between Vietnam and Canada: Comprehensive, Practical, and Efficient” (“Hoat dong hop tac phap luat va tu phap giau Vietnam va Canada: toan dien, thiet thuc, va hieu qua”), online: MoJ <http://moj.gov.vn/ct/tintuc/Lists/Hot%20ng%20ca%20c%20quan%20t%20php/View_Detail.aspx?ItemID=767>.

process in the LoL of 1996 and 2008 have many similarities with legislative processes in countries with parliamentary systems.²³

In Vietnam, most laws are proposed by the Government.²⁴ According to the LoL of 1996 (as amended in 2002), the process of drafting and enacting these laws primarily consists of four stages: (1) the initiative stage; (2) the government stage (or drafting stage); (3) the National Assembly stage (i.e. the debating and adopting stage); and (4) the promulgation stage as shown in the following figure:

Figure 2. Law-making Process in Vietnam



During the initiative stage, the sponsoring ministry wishing to have a law adopted must propose its legislative initiative²⁵ to the Government and then to the NA in order to get the green light to start the process of drafting the law. Approved initiatives will be added to the NA’s five-year law-making program or annual law-making program.²⁶

At the government stage, the Government will assign or usually return the approved initiative to the sponsoring ministry to start drafting activities. As a result, this sponsoring ministry becomes the drafting ministry. The minister of the drafting ministry will set up a Drafting Committee (DC) (*Ban soan thao*) and an assisting Editing Group (EG) (*To bien tap*) in charge of drafting activities.²⁷ The minister usually occupies the

²³ See, for example, Office of Legislative Counsel – Ministry of Attorney General (British Columbia, Canada), *A Guide to Legislation and Legislative Process in British Columbia* (April 2006).

²⁴ John Gillespie, “Localizing Global Rules: Public Participation in Lawmaking in Vietnam” (2008) 33:3 *Law & Soc. Inquiry* 673 at 681.

²⁵ As a matter of practice, this proposal is usually very simple. It includes only the name of the draft law and the reason for its necessity and suggested scope of regulation.

²⁶ Article 22 of the LoL of 1996 (as amended in 2002) and article 16 of Decree 161; article 27 of the LoL of 2008.

²⁷ According to article 32(1) and 32(2) of the LoL of 2008, the DC is responsible for organizing the drafting of the draft law and is responsible to the drafting ministry for the quality and progress of this work. This

position as head of the DC and one vice-minister is usually a deputy head of the DC. The DC has to complete the draft within a certain time. Once the draft is finalized, the drafting ministry sends it to MoJ for “evaluation” (*tham dinh*). After that, it is submitted to the Government for deliberation and approval. If the draft gets the approval from the Government, it will be submitted to the NA for debate and adoption.²⁸

At the National Assembly stage, the draft law is first “verified” (*tham tra*) by an assigned NA committee.²⁹ After that, it is submitted to the NA for debate and voting.³⁰

At the promulgation stage, the NA’s chairperson sends the adopted law to the State President for official promulgation (usually within 15 days from the date the law was passed).³¹

In comparison with the standard three-stage law-making process described by the Seidmans,³² the four-stage law-making process in Vietnam is different in that the process of problem identification and definition (or policy analysis) is usually incorporated into the draft-creating stage. In addition, if the drafting process in most Western parliamentary countries “begins with the receipt of drafting instructions and ends with completion of an agreed draft”³³ and this process is generally undertaken by professional legislative

committee has the following concrete tasks: (a) reviewing and approving the outlines of the draft law; (b) deliberating on related basic policies and substantive issues of the draft law; (c) deliberating on the draft law, the introductory notes supporting the submission of the draft law, the detailed narratives of the draft law, as well as on the incorporation of comments from agencies/organizations and individuals; (d) ensuring the relevance of the draft law to the party’s directions and policies as well as its constitutionality, legality, consistency with the legal system and feasibility. According to article 32(3) of the LoL of 2008, the EG assists the DC in preparing the outlines of the draft law as well as in editing and improving the draft law.

²⁸ Articles 25 and 26 of the LoL of 1996 (as amended in 2002); article 39 of the LoL of 2008.

²⁹ Article 32 of the LoL of 1996 (as amended in 2002); article 41 of the LoL of 2008.

³⁰ Article 46(b) of the LoL of 1996 (as amended in 2002); articles 51 & 53 of the LoL of 2008.

³¹ Article 50 of the LoL of 1996 (as amended in 2002); article 57 of the LoL of 2008.

³² Ann Seidman & Robert B. Seidman, “Law, Social Change, Development: The Fatal Race – Causes and Solutions” in Ann Seidman, *et al.*, eds., *Africa’s Challenge: Using Law for Good Governance and Development* (Trenton, NJ: Africa World Press, 2007) 19 at 23. The Seidmans state that a standard law-making process consists of three segments: (1) prioritization (i.e. identification the social problems to be solved and deciding that they must be addressed by legal solutions); (2) bill-creating (or draft-creating) (i.e. creating a bill to introduce before the legislature); and (3) law-enacting (debating and adopting at the legislature).

³³ G.C. Thornton, *Legislative Drafting*, 4th ed. (London: Butterworths, 1996) at 124; see also Richard C. Nzerem, “The Role of the Legislative Drafter in Promoting Social Transformation” in Constantin Stefanou & Helen Xanthaki, eds., *Drafting Legislation: A Modern Approach* (Farnham, UK: Ashgate Publishing,

drafters, this is not the case in Vietnam. In Vietnam, DCs and their assisting EGs are *ad hoc*. They are formed to draft a specific law and are dissolved after finishing their work. Legal drafters do not even need to have a background in law. Furthermore, if the drafting instructions given to legislative drafters in most Western parliamentary countries are quite specific and clear,³⁴ this is also not the case in Vietnam. The drafting instructions (if any) in Vietnam are usually very simple, abstract and vague. They say nothing specifically about what problems are to be addressed, who shall address them, or how. The mission of legal drafters in Vietnam is, therefore, not only to understand the problems and proposed policy options and to translate them into the language of laws but also to discover targeted problems and design desirable solutions.³⁵ In other words, public policy analysis is not conducted before the beginning of drafting but is integrated within the drafting of a law.

This four-stage law-making process was unchanged in the LoL of 2008. However, this law and its guiding Decree 24 make many important amendments. For example, to meet the government of Vietnam's commitment to the WTO,³⁶ as well as to meet the requirements for further democratization in the law-making process, the LoL of 2008 makes public consultation mandatory for all draft laws and LNDs.³⁷ To improve the feasibility of a draft law, article 35(3) of the LoL of 2008 even requires that the drafting ministry send the draft law to the Ministry of Finance and the Ministry of Internal Affairs

2008) 131 at 131; Office of Legislative Counsel – Ministry of Attorney General (British Columbia, Canada), *supra* note 23.

³⁴ Drafting instructions in developed countries usually consists of important elements such as: (1) the nature of the problem that the proposed legislation is intended to solve; (2) the purposes of the proposed legislation; (3) the means to achieve the said purposes; (4) the impact of the proposals on existing circumstances and laws. See Thornton, *ibid.* at 130; see also Office of Legislative Counsel – Ministry of Attorney General (British Columbia, Canada), *ibid.*

³⁵ It is noteworthy that professional legal drafters in developed countries do not simply limit their roles in translating “government policy into written laws”. Instead, they “cannot escape being involved in policy considerations.” See Nzerem, *supra* note 33 at 132. See also A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague: Kluwer, 2000) at 6. However, even so, legal drafters in Vietnam seem to assume a much broader role.

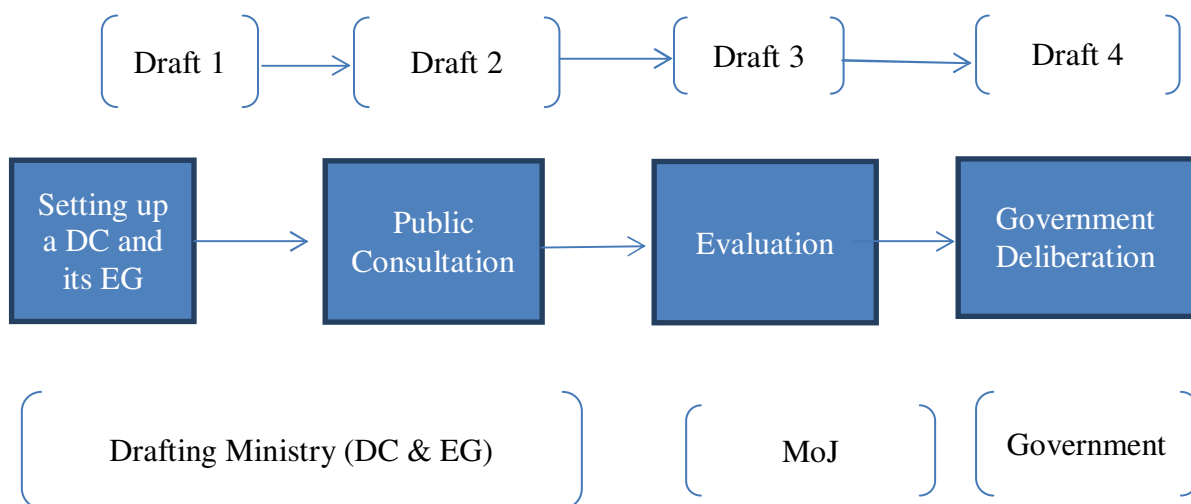
³⁶ Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 73.

³⁷ For example, article 35(1) of the LoL of 2008 provides that the drafting ministry has to solicit opinions of relevant ministries and organizations as well as of affected parties. The drafting ministry also has to post the draft law on its website or the website of the Government for at least 60 days so that the public can comment. The previous LoL of 1996 (as amended in 2002) did not have this provision. Instead, according to the LoL of 1996 (as amended in 2002), the drafting ministry had the right rather than the obligation to solicit public comments.

to comment on the financial and personnel resources available for the implementation of the draft law.³⁸

As a result, in accordance with the LoL of 2008 and Decree 24, in the government stage, from the time the DC is set up to the time the drafting ministry submits the draft law to the Government for deliberation, the draft law has to undergo many steps (such as public consultation and MoJ's evaluation) and four official drafts as shown in the following figure:³⁹

Figure 3. Steps in the Government Stage



After the Government meets to deliberate and approve the draft law, the drafting ministry must revise the draft at the request or suggestion of the Government.⁴⁰

Immediately afterwards, the drafting ministry, on behalf of the Government, sends the

³⁸ Actually, a similar provision was already stipulated in article 16(4) of Decree 161 (2005). However, this provision was simply ignored in reality, due to the fact that the Ministry of Finance and the Ministry of Internal Affairs did not have the time or expertise to provide these kinds of comments. See Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 45.

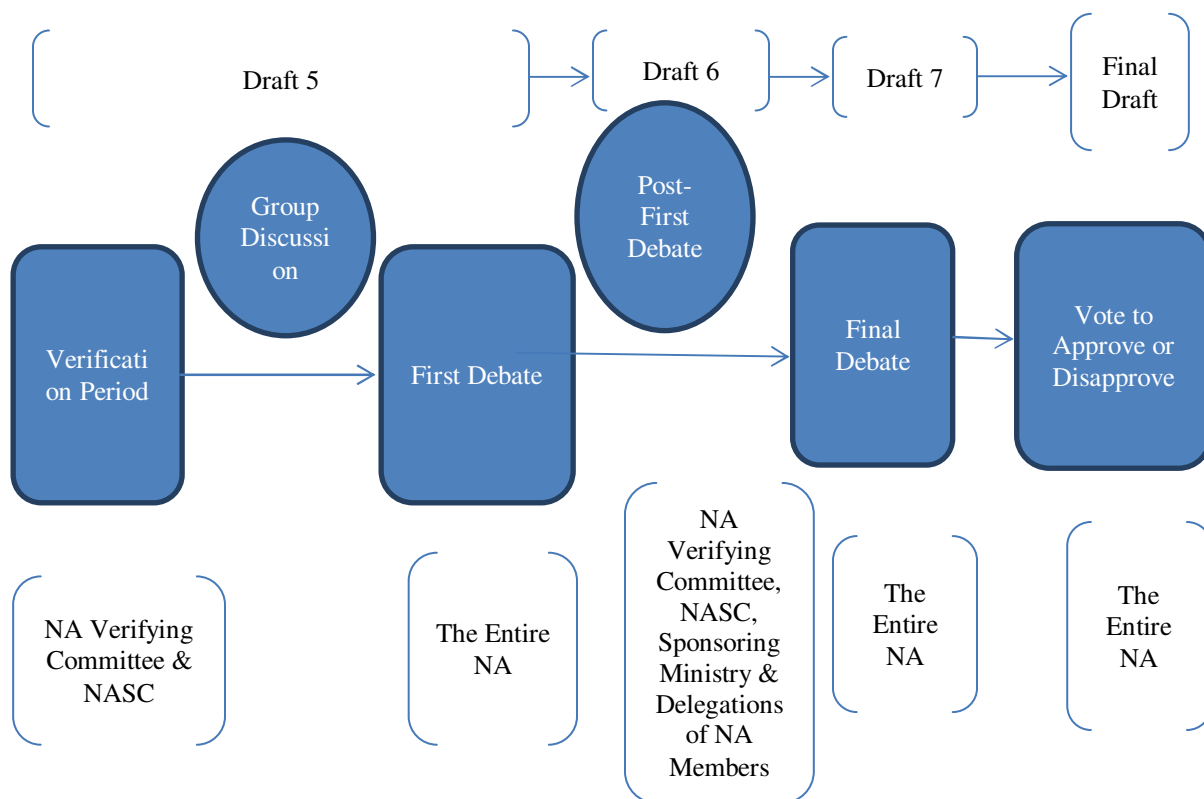
³⁹ Draft 1 is the draft that the DC initially completes and submits to the minister of the drafting ministry for his/her initial consideration and suggestions. Draft 2 is the draft that the DC uses for public consultation (after revising it according to the request of the minister of the drafting ministry and further improvement after that) and for soliciting comments or suggestions from relevant ministries and relevant state authorities. Draft 3 is the draft that the DC sends to MoJ for evaluation (after revising it according to the acceptance or rejection of opinions from the public and inter-ministerial consultation). Draft 4 is the draft that the DC submits to the Government for consideration and approval. See articles 27, 29 and 30 of Decree 24; articles 36 and 39 of the LoL of 2008.

⁴⁰ Article 30 of Decree 24.

draft law (Draft 5) and its relevant documents⁴¹ to the Standing Committee of the National Assembly (NASC) for “verification” (*tham tra*).⁴²

In the National Assembly stages, the draft law goes through many steps and procedures as shown in the following figure:

Figure 4. Steps in the National Assembly Stage



According to this figure, once receiving the draft law, NASC sends it to one of the NA’s specialized committees⁴³ already designated as the Verifying Committee.⁴⁴

⁴¹ According to article 42 of the LoL of 2008, relevant documents include (a) a Submission Report on the draft law; (b) an Elucidation Report reviewing each provision in the draft law; (c) an Impact Assessment Report (RIA) assessing potential impacts of the draft law; (d) MoJ’s Evaluation Report and a report summarizing opinions on the draft collected during the public consultation period; (e) a report reviewing law enforcement and assessing the actual situation of social relations concerning the principal contents of the draft law. These documents are provided to the Verifying Committee as well as to NASC and the NA, so that these bodies can have necessary information about the process of preparing and drafting the draft law.

⁴² According to article 41 of the LoL of 2008, this submission must take place at least 30 days prior to the date the NA opens its session.

Following that, the Verifying Committee prepares to verify the draft law.⁴⁵ The Verifying Committee examines whether the draft law meets the procedural as well as substantive requirements in the LoL, especially with respect to the following:⁴⁶ (1) its contents and issues on which opinions remain divergent; (2) its consistency with the CPV's doctrines and policies and legality;⁴⁷ and (3) its feasibility.⁴⁸ Also, during the verification period, NASC may consider and give its opinions on the draft law at least once.⁴⁹ If the Verifying Committee and NASC conclude that the draft law meets the requirements of the LoL, it may be submitted to the NA for the first debate.⁵⁰

At the first debate,⁵¹ the drafting ministry officially introduces the draft law (Draft 5) before the NA. Then, the Verifying Committee presents a verification report. A few days after that, the NA debates on the draft's principal contents (especially issues on which opinions remain divergent). Before this first debate, the draft may be discussed in groups of NA deputies.

In the recess between the two NA debates (i.e. the post-first debate period), NASC directs the drafting ministry and the NA's Verifying Committee to study

⁴³ It is worth noting that members of the NA's specialized committees are always NA members. They have certain assistance staff provided by the NA Office. However, the expertise of these staff and even of members of the NA's specialized committees is questionable.

⁴⁴ See article 41 of the LoL of 2008. In practice, the "verification" function provides a group of NA members and NASC with opportunities to recommend substantive changes to a draft law.

⁴⁵ According to article 41 of the LoL of 2008, the Verifying Committee must invite representatives of agencies assigned to participate in the verification to attend a verification meeting to present their opinions on the draft law from their own expertise and competence. The committee may invite representatives of concerned agencies and organizations, specialists, scientists and representatives of affected groups to attend meetings it organizes to present opinions on the draft law. It may request the drafting ministry to report on issues related to the draft law. It may also hold workshops and field surveys on the draft law, either on its own or together with the drafting ministry.

⁴⁶ Article 43 of the LoL of 2008.

⁴⁷ i.e. its consistency with the constitution and other laws.

⁴⁸ According to article 45 of the LoL of 2008, at the end of the verification process, the Verifying Committee must complete a verification report which (1) "clearly reflect[s] the viewpoint of the Verifying Committee on issues subject to verification prescribed in article 43 of this law and propose[s] contents that need to be amended and supplemented" and (2) "fully reflect[s] the opinions made by the members of the Verifying Committee and opinions given by other Committees participating in verification activities."

⁴⁹ Article 49 of the LoL of 2008.

⁵⁰ Before this step, the drafting ministry may revise the draft at the request of NASC. However, the drafting ministry may report to the Prime Minister. If the drafting ministry does not agree with the opinions of NASC, the drafting ministry may report to the NA (article 50 of the LoL of 2008).

⁵¹ Article 53 of the LoL of 2008.

contributed opinions and revise the draft.⁵² At this time, the draft law becomes Draft 6. This draft is sent to provincial delegations of NA deputies for further comments. These new comments will be incorporated into the draft law at the direction of NASC to become Draft 7, used for the final debate (or second debate) in the next NA session.

At the final debate, NASC presents a report highlighting major changes to Draft 7 (as compared with Draft 5 and Draft 6) and explaining such changes. Then, the NA discusses the draft's contents on which opinions remain divergent (the final debate). After that, NASC directs the drafting ministry and the Verifying Committee to study new opinions contributed by NA members at the final debate. The draft law is then revised and becomes the final draft used for voting.⁵³ A few days after the final debate, the NA votes to pass or reject the draft.⁵⁴

It might seem that the LoL has created a comprehensive framework to govern the process of producing laws and other LNDs in Vietnam by specifying the roles and missions of relevant participants⁵⁵ and the time frame for these participants to play their roles. In other words, the LoL is quite detailed in answering the important question “who does what when?” Unfortunately, it fails to answer another important question, “what level of quality?” and does not delineate who is responsible for shoddy outputs at each step of the law-making process. It also fails to separate the policy analysis period from the drafting period.⁵⁶ Further, it fails to provide a proper incentive mechanism to motivate

⁵² Article 53(2) of the LoL of 2008.

⁵³ According to article 53(3)(d) of the LoL of 2008, at least five days before the date of voting, the draft must be sent to the standing body of the Law Committee for review and perfection of drafting. The standing body of the Law Committee assumes the prime responsibility for, and coordinates with the Verifying Committee and the drafting ministry in, conducting a review to ensure the draft's constitutionality, legality and consistency with the legal system.

⁵⁴ However, it should not be assumed that all draft laws will smoothly pass all steps and become laws. A number of draft laws were killed at the Government deliberation step, or at the NA discussion stage. For example, the draft *Law on Referenda* (drafted by the Vietnam Lawyers' Association) was killed at the Government deliberation step. The Government explained that the draft law was not well-prepared and it was not the right time to submit it to the NA. Another example was the draft *Code on Execution of Judgment*. This draft code was approved by the Government but was killed by the NA because it was not well-prepared and because it did not create enough consensus among relevant agencies (i.e. MoJ, the Ministry of Public Security, the Supreme People's Court, and the Supreme People's Procuracy). See Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 292.

⁵⁵ Especially legal drafters, the drafting ministry, MoJ, the Government, NASC, the NA Committee and NA members.

⁵⁶ Perhaps the reason policy analysis is not regarded as a separate task before starting to draft a law in Vietnam, although the LoL has been twice revised in the last decade, is that authors of the LoL are not

participants to do their jobs better. Given these failings, it is not surprising that the current law-making process is still critiqued by Vietnamese legal scholars as being too slow, too rigid, having “so many steps”, and being “unnecessarily lengthy”.⁵⁷ The law-making process also fails to avoid producing “declaratory” or “skeletal” laws which need a large number of guiding LNDs to specify their true messages.⁵⁸ Furthermore, this law-making process also fails to prevent drafting ministries from advancing or privileging their own interests over other competing interests, including public interests.⁵⁹

5.2 PROPOSAL TO CONSTRUCT A CPL

In a one-party regime like Vietnam, drafting and adopting a law is seen as state action to promulgate the ruling party’s doctrines and policies.⁶⁰ A draft law which is not politically correct is not expected to be adopted.⁶¹ Therefore, the sources of legislative initiative come both from reality and from party philosophy and policies. The sponsoring ministry has to ensure that its legislative initiatives do not have any problems with the requirements in the CPV’s current doctrines and policies.⁶² This political constraint also applied to proposing the CPL.

Mainstream thinking in Vietnam has long been sceptical of consumer society. Personal consumption activities are sometimes seen as opportunities for hostile forces from outside Vietnam to aim at exporting “selfish”, “individualist” Western values in

determinative about who (among the important players such as the sponsoring ministry, the Government, the Politburo, NASC, or the NA) should assume the decisive role of policy-makers. This situation illustrates the lack of transparency and accountability in the current decision-making process in Vietnam.

⁵⁷ Nguyen Duy Quy & Nguyen Tat Vien, *supra* note 15 at 236-237.

⁵⁸ Nguyen Van Manh, *Theoretical and Practical Issues on Law Implementation (Mot so van de ly luan va thuc tien ve thuc hien phap luat)* (Hanoi: Political and Administrative Press, 2009) at 75.

⁵⁹ Nguyen Duy Quy & Nguyen Tat Vien, *supra* note 15 at 237.

⁶⁰ Hoang Thi Kim Que, “Principles, Role and Fundamental Orientations for Development of Socialist Vietnamese Laws” (“Ban chat, nguyen tac, vai tro va phuong huong phat trien co ban cua phap luat Vietnam xa hoi chu nghia”) in Hoang Thi Kim Que, ed., *The Textbook: General Theory on State and Law (Giao trinh ly luan chung ve nha nuoc va phap luat)* (Hanoi: Hanoi National University Press, 2007) 336 at 343.

⁶¹ Officially, according to the LoL of 2008 (articles 32(1)(d), 36(3)(b), and 43(3)), the DC is responsible for the draft law’s consistency with the CPV’s policy. MoJ (through its evaluation activities) and the NA’s Verifying Committee also have to examine the draft law’s consistency with the CPV’s policy.

⁶² The Chairperson of the DC is also a member of the CPV’s Central Committee.

order to undermine Vietnamese society.⁶³ Given this, the CPV's current policy does not provide a clear vision of the image of Vietnamese consumers that Vietnam is trying to portray or create, nor does it explain consumers' role in a socialist-oriented market economy.⁶⁴ This political obscurity did not help to deny the fact that Vietnamese consumers were increasingly encountering new problems and difficult experiences in the post-1986 market economy,⁶⁵ and that a revision of the current legal provisions on consumer protection was needed. VCAD was well aware of this need, at least since the time it was assigned the task in 2006⁶⁶ to draft a decree guiding the implementation of the CPO of 1999 to replace a former guiding decree.⁶⁷ In fact, VCAD (through the umbrella of the Ministry of Trade) proposed to the Government, and then to the NA that a CPL should be drafted. In a report in November 2007 submitted to the NA proposing the CPL be drafted and adopted during the 2007-2011 term of the 12th NA, VCAD (through the Ministry of Trade and the Government) offered an explanation for the need for a CPL to replace the CPO of 1999.⁶⁸ The language of this explanation was in standard format in order to sufficiently send a message on the need for a new law but to avoid offending the licensors or authors of the former ordinance. This explanation stated that the CPO had brought about positive impacts upon the socio-economic life of Vietnam, gradually set consumer protection activities in order, and prevented illegal behaviours,⁶⁹ although such

⁶³ Truong Tan Sang, "Enhancing the Effectiveness of the Fight against Peaceful Evolution" ("Nang cao hieu qua cuoc dau tranh chong dien bien hoa binh"), *Communist Review (Vietnam)* (29 November 2010), online: Tap chi Cong san <http://www.tapchicongsan.org.vn/details.asp?Object=5&news_ID=71057833>.

⁶⁴ See section 3.2.

⁶⁵ See section 1.1.

⁶⁶ Tin24h.com, "Consumers Remain Reluctant to Bring Complaints Relating to Quality of Products" ("Nguoi tieu dung van ngai khieu nai ve chat luong hang hoa") (14 December 2006), online: Tin24h <http://www.tin247.com/nguoi_tieu_dung_van_%E2%80%9Cngai%E2%80%9D_khieu_nai_ve_chat_luong_g_hang_hoa-3-21274816.html>; see also VnEconomy, "A Consumer Protection Law Will Be Drafted Soon" ("Se co Luat Bao ve nguoi tieu dung") (11 June 2007), online: VnEconomy <<http://vneconomy.vn/69165POC19/se-co-luat-bao-ve-nguoi-tieu-dung.htm>>.

⁶⁷ i.e. Decree 69.

⁶⁸ Appendix 1 of NASC's *Submission Report No. 71/TTr-UBTVQH12 dated 12 November 2007 on the Tentative Law and Ordinance Making Program of the 12th NA (2007-2011) (To trinh Quoc hoi so 71/TTr-UBTVQH12 ngay 12/11/2007 ve du kien chuong trinh xay dung Luat, Phap lenh cua Quoc hoi nhien ky khoa XII (2007-2011))* at 10-11, online: NA <http://www.na.gov.vn/htx/Vietnamese/C1396/C1745/C1764/default.asp?sAction=DETAIL_DOC&intTypeID=1&intSessionID=156&intSitID=10&intCurrPage=2&descript=Văn kiện chung#v5UzgoV1ADQa>.

⁶⁹ *Ibid.*

claims were not accompanied by any concrete scientific research reports. The explanation continued that, given the new national economic situation, the CPO had become unsuitable after eight years of implementation, and needed to be replaced by a CPL. The adoption of the CPL was promised to

[...] create favourable conditions for protection of consumers' rights and interests as well as protection of businesses' legitimate rights and interests in the market economy, meeting the requirements of international economic integration and enhancing efficiency in the *state management* of consumer protection.⁷⁰

VCAD's explanation clearly suggested that its proposal to construct a CPL was based on two premises: (1) the perceived existence of consumer problems in Vietnam's emerging market economy; and (2) the perceived failure of the current legal system in addressing them in a satisfactory manner. It might be argued that, by following this line of thinking, VCAD (and MoIT) officially began the process of problematizing Vietnamese consumers' actual experiences and the existing legal provisions on consumer protection, although whether such problematization was sufficiently concrete and comprehensive is a matter of debate.

VCAD's proposal to construct a CPL was officially acknowledged in NA *Resolution No. 11/2007/QH12 dated 21 November 2007*.⁷¹ Based on this resolution, in January 2008, the Prime Minister officially assigned MoIT as the drafting ministry in charge of drafting the CPL.⁷² The government stage of drafting the CPL had begun.

⁷⁰ *Ibid.* [translated by author, emphasis added].

⁷¹ According to article 22 of the LoL of 1996 (as amended in 2002), before the process of drafting a concrete draft law, a legislative initiative had to be approved in advance by the NA. Also according to article 22(2) of the LoL of 1996 (as amended in 2002), in addition to clearly explaining the necessity for adopting the proposed law, the sponsoring ministry had to "clearly state its intended targets and scope of regulation; its key positions and contents; its socio-economic potential impacts; the estimated resources for its enforcement; conditions for drafting the proposed law." However, in reality, these requirements are usually ignored. See Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 45.

⁷² *Decision No. 25/QĐ-TTg dated 7 January 2008 on assigning ministries in charge of formulating the drafts of laws and ordinances submitted by the Government in accordance with the Law-making Program of the 12th National Assembly and of the year 2008.*

5.3 THE GOVERNMENT STAGE OF DRAFTING THE CPL

5.3.1 Creating the DC

In March 2008, MoIT set up a DC in charge of the drafting process of the CPL. This DC consisted of 17 members.⁷³ They were representatives of key stakeholders,⁷⁴ including potentially affected ministries, representatives from the business community (VCCI),⁷⁵ and representatives from consumer protection associations (including Vinastas).⁷⁶ The minister and one vice-minister of MoIT acted as the chairperson and the permanent vice-chairperson of this committee respectively. Other members of the DC were representatives of VCAD (its director and one of its vice-directors), MoIT's Department of Legal Affairs (director), VCCI's Legal Bureau, Vinastas, MoJ, the Government Office, the Ministry of Finance, the Ministry of Science and Technology, the Ministry of Culture, Sports and Tourism, the Ministry of Information and Communication, the Ministry of Public Health, the Vietnam Lawyers' Association, and the University of Commerce (Hanoi). The DC also included a scholar⁷⁷ from the Institute of State and Law.⁷⁸

⁷³ For a list of members of the DC, see Appendix 3.

⁷⁴ The composition of a DC is stipulated by article 25(3) of the LoL of 1996 (as amended in 2002). Accordingly, this article states that “the DC consists of a Chairperson who is the head of the drafting Ministry [...] and other members who are representatives of relevant agencies and organizations, experts and scientists.”

⁷⁵ VCCI was originally established in 1963 primarily to represent the interests of state-owned enterprises trading with socialist bloc countries. However, in the early 1990s, it was reconfigured as “an independent, non-government organization” to represent state and private enterprises. However, it was not a non-governmental association in the sense commonly understood in Western countries. It was officially seen by the CPV as the “highest representative of the business community and the appropriate instrument for the party and state to gather and guide the business community for all economic sectors of the country in the cause of building the economy.” See John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam* (Farnham, UK: Ashgate, 2006) at 229-230 [Gillespie, *Transplanting Law Reform*].

⁷⁶ It is noteworthy that Vinastas is not totally similar to consumer associations as commonly understood in Western countries. It operates under the umbrella of Vietnam Fatherland Front placed under the CPV's leadership. See section 4.5.3.

⁷⁷ Nguyen Nhu Phat – Director of the Institute of State and Law.

⁷⁸ The composition of this DC was chosen to meet the requirements of the LoL of 1996 (as amended in 2002) and its guiding Decree 161 as well as the Prime Minister's *Decision No. 03/2007/QĐ-TTg dated 10 January 2007 on the regulation of organization and operation of the Drafting Committee*.

The DC also set up an EG consisting of 18 senior officials and experts⁷⁹ from VCAD, MoIT's Department of Market Control, MoIT's Department of Legal Affairs, and from other relevant ministries and organizations. Except for two members of the EG who were also members of the DC,⁸⁰ the EG had 16 other members. Therefore, in total, 33 officials and/or experts directly took part in drafting the CPL. VCAD was considered the agency (on behalf of MoIT) in charge of providing necessary resources for operation of the DC and the EG.

Unfortunately, there were no experts from the Supreme People's Court participating in either the EG or the DC, although it was invited to join.⁸¹ Perhaps, the Supreme People's Court did not see any significant impact of the CPL for the court system or perhaps consumer protection was simply not an item of its priority, given its widely-known overwhelming caseload. No experts from local governments were invited to participate in the EG or the DC, although expertise from local governments was expected to be solicited during the drafting process. Most legal experts joining the EG (especially representatives from VCAD) had received legal training at Hanoi Law University. Most of them were relatively novice legal drafters due to the fact that this was the first time they had directly taken part in drafting a statute. All members of the EG and the DC were considered experts and worked for the central government, the national consumer protection association (Vinastas) or the national business association (VCCI). However, it was quite clear that experts from the drafting ministry (especially VCAD) were dominant in the membership of the EG and the DC.⁸² As VCAD was then in charge of enforcing the *Competition Law* of 2004, a law incorporating certain elements of economic liberalism that was highly influenced by foreign competition laws,⁸³ perhaps

⁷⁹ See Appendix 4 for the detailed list of members of the EG.

⁸⁰ Bach Van Mung (VCAD's Director) and Ho Tat Thang (Vinastas' Vice-Chairperson).

⁸¹ I was informed of this fact in an online interview on 14 January 2011 with a legal drafter of the CPL.

⁸² Although officials from MoIT (including VCAD) accounted for only about 30% of DC members, they occupied all leading positions (Chairperson and Vice-Chairperson of the DC). Officials from MoIT accounted for 56% of EG members and they also occupied all leading positions in the DC.

⁸³ This law was drafted by the Ministry of Trade with technical assistance from UNDP and UNCTAD. It was drafted with reference to competition laws of more than 30 international jurisdictions. See Tran Anh Son (Deputy Director of VCAD), "The Progress of Drafting Competition Law", online: JFTC <<http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/TranAnh.pdf>>; see also Alice Pham, "The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration" (2005-2006) 26 Nw. J. Int'l L. & Bus. 547 at 551; William A.W. Neilson, "Competition Laws for Asian

legal drafters representing VCAD were not unfamiliar with ideas of importing foreign legal solutions (including elements of the “foreign” ideology of economic liberalism) to address Vietnam’s problems.

In addition, like all other DCs or EGs, the DC and the EG of the CPL operated on an *ad hoc* basis, with all legal drafters working part-time. No members of the DC or the EG could be said to be professional legislative drafters as understood in Western countries. For most of these legal drafters, this was a first-time experience and only a very few of them (perhaps three or four) had previously participated in a number of DCs or EGs concerning laws. The diverse composition of the DC and the EG reflected the well-established practice of trying to obtain consensus among affected ministries as well as relevant stakeholders during the process of drafting a law.

5.3.2 The Start-up Workshop

To initiate the drafting process, VCAD organized a workshop⁸⁴ in June 2008 to initially evaluate the existing legal provisions on consumer protection and to solicit experts’ opinions on orientations for drafting the CPL.⁸⁵ This workshop was financed by the STAR-Vietnam Project (USAID).⁸⁶ It was attended by experts from VCAD, MoIT, Vinastas, the Institute of Legal Sciences, the Institute of State and Law, and from a

Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (New York: Routledge, 2006) 291 at 303. Neilson notes that during the process of formulating the *Competition Law*, experts from the EU, Japan, the U.S, Canada and other countries provided policy and drafting advice in several Official Development Assistance (ODA) technical assistance programs to relevant ministries such as the Ministry of Trade, the Ministry of Justice, and the Ministry of Planning and Investment.

⁸⁴ This workshop was organized on 11 June 2008 in Hanoi.

⁸⁵ These activities were carried out to meet the requirements in the LoL of 1996 (as amended in 2002) (articles 26 and 28) that, before drafting a bill, the existing relevant legal provisions must be evaluated in order to find gaps and shortcomings and to justify the introduction of a new law.

⁸⁶ STAR-Vietnam supports implementation of the U.S.-Vietnam Bilateral Trade Agreement and accession to the WTO. It was the first major USAID-funded technical assistance contract in post-war Vietnam, commencing in September 2001. It contributes not only to liberalizing the trade and investment regime, but also supports systematic advances in the rule of law, good governance, and protection of property rights. See Steve Parker, “USAID-Funded STAR-Vietnam Project Technical Assistance for Improving IPR Protection in Vietnam” (2005), online: USVTC <http://www.usvtc.org/trade/ipr/STAR_IPR_28apr05.pdf>.

number of relevant ministries and the public press. Unfortunately, no representatives of VCCI attended this important workshop.

At this workshop, VCAD presented a timely report on the actual implementation of legal provisions on consumer protection and proposals on orientation for drafting the CPL (the “Summary Report”).⁸⁷ The authors (experts from VCAD) of the Summary Report quoted a famous saying of US president John Kennedy in his “Special Message to the Congress on Protecting the Consumer Interest” on 15 March 1962, that

[...] consumers [...] include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision [...] But they are the only important group in the economy [...] whose views are often not heard.⁸⁸

The authors seemed to be impliedly sending the message that Vietnamese consumers were vulnerable and were ignored by both the business community and the legal system. The authors of this report opined that “consumer protection also means to protect a business environment so that it is safe, truthful, and healthy.”⁸⁹ Accordingly, consumer protection was seen not simply as protecting consumers against shoddy products and services and improper business practices, but also as an instrument to maintain a healthy business environment. The authors also acknowledged many problems with the existing legal provisions regarding consumer protection, somewhat similar to what I presented in Chapter 4.⁹⁰ The report also admitted that

[...] the number of violations against consumers’ legitimate rights and interests [...] over time [...] increase in terms of both quantity and the seriousness [...]

⁸⁷ VCAD, *Report on Actual Implementation of Consumer Protection Laws and Orientation for Drafting the CPL (Bao cao tong ket cong tac thuc thi phap luat bao ve nguoi tieu dung va dinh huong xay dung Luat BVQLNTD)*, presented at the workshop “The Reality of Implementation of Consumer Protection Laws and Orientations for Drafting the CPL” held by VCAD and the STAR-Vietnam Project in Hanoi (11 June 2008) [VCAD, *Report on Implementation*].

⁸⁸ John F. Kennedy, online: University of California at Santa Barbara <<http://www.presidency.ucsb.edu/ws/index.php?pid=9108>>.

⁸⁹ VCAD, *Report on Implementation*, *supra* note 87 at 3.

⁹⁰ See section 4.6. Concretely, the report mentioned the following concrete weaknesses of the current consumer protection provisions: (1) lack of transparency; (2) vagueness or abstractness of legal rules; (3) lack of specific sanctions for concrete violations; and (4) ineffective coordination among relevant state authorities. However, it is not surprising that the report did not challenge the rationales and the legitimacy of the traditional model of state management. See VCAD, *ibid.* at 8.

while competent state authorities⁹¹ [...] do not have adequate necessary legal instruments to carry out their assigned tasks.⁹²

Based on these initial observations of the problems with consumer protection in Vietnam, the report proposed that the new CPL be drafted in accordance with the following four principles: (1) Focusing on raising the awareness of consumers and enhancing their self-protecting abilities (i.e. emphasizing consumer information, consumer education and consumer empowerment); (2) Ensuring a balance of interests among consumers and suppliers/businesses; (3) Improving the effectiveness of state authorities in consumer protection (i.e. better empowerment, better coordination mechanisms, and more devolution of consumer protection authority to local governments); (4) Enhancing the role of consumer protection associations in consumer protection.⁹³

Also in this workshop, a representative of Vinastas⁹⁴ presented its own assessment of the actual implementation of legal provisions on consumer protection and proposals for key contents of the CPL. Vinastas welcomed the decision to draft the CPL and proposed that the CPL should recycle a number of provisions in the CPO regarding consumer protection principles,⁹⁵ consumers' rights and obligations, traders' responsibilities, and state management, and should supplement the following matters:⁹⁶

- (1) Granting consumer protection associations the mandate to take legal actions to protect consumers without oral or written authorization from consumers;

⁹¹ Implying MoIT, VCAD and local governments.

⁹² VCAD, *Report on Implementation*, *supra* note 87 at 8 [translated by author].

⁹³ These four principles later resurfaced in the guiding objectives of the CPL. *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers' Rights and Interests* (submitted to NASC) stated that the CPL was drafted in accordance with the following three principles: (1) ensuring a balance between consumers and traders (consumers are regarded as a weak party in market relations); (2) socializing consumer protection activities (i.e. mobilizing social forces and market forces to participate in consumer protection activities); and (3) protecting consumer rights in harmony with protection of traders' legitimate rights.

⁹⁴ Ho Tat Thang – Vice Chairperson of Vinastas. Ho was a member of both the DC and the EG of the CPL.

⁹⁵ Such principles include “consumer protection is the responsibility of society as a whole”, which implies that Vinastas and its provincial consumer protection associations should have an important role in this regard.

⁹⁶ It is noteworthy that Vinastas and VCAD had been in close cooperation for the purpose of advancing consumer interests since VCAD assumed a consumer protection role in 2004. It should be further noted that many members of the executive board of Vinastas were formerly drafters of the CPO of 1999.

- (2) Simplifying and improving the legal mechanisms for handling consumer complaints; simplifying legal proceedings (civil procedure rules) to make it easier for consumers to file legal suits. In other words, Vinastas proposed that the CPL should enhance consumers' access to justice;
- (3) Supplementing concrete and strong state sanctions applicable to offending traders; and
- (4) Setting up the Consumer Protection Fund.

Given the fact that many members of Vinastas' executive board were formerly drafters of the CPO and its guiding legal documents (Decree 69 and Decree 55), it is not surprising that it urged MoIT to recycle various provisions of the CPO and its guiding Decree 55. In addition, as most members of Vinastas' executive board were formerly state officials,⁹⁷ it is also not surprising that Vinastas did not raise concerns with the current model of state management of consumer protection. It even urged MoIT to strengthen the function of state management by increasing the level of state sanctions (administrative fines) applicable to violations against consumer rights. However, Vinastas' proposal to allow Vinastas and its provincial consumer protection associations to file lawsuits without authorization from consumers and the proposal to set up the Consumer Protection Fund was totally new at that time. All of these proposals seemed to reflect Vinastas' intention to advance its presence in society as well as its difficulty in accessing necessary financial resources.

Also at this workshop, an expert from the Institute of Legal Sciences made a short presentation proposing that the new CPL should state that consumers were a group in need of "special protection." An expert from the Institute of State and Law⁹⁸ presented a brief report about foreign experiences in consumer protection.⁹⁹ The author of this report

⁹⁷ The phenomenon of associations in Vietnam – even business associations – being led by retired state officials is quite pervasive. Currently, Vietnam has about 350 business associations participated in by about 40% of businesses operating in the economy. Among the 350 chairpersons of these business associations, 58.6% of them are retired senior state officials or currently directors of state-owned enterprises. See Vu Xuan Tien, *Vietnamese Businesses and Entrepreneurs in the Market Economy (Doanh nghiep, doanh nhan Vietnam trong kinh te thi truong)* (Hanoi: Finance Press, 2009) at 8 and 21.

⁹⁸ Nguyen Nhu Phat – Director of the Institute of State and Law, and member of the DC of the CPL.

⁹⁹ This brief report referred to experiences in European countries (including France, England, Austria, Belgium, Denmark, Finland, Sweden, Greece, Luxembourg and Spain), the United States, China, and a number of ASEAN countries (such as Thailand, Indonesia and Malaysia).

did not propose a specific model for drafters of the CPL to follow but only emphasized that enacting a CPL was not unique to Vietnam and, in fact, many other countries had already enacted statutes to protect consumers and the approaches could be quite diverse. However, the presentation of foreign experiences at this workshop seemed to send a clear message that Vietnam should consult and learn from foreign experiences in designing and implementing its first CPL. However, the author of this report made no attempt to rank these foreign consumer protection regimes for suitability or adaptability to Vietnamese needs based on Vietnam's available resources as well as its legal culture.

At the end of the workshop, the proceedings were distributed among members of the EG and the DC, although no resolutions or consensus findings were made. However, this workshop can be regarded as an important milestone in which VCAD and relevant parties launched concrete efforts to formulate the CPL for Vietnam.

5.3.3 Activities Preparatory to Completing Draft 1

After the start-up workshop, VCAD accelerated its preparatory activities for drafting the CPL. A number of members of the EG were selected to conduct these activities. This was a group of officials, relative novices in law-making activities, with backgrounds mainly in law from VCAD, MoIT's Department of Legal Affairs, the Institute of State and Law and the Institute of Legal Sciences.

Guided by the LoL of 1996 and its own wisdom, VCAD determined that preparatory activities included the following five items: (1) translating foreign consumer laws; (2) conducting a comparative study of foreign consumer laws; (3) writing a report on the actual implementation of the CPO of 1999;¹⁰⁰ (4) reviewing the current consumer protection regime in Vietnam;¹⁰¹ and (5) conducting a social survey about actual

¹⁰⁰ To meet the requirement of article 26(1) of the LoL of 1996 (as amended in 2002).

¹⁰¹ To meet the requirement of article 26(1) of the LoL of 1996 (as amended in 2002). This article states that the DC "shall [...] review the current situation of law implementation; examine and evaluate existing LNDs relating to the draft law." The purpose of this requirement is, perhaps, to prevent the DC from drafting a bill with repeated or conflicting content. Although the LoL says nothing about when this activity should be carried out (whether before starting to draft the bill or later), it assumes that this activity should be completed before the draft law is sent to MoJ for evaluation, at the latest (i.e. before the completion of Draft 3). This activity was financed by the EU-Vietnam MUTRAP.

violations of consumer rights in Vietnam.¹⁰² From the list of these five items, it can be inferred that VCAD saw the drafting of the CPL as a process of identifying problems (i.e. problematic business practices as well as problematic laws) and designing suitable solutions to address them. It also seems to reveal VCAD's belief that foreign experiences could provide useful sources of information in designing legal solutions in the CPL.

The activities of translating foreign consumer laws and conducting a comparative study of foreign consumer laws were carried out¹⁰³ with the hope that foreign laws could provide information and inputs for legal drafters, most of whom admitted they lacked expertise in consumer protection. It was also hoped these activities would provide relatively novice legal drafters useful insights into how different jurisdictions had prepared and administered their own consumer protection laws.

Despite the fact that all of these preparatory activities were costly, the state budget was very limited and barely covered all of these activities.¹⁰⁴ This was, perhaps, one of VCAD's key motivations in inviting foreign donors to provide their assistance in the process of drafting the CPL. Responding to this invitation, foreign donors involved in the process of drafting the CPL included: the STAR-Vietnam Project (USAID), the EU-Vietnam Multilateral Trade Assistance Project (EU-Vietnam MUTRAP),¹⁰⁵ the Consumer Unity and Trust Society (CUTS) Hanoi Resource Centre,¹⁰⁶ and the Maison du Droit (House of Law) Vietnamo-Française in Hanoi.¹⁰⁷

¹⁰² To meet the requirement of article 26(1) of the LoL of 1996 (as amended in 2002). This article states that the DC shall conduct surveys and evaluate the actual situation of social relations expected to be governed by the draft law. The purpose of this requirement is, perhaps, to urge legal drafters to formulate a more evidence-based bill.

¹⁰³ Although these activities were not explicitly required in the LoL.

¹⁰⁴ The budget ceiling for drafting a law was about 110 million VND (equal to about \$7,000 USD at that time) as rigidly stipulated in the Ministry of Finance's *Circular No. 100/2006/TT-BTC dated 23 October 2006 guiding the management and employment of state budgets for activities relating to the formulation of LNDs*.

¹⁰⁵ This project is funded by the European Union to assist the Vietnamese government in implementing multilateral trade agreements to which Vietnam is a signatory. The office of this project is located near MoIT's headquarters as well as VCAD's headquarters. See EU-Vietnam MUTRAP, online: MUTRAP <<http://www.mutrap.org.vn/en/default.aspx>>.

¹⁰⁶ As explained on its official website, "CUTS Hanoi Resource Centre (CUTS HRC) is a member of the Consumer Unity and Trust Society (CUTS International), an international research, advocacy and networking group headquartered in India. CUTS HRC was officially launched in February 2008 with the objective to work as a catalyst in transferring objective knowledge and advocacy skills from India and elsewhere to the Greater Mekong Sub-region countries for the purpose of mainstreaming the civil society movement into the development process. Areas of priority for CUTS HRC's research and advocacy activities include: public policy reforms, sustainable development and poverty reduction, and

Thanks to the state budget from VCAD and financial assistance from CUTS Hanoi Resource Centre and Maison du Droit in Hanoi, the first three items on the list of activities¹⁰⁸ were completed within a very short time (from July to September 2008). However, it is worth noting that, except for the translation of France's *Consumer Code*, all of these three activities were conducted directly by VCAD's legal drafters.

The list of translated foreign legal documents on consumer protection included:¹⁰⁹ (1) Québec's *Consumer Protection Act*¹¹⁰ and its relevant guidelines; (2) *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*; (3) France's *Consumer Code*;¹¹¹ (4) the United Kingdom's *Consumer Protection Act* of 1987; (5) Taiwan's *Consumer Protection Act* and its guidelines; (6) China's *Law on Protection of the Rights and Interests of the Consumers* of 1993; (7) Malaysia's *Consumer Protection Act* of 1999; and (8) India's *Consumer Protection Act* of 1986 and its guidelines.

As for comparison of foreign consumer laws, a 116-page *Comparative Study Report*¹¹² was completed in September 2008 providing a rich source of information on

development of the civil society movement in the GMS." Currently, CUTS has a project with VCAD – "Strengthening the Competition Authorities in Vietnam", and a project with Vinastas – "Strengthening the Consumer Movement in Vietnam", online: CUTS HRC <<http://cuts-hrc.org/>>.

¹⁰⁷ Maison du Droit (Hanoi), as explained on its official website, is a joint project between the French and Vietnamese governments operating via a bilateral agreement. Its main function is to provide French legal information to Vietnamese policy-makers, providing study tours in France for Vietnamese legal officials and providing training assistance for law officials in Vietnam, online: Maison du Droit <<http://www.maisondudroit.org/Presentationvn.htm>>. This project began in 1993 and it provided important technical assistance in drafting the first *Civil Code* of Vietnam of 1995 and the *Commercial Law* of 1997. See Rose, *supra* note 19.

¹⁰⁸ i.e. (1) translating foreign consumer laws; (2) conducting a comparative study of foreign consumer laws; (3) writing a report reviewing the actual implementation of the CPO of 1999.

¹⁰⁹ It is noteworthy that all of these translated laws were sent to all members of the EG and the DC for their own study and reference.

¹¹⁰ The translators used the English version of this act, online: CANLII <<http://www.canlii.org/en/qc/laws/stat/rsq-c-p-40.1/15313/rsq-c-p-40.1.html#history>>. Extracts of this law in this dissertation are based on the English version found here.

¹¹¹ This code was translated directly from the French version with the assistance of the Maison du Droit (Hanoi) (according to an interview with one member of the EG on 5 August 2010).

¹¹² VCAD, *Comparative Study of Consumer Protection Laws of a Number of Foreign Jurisdictions – Lessons and Recommendations for Key Contents of the Draft Law on Consumer Protection of Vietnam (So sanh luat bao ve nguoi tieu dung mot so nuoc tren the gioi – bai hoc kinh nghiem va de xuat mot so noi dung co ban quy dinh trong Du thao Luat Bao ve nguoi tieu dung cua Vietnam)* (Hanoi: VCAD, 2008) [VCAD, *Comparative Study Report*].

the concept of consumer protection laws in a number of foreign jurisdictions¹¹³ such as the EU, France, the UK, Norway, Québec (Canada), India, Russia, Japan, South Korea, China, Taiwan, Hong Kong, Malaysia, Thailand and Singapore.¹¹⁴

It seems that the sample of foreign consumer protection laws selected for translation or for comparative study was not a coincidence. Most of these jurisdictions have historical connections with Vietnam or the Vietnamese legal system. It is noteworthy that the Vietnamese legal system was historically influenced by Chinese, French and Russian legal systems. Vietnam and China also currently share many similar socialist political features. Malaysia, Thailand and Singapore were perhaps selected because they each have a separate statute on consumer protection and all of them are members of the same important regional organization, ASEAN, of which Vietnam is a member.¹¹⁵ The EU and a number of other European countries were selected because they were known as having rich traditions of consumer protection. Information on the consumer protection law of India was available to VCAD's legal drafters thanks to a long relationship between VCAD and CUTS Hanoi.¹¹⁶ Québec was selected for having comprehensive consumer protection legislation and, perhaps, because Québec is a civil law jurisdiction in the French tradition. Japan, South Korea, and Taiwan were likely selected because they are economically developed Asian jurisdictions which, for certain time in the early Doi Moi era, provided inspiration for economic reform in Vietnam. In

¹¹³ However, it should be noted that this *Comparative Study Report* was conducted mainly by legal officials working for VCAD. The information available was basically the text of consumer protection laws in foreign countries which the authors of the report found on the internet. Therefore, this is information on “the law in books” rather than on “law in action”. In addition, without the assistance of foreign experts, the *Comparative Study Report* could not clarify the relationships among these foreign consumer laws from a legal transplantation perspective. For example, among 15 jurisdictions selected for comparison, some may have had a richer tradition of consumer protection and may have acted as models for others to imitate. The *Comparative Study Report* therefore focused on core similarities between consumer laws in foreign jurisdictions rather than on highlighting and explaining the differences. The *Comparative Study Report* also failed to provide a thicker description of each concrete foreign consumer protection law in relationship to other laws in the same legal system.

¹¹⁴ VCAD, *Comparative Study*, *supra* note 112 at 106-110.

¹¹⁵ Vietnam and other ASEAN members jointly set up an ASEAN Coordinating Committee on Consumer Protection in 2007. See MoIT, *Report No. 27/BC-BCT dated 18 March 2010 on actual implementation of the Ordinance on Protection of Consumers' Rights and Interests (Bao cao so 27/BC-BCT ngay 18/3/2010) Tong ket cong tac thi Phap lenh bao ve quyen loi nguoi tieu dung* at 10 [MoIT, *Report No. 27*]; see also ASEAN consumer protection, online: ASEAN SEC <<http://www.aseansec.org/23104.htm>>.

¹¹⁶ VCAD and CUTS Hanoi have cooperated since at least 2006. See information on VCAD's website, online: QLCT <<http://www.qlct.gov.vn/Web/Zone.aspx?zoneid=237&lang=vi-VN>>.

addition, the fact that VCAD had also accumulated certain knowledge about the laws of South Korea and Japan through its numerous cooperative activities with the Korean Fair Trade Commission¹¹⁷ and the Japan Fair Trade Commission (through Japan International Cooperation Agency – JICA)¹¹⁸ is a possible explanation for the inclusion of Korean and Japanese laws for comparative study.¹¹⁹

The *Comparative Study Report*¹²⁰ found that consumer protection laws in foreign countries usually focused on the following issues: (1) the definition of “consumer”; (2) consumers’ basic rights; (3) unfair commercial practices; (4) unfair terms in consumer contracts and specific consumer contracts such as door-to-door sales and distance sales contracts (in which cooling-off periods are stipulated); (5) product liability; (6) mechanisms to handle consumer complaints or to resolve disputes between consumers and merchants; (7) legal remedies for violations of consumer protection laws; (8) consumer protection associations; and (9) the availability of special consumer protection agencies or consumer tribunals or small claims courts.¹²¹ Based on these findings, the authors of the report¹²² recommended that the new CPL should have provisions to regulate similar issues in order to enhance consumer protection in Vietnam.¹²³

¹¹⁷ A number of cooperation activities between VCAD and the South Korean Fair Trade Commission were also reported by the public media in Vietnam. See, for example, Vietbao, “FDI in Vietnam Increases Due to the Competition Law?” (“FDI vào Vietnam mạnh hơn nhờ Luật cạnh tranh”) (24 March 2007), online: Vietbao < <http://vietbao.vn/Kinh-te/FDI-vao-Viet-Nam-manh-hon-nho-Luat-can-h-tranh/65086497/87/>>.

¹¹⁸ VCAD and JICA have cooperated since at least 2005. See information on VCAD’s website, online: Quan ly canh tranh <<http://www.qlct.gov.vn/Web/Zone.aspx?zoneid=238&lang=vi-VN>>.

¹¹⁹ MoIT, *Report No. 27*, *supra* note 115.

¹²⁰ This *Comparative Study Report* was widely shared among members of the EG and the DC. The summary of this report was also provided to all NA members. It was also publicly posted on the internet.

¹²¹ These core consumer protection issues were based on the following foreign consumer protection laws: Thailand’s *Consumer Protection Law* of 1979, Singapore’s *Consumer Protection Act* of 2003, Japan’s *Consumer Protection Fundamental Act* of 2006, Hong Kong’s *Consumer Council Ordinance* of 1977, India’s *Consumer Protection Act* of 1986, South Korea’s *Framework Act on Consumers* of 2006, Québec’s *Consumer Protection Act*, China’s *Law on Protection of Consumers’ Rights and Interests* of 1993, Malaysia’s *Consumer Protection Act* of 1999, Taiwan’s *Consumer Protection Law* of 1994 (as amended in 2003), the United Kingdom’s *Consumer Protection Act* of 1987, *EU Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees*, and France’s *Consumer Code*. See VCAD, *Comparative Study Report*, *supra* note 112 at 106-110.

¹²² These authors were not the persons directly creating the initial draft of the CPL (completed on 23 September 2008).

¹²³ It is worth noting here that

[...] the regulation of consumer protection in Asia might be considered less developed either in the EU or the United States. Asian countries generally take an EU-type approach to consumer protection,

However, the two remaining activities, i.e. reviewing and evaluating the whole legal system of consumer protection in Vietnam (item 4)¹²⁴ and conducting a social survey of the actual violations of consumer rights in Vietnam (item 5) were begun somewhat later due to a shortage of financial resources. Finally, legal experts from the Institute of Legal Sciences and a number of relevant authorities were invited to conduct these two important activities together with VCAD's legal drafters. The rationales for selecting the Institute of Legal Sciences were based on the fact that this institute had completed comprehensive research about consumer laws in Vietnam just a few months previously.¹²⁵ In addition, the institute was also quite well-known for their experience in doing social surveys of law implementation in Vietnam.

Because the state budget was too limited to cover a costly social survey, VCAD looked to foreign donors to provide funds for this activity. Finally, EU-Vietnam MUTRAP agreed to give a small donation towards these two important activities.

Within their limited budget, experts and officials from the Institute of Legal Sciences and VCAD jointly conducted the social survey, doing fieldwork in the three biggest cities in Vietnam (Hanoi, Da Nang and Ho Chi Minh City) and in three rural provinces.¹²⁶ The key targeted subjects that were surveyed included: (1) market control officials; (2) public health officials; (3) food safety officials; (4) management of standards and measurement officials; and (5) provincial consumer protection

providing greater state involvement, rather than the U.S. approach of relying more on industry self-regulation and consumer education. Furthermore, consumer protection laws in Asia often grew out of pragmatic considerations made in light of globalization and trade rather than human rights tradition and ideology. Although some Asia-Pacific countries, such as [...] Japan, and Korea, have highly developed consumer protection regimes, most countries do not yet have as comprehensive a system of consumer protection and privacy regulation as the United States and the EU, although this is changing.

See August Horvath & John Villafranco, eds., *Consumer Protection Law Developments* (Chicago: A.B.A. Antitrust Law Section, 2009) at 729.

¹²⁴ This activity was conducted to meet the requirement of the LoL of 1996 (as amended in 2002) and its guiding Decree 161. Article 26(1) of the LoL of 1996 (as amended in 2002) states that the DC "shall [...] review the current situation of law implementation; examine and evaluate existing LNDs relating to the draft law."

¹²⁵ MoJ – Institute of Legal Sciences, *Phap luat bao ve nguoi tieu dung Vietnam – Thuc trang va huong hoan thien (Legal Provisions on Consumer Protection in Vietnam – The Actual Situation and Orientations for Improvement)* (Hanoi: Law Science Information Bulletin, January 2008).

¹²⁶ One in the north (Phu Tho Province), one in central Vietnam (Thanh Hoa Province) and one in the south of Vietnam (Kien Giang Province).

associations. Unfortunately, actual market surveys involving supermarkets, commercial centres, and local markets were not carried out and, most significantly, there was no representative sampling of consumers, apparently due to a lack of time and funding.

The survey was conducted extensively within about two weeks (from 20 October to 3 November 2008). At the end of 2008, a final 30-page Survey Report (SR)¹²⁷ was finished. A portion of the SR concentrated on six typical patterns of violations of consumer rights: (1) infringements regarding quality of goods and services; (2) infringements associated with counterfeited goods; (3) infringements relating to measurement and weight; (4) infringements relating to advertisement and information; (5) infringements relating to labelling; and (6) infringements relating to warranty. Although this report provided important sources of information on consumer problems and on the challenges of implementing consumer protection law, this SR was not problem-free. Given the sample of informants, it was very likely that the voices represented in the SR mainly came from state authorities (regulators) reflecting state management perspectives rather than actual voices of victimized consumers or other market players. In addition, the SR had its own problems in terms of the depth of analysis as well as its coverage. For example, in terms of the depth of analysis, it was quite evident that, perhaps due to the limited resources, the SR did not even mention any reasons for the pervasive presence of unfair commercial practices in Vietnamese markets. Perhaps the SR needed go a step further by testing whether such unfair commercial practices were the results of problems in the market structure (such as absence of effective competition) or whether they were the results of shortcomings in the business culture in Vietnam, e.g. whether such unfair commercial practices had any relevance to the lack of transparency in market transactions. These shortcomings can probably be attributed to the lack of time, resources, and perhaps also to the lack of expertise and proper survey methodologies among members of the survey team (most of whom had only a legal background; almost none of them had a background in economics or sociology).

¹²⁷ Le Hong Hanh, *et al.*, *Report on Actual Violations against Consumer Rights and Current Situation of Consumer Protection in Vietnam (Bao cao thuc trang xam pham quyen loi nguoi tieu dung va thuc tien bao ve nguoi tieu dung o Vietnam)* (Hanoi: The DC of the CPL, 2009) ["Survey Report" or "SR"].

As for the coverage of the SR, it is also quite easy to see that the SR failed to mention many real consumer problems in the Vietnamese economy. For example, it did not acknowledge any problems relating to the practice of door-to-door sales contracts, distance sales contracts, or the sale of used goods (e.g. used motors and used cars) in Vietnam. It also failed to document the practice of using standard consumer contracts, although this topic was later extensively covered by the public media.¹²⁸ The SR also failed to identify consumer problems associated with the contents of written warranties.¹²⁹ In addition, the SR failed to mention the actual handling of consumer complaints by businesses. Therefore, the drafting of the CPL was not based on any sound research reports about how internal consumer complaint resolution systems were organized and run in reality.

The simple comparison of foreign consumer laws and foreign consumer protection agencies and the local expertise of the members of the EG helped to create an initial draft of the CPL, completed on 23 September 2008.¹³⁰ This very first draft consisted of 81 articles divided into 10 chapters.¹³¹ Most of the key policy issues such as definition of “consumer”, unfair commercial practices, consumer contracts,¹³² consumers’ access to justice,¹³³ and state management of consumer protection were

¹²⁸ VietnamNet, “Written Contracts: Is It Wise or Unwise to Enter into Them?” (“Hop dong in san: khon ban – dai mua”) (6 May 2010), online: VietnamNet <<http://www.vietnamnet.vn/bvkh/201005/Hop-dong-in-san-Khon-ban-Dai-mua-908149/>>.

¹²⁹ During my fieldwork in the summer of 2010 in Hanoi, I collected the warranty documents of more than 20 producers of home appliances such as air-conditioners and electronic devices. It is quite easy to see that many conditions stated in the warranty documents are very unfavourable to consumers, e.g. the warranty document must be filled out by consumers (with their name, description of products bought, etc.) and sent to the producer’s service centre in order to be entitled to warranty performance.

¹³⁰ This initial draft was later revised and turned into Draft 1 by the DC in early 2009.

¹³¹ Chapter 1 “General Provisions” (articles 1 to 8); Chapter 2 “Consumer Rights and Responsibilities of Organizations and/or Individuals Conducting Business in Goods and/or Services” (articles 9 to 24); Chapter 3 “Unfair Commercial Practices towards Consumers” (articles 25 to 32); Chapter 4 “Consumer Contracts” (articles 33 to 46); Chapter 5 “Product Liability” (articles 47 to 55); Chapter 6 “Resolution of Consumer Complaints, Denunciations and Disputes” (articles 56 to 65); Chapter 7 “State Management of Consumer Protection” (articles 66 to 69); Chapter 8 “Consumer Protection Organizations” (articles 70 to 74); Chapter 9 “Dealing with Violations of Consumer Laws” (articles 75 to 79); Chapter 10 “Implementation Articles” (articles 80 to 81).

¹³² This draft contained provisions on issues relating to unfairness of contractual terms, control of standard contracts, and specific consumer transactions such as door-to-door sales and distance sales contracts.

¹³³ Article 65 of this initial draft expressly acknowledged consumer protection associations’ rights to file civil lawsuits against offending traders without authorization from consumers.

mentioned in this draft.¹³⁴ Most of these provisions were inspired by foreign consumer laws¹³⁵ although provisions on state management of consumer protection were basically the product of recycling the existing legal rules in the CPO and its guiding decree (Decree 55). However, it is worth noting that the initial draft had one separate chapter on specific administrative sanctions applied to violations of the CPL¹³⁶ which supplemented two new administrative sanctions, namely, confiscation of profits gained by offending traders, and public disclosure of offenses and names of offending traders.¹³⁷ Unfortunately, provisions on simplified civil procedure were not included in this draft.

It can be seen that the approach of the EG and the DC in designing the CPL after the completion of a number of preparatory steps had substantially changed in comparison with the initial suggestions expressed in VCAD's Summary Report at its start-up workshop on 11 June 2008. Actually, by the end of September 2008, there was broad consensus among members of the EG (especially VCAD's officials) and the DC that the CPL should be drafted to regard consumers as weak parties in asymmetric market relations and to equip them with special protection measures. In addition, there was also broad consensus among legal drafters (especially VCAD's officials) that the CPL should contain provisions on unfair commercial practices, consumer contracts, consumer protection associations and state management of consumer protection.

It is also noteworthy that the initial draft was completed before the survey on offenses against consumers was conducted. In reality, the survey was begun only about a month after the initial draft of the CPL was already completed and its result report (the SR) was completed even later. The SR did not seem to have any significant influence upon the process of drafting the CPL except for providing further evidence to strengthen what was already proposed in the initial draft. This was why the initial draft was kept almost unchanged in Draft 1 of the CPL, finished in early 2009. In other words, it seems that the importance of conducting social surveys about the actual situation of Vietnam

¹³⁴ Of this draft, provisions in Chapters 3 to 5 were substantially new to the legal system of Vietnam.

¹³⁵ See sections 6.2 & 6.3 for detailed identification of foreign origins of each provision in the adopted CPL.

¹³⁶ Chapter 9 (articles 75 to 79).

¹³⁷ Article 77 of the initial draft. These provisions survived from Draft 1 to Draft 5 of the CPL.

was not properly appreciated by the drafting ministry.¹³⁸ Perhaps the reason for conducting this survey was to meet the requirements of the LoL rather than to provide critical inputs for drafting a new law.¹³⁹

Together with the above-mentioned preparatory activities, the DC also organized a study tour in November 2008 in France to solicit more legal experience lessons.¹⁴⁰ Among legal drafters at that time, France was the top destination priority (within the constraints of the budget for study tours in foreign countries) for two key reasons: (1) France had one of the largest and most comprehensive consumer statutes (i.e. the *Consumer Code*) in the world; and (2) France was a civil law country that had influenced the legal history of Vietnam.¹⁴¹ The study tour in France was held from 24-28 November 2008. All three members of this study tour were key members of the EG and the DC. The study tour members were impressed by the way consumer protection activities were carried out in France, especially by the role of consumer protection associations and the role of relevant state authorities in consumer protection. The study tour members also became familiar with the extent to which the Government gave financial support to the activities of consumer protection associations. All of this information further strengthened the legal drafters' belief in the necessity of creating some new provisions in the initial draft of the CPL (1) to empower the consumer protection authority to supervise the fairness of consumer standard contracts; and (2) to ensure that the government provide some financial assistance to consumer protection associations.

In early 2009, Draft 1 was finished and submitted to the Minister of Industry and Trade for initial comments. Because this was only Draft 1, for stakeholders in the EG as well as the DC, there was still plenty of time to propose new contents, attacking as well as defending new initiatives in the draft. As the findings of the French study tour report

¹³⁸ This is an example of deviations from the Seidmans' legislative theory that will be analyzed in Chapter 7 (section 7.3).

¹³⁹ There are no reported instances of the implementation of the LoL in which a draft law was returned or rejected due to a poor social survey.

¹⁴⁰ In reality, VCAD also organized a study tour group in China. However, this study tour was organized much later, i.e. in July 2009.

¹⁴¹ At that time, many members of the EG held the mistaken view that the Vietnamese legal system belonged to the civil law family.

and of the SR did not raise any serious new challenges to what had already been included in the initial draft, Draft 1 was not substantially different from the initial draft.¹⁴²

5.3.4 Public Consultation

Draft 2 was an important draft because it was expected to be used for official public consultation.¹⁴³ Because of this significance, stakeholders had more incentive to urge that the revision of the draft reflect their own viewpoints. During the process of revising Draft 1 and transforming it into Draft 2, Vinastas kept urging the DC to add a number of provisions providing legal foundations for the Consumer Protection Fund. Reflecting this recommendation, Draft 2 added four articles on the Consumer Protection Fund (articles 57 to 60).¹⁴⁴ According to these articles, the Consumer Protection Fund is a not-for-profit organization. Its main function is to provide financial assistance for consumer protection activities. Its money is made through public donations and government subsidies. However, Vinastas' representative and MoIT's legal drafters disagreed about the organization which should oversee this fund. Vinastas proposed that this fund should be placed under its management, while a number of MoIT's legal drafters argued that the fund should be placed under MoIT's management. Draft 2 reflected MoIT's position.

The representatives from VCCI and also from MoJ openly criticized Draft 1's provisions on door-to-door sales contracts and distance sales contracts. The provisions on the "cooling off period" that applied to door-to-door sales and distance sales, in which

¹⁴² Draft 1 also had 10 chapters with titles similar to those in the initial draft.

¹⁴³ Article 35(1) of the LoL of 2008.

¹⁴⁴ Vietnam has already had one precedent to set up a similar fund, i.e. the Vietnam Environmental Protection Fund, which was set up in 2002 in accordance with the Prime Minister's *Decision No. 82/2002/QĐ-TTg dated 26 June 2002 on the establishment, organization, and operations of the Vietnam Environmental Protection Fund*. The initial capital of this fund was 200 billion VND (equal to about \$13 million USD at the time of establishment). In 2008, the Prime Minister increased this capital to 500 billion VND (equal to about \$30 million USD at that time) in accordance with *Decision No. 35/2008/QĐ-TTg dated 3 March 2008 on the organization and the operation of the Vietnam Environmental Protection Fund*. The *Law on Environmental Protection* of 2005 (article 115) even stipulates that environmental protection funds can be set up in provinces (via decisions of provincial People's Committees) or economic sectors (via decisions of ministries in charge of these economic sectors).

consumers could return goods within seven days after purchase without explanation,¹⁴⁵ were seen as too favourable to consumers and not suitable given the current economic conditions in Vietnam. Vinastas's representative and VCAD's legal drafters failed to effectively defend the attacked provisions. The DC ended up with a decision that all provisions on door-to-door sales and distance sales were removed from Draft 2. The idea of freedom of contract in the *Civil Code*¹⁴⁶ was respected, except for some new provisions in the draft CPL on standard (consumer) contracts.

Draft 2 was also completed as the EG and the DC were becoming better informed about foreign consumer laws regarding mechanisms for resolving disputes between consumers and merchants. The EG and the DC decided to redesign the mechanisms for resolving these kinds of disputes. As a result, the chapter on resolving disputes between consumers and merchants underwent a substantial change, perhaps, with the intention to enhance consumers' access to justice. Accordingly, while Draft 1 had only nine articles¹⁴⁷ providing mechanisms for handling consumer complaints and resolving disputes between consumers and traders (equal to 12.16% of the total number of articles in Draft 1), the number of articles on these matters swelled to 33 articles¹⁴⁸ in Draft 2 (equal to 46.48% of the total number of articles in Draft 2). All conventional forms of resolving disputes between consumers and traders such as negotiation, mediation, arbitration and litigation were stipulated in this draft. Particularly, Draft 2 contained some provisions about

¹⁴⁵ Articles 40 and 42 of Draft 1.

¹⁴⁶ Actually, Vietnam's *Civil Code* of 2005 did not use the term "freedom of contract". Many scholars in Vietnam criticized this code for not explicitly stipulating the principle of freedom of contract. See, for example, Nguyen Ngoc Khanh, *Contract Rules in the Vietnamese Civil Code (Che dinh hop dong trong Bo luat dan su Vietnam)* (Hanoi: Judicial Press, 2007) at 111; see also Nguyen Quoc Vinh, "Freedom of Contract: A Leading Principle in Contract Law of Economically Developed Countries and Its Absence in Contract Law of Vietnam" (Ph.D. Dissertation, Meiji Gakuin University, Tokyo, Japan, 2006) [unpublished]. However, the *Civil Code* of 2005 has many provisions which could be regarded as expressing concepts substantially similar to freedom of contract. For example, article 4 of the code explicitly stipulates that "The right to freely undertake or agree on the establishment of civil rights and obligations shall be guaranteed by law, if such undertaking or agreement is not banned by law and/or not contrary to social ethics. In civil relations, the parties shall act entirely voluntarily and neither party may impose, prohibit, coerce, threaten or hinder the other party. Lawful undertakings or agreements shall be binding on the parties and must be respected by individuals, legal persons and other subjects." According to these provisions, private parties can freely formulate their agreements, which are not banned by the law. These agreements are binding upon contracting parties. The state and its bodies also have to protect and respect these agreements.

¹⁴⁷ Articles 50 to 58 of Draft 1.

¹⁴⁸ Articles 21 to 53 of Draft 2.

“simplified civil procedures” (*thu tuc don gian/thu tuc rut gon*) modelled after summary court procedures in a number of foreign countries.¹⁴⁹ Draft 2 also contained some provisions on resolution of disputes between consumers and traders by district administrative authorities (i.e. district People’s Committees) and by provincial Departments of Industry and Trade.¹⁵⁰ With this substantial change, the EG and the DC expressed their determination to make a significant improvement in the current situation of consumers’ access to justice in Vietnam. It was also hoped this movement would make consumers, consumer protection associations and the judicial system more active in consumer protection. The EG and the DC explained that Vietnamese consumers were not proactive in bringing lawsuits to challenge offending traders due to the fact that Vietnamese consumers exercised cost/benefit analyses and found that the complicated judicial proceedings available were not cost-effective and not favourable to consumers.¹⁵¹ However, this argument did not seem to be based on any actual survey in Vietnam.¹⁵²

¹⁴⁹ See section 6.4 for detailed discussion.

¹⁵⁰ Articles 36 to 42. This draft envisioned that consumer complaints with a value of less than 100 million VND (equal to \$5,000 USD) could be submitted to these administrative authorities for resolution and that the authorities would issue decisions resolving these complaints within 25 days from their date of reception. Such decisions would determine whether accused traders violated the consumer protection law and, if so, what sanctions would be applied (such as removing unfair terms from contracts with consumers, restitution, or specific performance). Critics of these provisions argued that Draft 2 turned administrative authorities into a new kind of court. See section 5.3.5. It is worth noting that article 19(1) of Decree 55 (2008) only allows provincial Departments of Industry and Trade to provide mediation services to victimized consumers.

¹⁵¹ VietnamNet, “Vietnamese Consumers: Consumers’ Money [...] but Producers’ Rights” (“Tieu dung Viet: Tien cua chung ta, quyen cua [...] chung no”) (15 March 2010), online: VietnamNet <<http://vietnamnet.vn/bvkh/201003/15/3-Tien-cua-chung-ta-quyen-cua-chung-no-898809/>>.

¹⁵² The level of court usage in Vietnam remains a debatable topic among foreign scholars on Vietnam. However, the conclusion shared among foreign scholars is that the level of court usage in Vietnam is low. This low court usage is usually attributed to the public’s low confidence in fairness and competence of the court system. See Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Leiden: Martinus Nijhoff, 2007) at 269-272. However, Nguyen Hung Quang & Kerstin Steiner referred to legacy of Confucianism in the agricultural society of Vietnam. They noted that, in Vietnam, “in cases of dispute, recourse to alternative dispute resolution mechanisms is preferred. These mechanisms include amicable settlements [...] conciliation [...] lynch law or self-justice, or approaching senior officers in the administrative system. Courts are seen as the last resort.” See Nguyen Hung Quang & Kerstin Steiner, “Ideology and Professionalism: The Resurgence of the Vietnamese Bar” in John Gillespie & Pip Nicholson, eds., *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: Asia Pacific Press, 2005) 191 at 197-198. Many Vietnamese legal scholars take for granted that Vietnam is a non-litigious society. See Bui Thi Bich Lien, “Legal Education and the Legal Profession in Contemporary Vietnam: Tradition and Modification” in John Gillespie & Albert H. Y. Chen, eds., *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge, 2010) 299 at 313.

As a consequence, Draft 2 was also quite different from Draft 1 in terms of both structure and specific provisions.¹⁵³ The contents of Draft 2 truly reflected the intention of the DC that

[...] the CPL only focuses on stipulating provisions not found in the existing laws to protect consumers from being abused due to their weak positions in market relations [...] at the same time the CPL concentrates on designing mechanisms to enhance consumers' self-help activities.¹⁵⁴

In other words, the CPL provisions were designed to supplement the existing legal provisions on consumer protections instead of amending or substituting them. Certainly, this approach creates the possibility of further overlap and conflicts in the consumer protection system, diminishing its promised benefits to consumers.

In contrast to earlier drafting experiences,¹⁵⁵ the public consultation process for the CPL was quite extensive.¹⁵⁶ Following the requirements of the LoL of 2008,¹⁵⁷ on 2

¹⁵³ Draft 2 had 71 articles divided into nine chapters as follows: Chapter 1 “General Provisions” (articles 1 to 5); Chapter 2 “Consumer Protection Prior to Transactions with Merchants” (articles 6 to 9); Chapter 3 “Consumer Protection During Transactions with Merchants” (articles 10 to 14); Chapter 4 “Consumer Protection during the Use of Goods and/or Services” (articles 15 to 20); Chapter 5 “Resolution of Disputes between Consumers and Merchants” (articles 21 to 53); Chapter 6 “State Management of Consumer Protection” (articles 54 to 60); Chapter 7 “Consumer Protection Organizations” (articles 61 to 65); Chapter 8 “Dealing with Violations of Consumer Laws” (articles 66 to 69); and Chapter 9 “Implementation Articles” (articles 70 to 71).

¹⁵⁴ Nguyen Van Thanh, “Necessary Contents in the *Law on Protection of Consumers' Rights and Interests*” (“Cac noi dung can co trong Luat bao ve quyen loi nguoi tieu dung”) (Paper presented at the workshop entitled “Consumer Protection Law in Vietnam – Reality and Orientation for Improvement” held by Hanoi Law University, Hanoi (10 September 2010). Nguyen Van Thanh is a legal expert working for VCAD and one of the drafters of the CPL.

¹⁵⁵ Before the LoL of 2008 took effect on 1 January 2009, the drafting ministry had a right rather than an obligation to conduct public consultations. As a result, many draft LNDs were adopted without public consultation. Draft laws could even be classified as “secret”. In addition, public consultation, if any, was usually conducted at a very late stage (e.g. once the Government had already given comments and approved the draft law to submit to the NA). Public consultation was, therefore, widely critiqued by Vietnamese legal scholars as meaningless. See Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 72.

¹⁵⁶ However, it is noteworthy that public consultation, as stipulated in the LoL, has to be carried out only once the draft law has reached the Draft 2 stage. This is different from common practices in Western parliamentary systems in which public consultation may be carried out before a law is drafted (i.e. during the policy development period), during the drafting process (as suggested in the request for legislation), and during the parliamentary stage (through parliamentary committees' public hearings). See for example, Office of Legislative Counsel – Ministry of Attorney General (British Columbia, Canada), *supra* note 23.

¹⁵⁷ According to article 35(1) of the LoL of 2008, “in the process of drafting the draft law [...] the drafting Ministry [...] shall collect comments from concerned agencies/organizations and the direct objects of the draft law; [...] posting the full texts of the draft law [...] on the websites of the Government and the drafting Ministry [...] within a minimum of 60 days for agencies/organizations and individuals to provide comments on.” Article 35(2) of the LoL of 2008 also stipulates that “comments may be collected directly from the

June 2009, VCAD sent an official dispatch to all press organizations in Vietnam asking for the dissemination of the draft CPL (Draft 2) and soliciting opinions from the public to improve the draft. On 3 June 2009, VCAD published the draft CPL on its website and invited the public to send comments or suggestions for improving the draft.¹⁵⁸

In addition, VCAD also coordinated with other stakeholders to organize conferences to collect opinions or comments on the draft CPL. At a minimum, the following conferences were held over the course of the public consultation process:

- Vinastas organized two workshops to collect public opinions on the draft CPL (with the financial assistance of EU-Vietnam MUTRAP), one on 31 July 2009 in Da Nang¹⁵⁹ and the other on 18 August 2009 in Hanoi.¹⁶⁰
- VCCI and VCAD jointly organized two open workshops purposely designed to solicit opinions from the business communities in the north (Hanoi) and the south (Ho Chi Minh City) of Vietnam. One conference was held on 12 August 2009 at the head office of VCCI in Hanoi. This conference was organized with assistance from JICA (Japan International Cooperation Agency).¹⁶¹ Another conference was held on 8 September 2009 in Ho Chi Minh City. VCCI also maintained an online

consulted agencies/organizations/individuals or by sending the draft law to them for their comments or organizing consultative workshops, through the websites of the Government and the drafting ministry [...] or through the mass media.”

¹⁵⁸ VCAD Website News, “Collecting Opinions on the Draft CPL” (“Lay y kien doi voi du thao Luat bao ve nguoi tieu dung”) (3 June 2009), online: Quan ly canh tranh <<http://www.qlct.gov.vn/Web/Content.aspx?distid=2059&lang=vi-VN>>. Unfortunately, no relevant research reports or detailed explanations of the draft CPL were published.

¹⁵⁹ EU-Vietnam MUTRAP Website News, “Workshop on the Draft CPL” (“Hoi thao gop y Du thao Luat Bao ve nguoi tieu dung”) (31 July 2009), online: MUTRAP <<http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=288&Source=http%3A%2F%2Fwww%2Emutrap%2Eorg%2Evn%2Fdefault%2Easpx%3FPage%3D17>>.

¹⁶⁰ EU-Vietnam MUTRAP Website News, “Workshop on the Draft CPL” (“Hoi thao gop y Du thao Luat Bao ve nguoi tieu dung”) (18 August 2009), online: MUTRAP <<http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d-4e3a-4c5b-a2ad-c903807cc7ea&ID=293&Source=http%3A%2F%2Fwww%2Emutrap%2Eorg%2Evn%2Fdefault%2Easpx%3FPage%3D17>>.

¹⁶¹ VOV News, “Soliciting Opinions to Improve the Draft of the CPL” (“Gop y du thao Luat Bao ve nguoi tieu dung”) (12 August 2009), online: VOV News <<http://vovnews.vn/Home/Gop-y-Du-thao-Luat-Bao-ve-nguoi-tieu-dung/20098/118992.vov>>.

forum for public discussions about the drafts of the CPL at the website:

<http://www.vibonline.com.vn/vi-VN/Forum/Topic.aspx?ForumID=200>.¹⁶²

Also during the public consultation period, VCAD sent Draft 2 to all ministries and provincial departments of industry and trade for comments and suggestions. This activity was aimed at soliciting local input and seeking inter-ministerial consensus on the draft CPL.

During the process of public consultation, the viewpoints of many stakeholders were reported or published through public media. For example, at the conferences held by VCCI and VCAD, most experts working for the business community (usually lawyers or business consultants) expressed concerns that the draft CPL contained provisions too favourable to consumers.¹⁶³ Further, the business community also criticized the provision in the draft that businesses using standard contracts had to get them approved in advance if they traded in sectors relating to “essential” goods and services.¹⁶⁴ The business community argued that such provision substantially reduced their right to freedom of business and should be removed.¹⁶⁵

¹⁶² The public consultation process continued even after Draft 2 was revised and turned into Draft 3, and sent to MoJ for evaluation. For example, on 18 March 2010, Vinastas (with financial assistance from EU-Vietnam MUTRAP) organized a national conference in Ha Tinh Province to comment on the latest draft of the CPL. This conference was attended by representatives from the EG and the DC, a number of provincial Departments of Industry and Trade, and 38 provincial consumer protection associations throughout the country. See EU-Vietnam MUTRAP Website News, “Conference to Comment on the Draft of CPL” (“Hoi thao Gop y xay dung Luat bao ve nguoi tieu dung”) (23 March 2010), online: MUTRAP <<http://www.mutrap.org.vn/Lists/Posts/Post.aspx?List=5276b79d%2D4e3a%2D4c5b%2D2ad%2Dc903807cc7ea&ID=389>>. In May 2010, a few days before the NA met to discuss the draft CPL for the first time, MoIT held a workshop in Ho Chi Minh City to canvas opinions of lawyers and businesses. At this workshop, a number of businesses even proposed that the CPL should include provisions that consumers abusing their rights (for example, lodging complaints without sound reasons) should be fined in order to protect the legitimate rights of businesses. Businesses attending this workshop complained that, in reality, many businesses wasted a great deal of time and resources in resolving “groundless” consumer complaints. See Thanh Vu, “Consumer Protection Law Should Also Protect Businesses” (“Luat bao ve nguoi tieu dung cung can bao ve doanh nghiep”) Investment Review (Vietnam) (8 May 2010).

¹⁶³ Especially provisions on shifting the burden of proof from consumers to traders in their disputes as stipulated in article 44 of Draft 2. See Nam Phuong, *et al.*, “The Draft CPL: Interests of Both Parties Should Be Balanced and Protected” (“Du thao Luat Bao ve nguoi tieu dung: can bao ve quyen loi doi ben”), Business Forum (12 August 2009), online: Dien Dan Doanh Nghiep (Business Forum) <<http://ddd.com.vn/20090811094056172cat103/du-thao-luat-bao-ve-nguoi-tieu-dung-can-bao-ve-quyen-loi-doi-ben.htm>>.

¹⁶⁴ Article 13 of Draft 2.

¹⁶⁵ Nam, *supra* note 163.

On the other hand, Vinastas, at its conference held in Da Nang on 31 July 2009, expressed its general welcome to new consumer protection measures stipulated in the draft. It expressed its strong support for the definition of “consumer” in the draft, which included not only “individuals” but also “organizations”.¹⁶⁶ It also expressed strong support for establishing “simplified civil procedures” applicable to resolution of disputes between consumers and suppliers.¹⁶⁷ It welcomed new provisions on consumer protection associations including provisions granting these associations the right to file independent lawsuits to protect consumers, and provisions stating that these organizations could be granted financial assistance from the state budget.¹⁶⁸ It also agreed with the establishment of an independent Consumer Protection Fund as a new source of financial assistance for operation of consumer protection associations.¹⁶⁹ However, Vinastas continued to express its desire to oversee this fund. Vinastas also expressed its disagreement over the provision in the draft that consumer protection associations would be placed under the state management of MoIT (with the implication that VCAD could become the “boss” of Vinastas). Vinastas claimed that state management of Vinastas should be left unchanged,¹⁷⁰ i.e. it was happier to stay under the state management of the Ministry of Internal Affairs than under MoIT.¹⁷¹

At the end of the public consultation process (January 2010), VCAD completed a 93-page report classifying, examining and synthesizing all opinions from the public, relevant ministries, provincial departments of industry and trade and provincial People’s Committees. This report showed that most ministries’ comments were short. They generally expressed their support for adopting a CPL. They did not raise many problems

¹⁶⁶ Article 3(1) of Draft 2 stated that “‘consumer’ means an individual and/or organization purchasing and/or using goods and/or services for a purpose other than doing business.”

¹⁶⁷ Articles 45-47 of Draft 2. See Section 6.5 for detailed discussion.

¹⁶⁸ Articles 48, 49, 50, 51, 52, 53, and 64 of Draft 2.

¹⁶⁹ Article 57 of Draft 2 states that “the Consumer Protection Fund shall be set up to finance consumer protection programs and activities”. Article 58 of Draft 2 states that “financial sources of the Consumer Protection Fund come from voluntary donations of individuals and/or organizations, assistance from the state budget, and other lawful sources”. Article 59 of Draft 2 states that “the Consumer Protection Fund operates on a not-for-profit basis and is exempted from taxation.” Article 60 of Draft 2 states that “the Government shall specify the establishment and management of the Consumer Protection Fund.”

¹⁷⁰ This proposal of Vinastas was simply ignored by MoIT.

¹⁷¹ Report of Vinastas presented at the Conference on Consumer Protection Law in Da Nang (31 July 2009) held by Vinastas with the assistance of EU-Vietnam MUTRAP.

with the draft CPL. They also did not provide much input for MoIT to improve the draft CPL. However, the report showed that most of the local authorities urged MoIT to draft the CPL in a more concrete manner. One of the very noticeable proposals from these local officials was to urge MoIT to strengthen provisions on consumers' obligations to refrain from exercising their rights in a manner that would harass businesses. This concern seemed to reflect the fact that the idea of freedom of business and the interests of businesses (including private businesses) gained momentum among local governments throughout the nation. In other words, local governments seemed to support a more favourable policy towards businesses.¹⁷²

During the process of public consultation, EU-Vietnam MUTRAP was one of the foreign donors quite active in providing financial assistance to VCAD and MoIT in carrying out their tasks. In this context, two European legal experts, Andrea F. Gagliardi and Carmen Victor, were invited by EU-Vietnam MUTRAP to prepare a report commenting on Draft 2 and providing suggestions to improve the draft. On 5 August 2009 (during the public consultation period for Draft 2), the two experts completed a 68-page report containing numerous recommendations for improving Draft 2 of the CPL. The full name of this report is "Upgrading Vietnamese Consumer Protection Legislation"¹⁷³ (the "EU-Vietnam MUTRAP Report").

The report essentially provided information on a wide range of laws and regulations in the EU that related to a number of consumer issues, many of which were outside the scope and purpose of the proposed CPL, or the capacities of Vietnamese governance resources. It was a very Eurocentric document and basically confirmed information about consumer protection laws in industrialized countries that many members of the EG and the DC already knew from earlier comparative studies.

The authors simply based their recommendations on a word-by-word comparison between Draft 2 and the corresponding provisions in EU directives on consumer protection as well as in a number of provisions on consumer protection from EU member

¹⁷² There are a number of possible explanations for this. For example, local politicians have quite a strong incentive to attract investment to boost their local economies.

¹⁷³ This report (in English) is available online: MUTRAP
<<http://www.mutrap.org.vn/en/library/MUTRAPIII/Technical%20reports/RECOMMENDATIONS%20N%20DRAFT%20LAW%20ON%20CONSUMER%20PROTECTION.pdf>>

states. These recommendations were, unfortunately, not based on any real experiences of Vietnamese consumers. As well, the report was submitted in English only, which further diminished its utility given the very tight deadlines facing the DC and EG.

Other foreign donors also provided foreign expertise to legal drafters to improve the draft of the CPL, especially during the public consultation period. The information I obtained during my fieldwork in Hanoi by interviewing a legal drafter of the CPL on 4 August 2010 confirmed that the draft CPL was occasionally commented upon by American experts working for the U.S. Federal Trade Commission. Although these comments were not fully documented, it is reasonable to speculate that such comments could have helped legal drafters of the CPL know more about the U.S. consumer protection laws.¹⁷⁴

Parallel with public consultation activities, VCAD's legal drafters also attempted to finish the Report on Impact Assessment of the draft CPL (RIA). This effort was funded by the STAR-Vietnam Project (USAID).¹⁷⁵ In October 2009, a 37-page RIA was completed by VCAD.¹⁷⁶ This report focused on five key issues of the draft CPL, namely: (1) the concept of "consumer"; (2) control of standard contracts; (3) product liability; (4) simplified civil procedure and resolution of disputes by district administrative authorities; and (5) consumer protection associations' right to file lawsuits without written authorization from victimized consumers. The report concluded that all provisions on

¹⁷⁴ Perhaps it is not a coincidence that the definition of "defective good(s)" in the CPL is quite similar to the concept "defective product" in United States product liability law. Article 3(3) of the CPL defines "defective goods" as

[...] goods failing to ensure the safety of consumers, or likely causing harm to the life, health, and/or property of consumers, even when such goods are produced in accordance with current standards or technical regulations and even if their defects are not identified at the time they are supplied to consumers, including: (a) Goods mass produced having defects arising from technical design; (b) Individual goods having defects arising from the process of manufacture, processing, transportation, or storage; (c) Goods with the potential to cause harm [to consumers] during use, yet lacking sufficient instructions or warnings to consumers.

This definition was not found in Draft 2, but it was found in article 23(1) of Draft 3.

¹⁷⁵ VCAD Website News, "International Cooperation for Drafting the CPL" ("Hop tac xay dung Luat bao ve quyen loi nguoi tieu dung"), online: Quan ly canh tranh <<http://www.qlct.gov.vn/Web/Content.aspx?distid=2911&lang=vi-VN>>.

¹⁷⁶ MoIT, *Report on Impact Assessment of the Draft Law on Protection of Consumers' Rights and Interests (Bao cao danh gia tac dong Du thao Luat Bao ve quyen loi nguoi tieu dung)* (Hanoi, October 2009) [MoIT, *Report on Impact Assessment*, or "RIA"].

these five issues in Draft 2 were optimal choices.¹⁷⁷ It is worth noting that the RIA was prepared quite late in the drafting process (i.e. only after Draft 2 was completed); thus, its intended function as an instrument for helping legal drafters to effectively identify problems to be solved and sharpen their thinking in selecting optimal solutions was unfulfilled. Instead, the RIA was, perhaps, used as an instrument to defend what had already been determined by legal drafters.

5.3.5 Voices from MoJ and the Government

After the public consultation period ended, the DC and its EG revised Draft 2 and turned it into Draft 3.¹⁷⁸ Draft 3 did not contain many substantial changes, except for the following:¹⁷⁹

- The term “merchant” was replaced with the term “organizations and/or individuals conducting business” to reflect the general opinion offered at many conferences and workshops during the public consultation process that consumer transactions in Vietnam were not simply transactions between consumers and “merchants” (i.e. “registered traders”) but mainly transactions between consumers and “unregistered” individuals conducting business (i.e. unregistered vendors or unregistered traders). This reflects a typical feature of the Vietnamese economy: small-scale business establishments still dominate. Therefore, if the CPL only focused on transactions between consumers and merchants, a huge gap in regulation would appear. With this revision, the relations between consumers and hundreds of thousands of retail shops were to be governed by the CPL.
- Draft 3 added the obligation of consumers to “[...] refrain from taking advantage of legal provisions on consumer protection to infringe upon legitimate rights and

¹⁷⁷ This included the ideas that the concept of “consumer” should include legal persons, and that the district administrative authorities should directly resolve disputes between consumers and traders.

¹⁷⁸ This draft was completed on 10 February 2010. It had 68 articles divided into eight chapters and was basically similar in structure to Draft 2.

¹⁷⁹ Other noticeable changes included the fact that Draft 3 added two articles on basic rights and responsibilities of consumers (articles 5 and 6) to reflect Vinastas’ recommendations. Draft 3 also added one article (article 4) about protection of consumer privacy to reflect the public’s concerns about electronic transactions as well as other market transactions.

interests of the State and other organizations or individuals.”¹⁸⁰ This change seems to reflect concerns of businesses voiced at conferences and workshops, and the input of many provincial governments during the public consultation process.

- Provisions on the Consumer Protection Fund were removed to avoid further disagreements about several aspects of the fund. With the removal of these provisions, the initiative from Vinastas to set up a Consumer Protection Fund was officially killed from this moment and was never raised again during the remaining period of drafting the CPL. Owing to these few changes, most of Vinastas’ proposals were not heeded.

Draft 3 and relevant documents¹⁸¹ were then sent by MoIT to MoJ for evaluation.¹⁸² Responding to this request, the Minister of Justice set up an *ad hoc* “Evaluation Council” (*Hoi dong tham dinh*) of 11 experts, chaired by one vice-minister of MoJ, to examine and assess Draft 3. The remaining 10 members included six experts working for MoJ¹⁸³ and four experts from relevant agencies such as the Government Office, the Supreme People’s Court, the Ministry of Science and Technology, and Vinastas.¹⁸⁴ The composition of the Evaluation Council seemed, again, to reflect a long established concern in the governmental system of Vietnam to reach intra-ministry and inter-agency consensus in the policy-making process.

¹⁸⁰ Article 6(1) of Draft 3.

¹⁸¹ According to article 36(2) of the LoL of 2008, these documents include: (a) a Submission Report explaining the rationale for the draft law; (b) the draft law; (c) an Elucidation Report on contents of the draft law; (d) a Report on Impact Assessment [i.e. RIA] of the draft law; (e) a report on actual implementation of existing legal rules to be replaced by the draft law; (f) a report on actual status of social relations to be governed by the draft law; (g) a Synthesis Report on comments from agencies/organizations/individuals on the draft law; (h) a copy of comments from ministries and ministry-equivalent agencies; (i) a report on the incorporation of the comments into the draft law. All of these requirements were procedurally followed by MoIT. However, the actual quality of these documents was an issue for debate.

¹⁸² According to the LoL of 1996 as well as the LoL of 2008, all draft laws prepared by ministries, before being submitting to the Government for deliberation and approval (before being sent to the NA), must be evaluated by MoJ. Article 36(1) of the LoL of 2008 states that, “for complex draft laws, the Minister of Justice shall establish an Evaluation Council consisting of representatives of concerned agencies, experts and scientists to evaluate the draft law.”

¹⁸³ The Director of the Department of Civil and Economic Laws, the Director of the Institute of Legal Sciences, the Vice-Director of the Department of Criminal and Administrative Laws, one expert working for the Department of Civil and Economic Laws, and one professor of civil law from the Hanoi University of Law.

¹⁸⁴ See Appendix 5 for a list of members of the Evaluation Council.

On the morning of 5 March 2010,¹⁸⁵ the council convened to collectively comment on and assess the provisions in the draft CPL. At this meeting, MoIT's representative was given time to present the key ideas underlying Draft 3 before each expert gave his/her own comments and suggestions. The experts focused on the following aspects of the draft:¹⁸⁶ (1) its rationales and necessity; (2) its consistency with the CPV's policy¹⁸⁷ and legality;¹⁸⁸ (3) its feasibility; and (4) its legal language and drafting techniques. Based on the comments from these experts, on 17 March 2010, MoJ sent a 10-page Evaluation Report¹⁸⁹ to MoIT and to the Government Office. This evaluation report showed that MoJ shared MoIT's explanation of the necessity of adopting a CPL. MoJ also confirmed that provisions in the draft were consistent with the CPV's doctrines and Vietnam's constitution. However, MoJ stressed its concerns about the possible inconsistencies between the draft CPL and the following laws: the *Civil Code* of 2005 (as to provisions regarding consumer contracts and product liability); the *Code of Civil Procedure* of 2004 (as to provisions regarding simplified civil procedures and the shift of the burden of proof from consumers to businesses); and the *Ordinance on Dealing with Administrative Offenses* of 2002 (as to provisions about new administrative sanctions such as confiscation of illegal profits and disclosure of the names of offending traders).

MoJ especially stressed that the new forms of administrative sanctions stipulated in Draft 3 were not consistent with the provisions on forms of administrative sanctions in the *Ordinance on Dealing with Administrative Offenses* of 2002. MoJ also informed the DC that the new *Law on Dealing with Administrative Offenses* being drafted by MoJ would address any shortcomings of the current *Ordinance on Dealing with*

¹⁸⁵ It is worth noting that MoJ set up the Evaluation Council on March 1, 2010 and this council convened only four days after that (i.e. on 5 March 2010). It is thus questionable whether members of this council had sufficient time to study and prepare their comments.

¹⁸⁶ Article 36(3) of the LoL of 2008.

¹⁸⁷ Its conformity with the CPV's doctrines and policies.

¹⁸⁸ Its constitutionality and its consistency with the legal system as a whole, and its compatibility with relevant treaties to which the Socialist Republic of Vietnam is a signatory.

¹⁸⁹ MoJ, *Report No. 662/BC-HDTD dated 17 March 2010 on evaluation of the draft Law on Protection of Consumers' Rights and Interests (Bao cao so 662/BC-HDTD ngay 17/3/2010 tham dinh du thao Luat Bao ve quyen loi nguoi tieu dung)* [MoJ, *Report No. 662*].

Administrative Offenses of 2002.¹⁹⁰ Therefore, the CPL should not contain any provisions on dealing with administrative offenses in the area of consumer protection.

Regarding the provisions on simplified civil procedures applicable to consumer lawsuits, despite pointing out the inconsistency of these provisions with the current *Code of Civil Procedure*, MoJ supported the idea that disputes between consumers and businesses should be resolved via a specialized and simplified civil procedure. Nevertheless, MoJ disagreed with MoIT over the provisions of the draft CPL, stating that disputes between consumers and traders could be resolved through district administrative authorities and provincial Departments of Industry and Trade in a court-like manner.¹⁹¹ MoJ stated that the *Law on the Organization of People's Councils and People's Committees* did not grant this kind of mandate to administrative authorities. In other words, MoJ was persistent in the idea that, among state authorities, only the court system had the power to resolve private disputes by ascertaining which parties were in the wrong and by applying remedies to wronged parties.¹⁹² This idea was said to be consistent with the underlying idea of the law-governed state in Vietnam – that state powers are uniform but clearly allocated among branches of government.¹⁹³

After receiving MoJ's evaluation report, the DC convened and revised Draft 3, thereby creating Draft 4. This draft was used for the Government's meeting on 1 April 2010. However, most of MoJ's recommendations were not accepted.¹⁹⁴ There was one important change in Draft 4 in comparison with Draft 3: the right of consumers to set up their own associations was quietly removed.¹⁹⁵ No stakeholders (even Vinastas)

¹⁹⁰ Checking MoJ's legal database, I found that, from 2002 to 2010, the Government adopted approximately 100 decrees to provide guidance in implementing the *Ordinance on Dealing with Administrative Offenses* of 2002. These decrees provided detailed descriptions of administrative offenses and corresponding administrative sanctions (fines, warnings, administrative injunctions, etc.). The administrative offenses described and sanctioned by these decrees number in the thousands.

¹⁹¹ Articles 37 to 43 of Draft 3.

¹⁹² However, MoJ did not challenge the idea that administrative authorities can provide mediation services to resolve consumer complaints because this method of resolving disputes is currently stipulated in article 19 of Decree 55 (2008).

¹⁹³ See section 3.4.

¹⁹⁴ Perhaps that is why the structure and the name of each chapter in Draft 4 was exactly the same as that in Draft 3. Draft 4 had 67 articles, i.e. one article fewer than Draft 3.

¹⁹⁵ In an interview on 5 August 2010 with a member of the EG of the CPL during my fieldwork in Hanoi, the interviewee explained to me that the right to association was removed because this issue would be regulated by the future *Law on Association*.

challenged this change. The Government and the NA similarly did not raise any discussion of this matter. However, this is not surprising given that the right to freedom of association is still regarded as a sensitive topic in Vietnam and the official attitude of the Vietnamese state is usually ambivalent about this issue.¹⁹⁶

Just less than one hour¹⁹⁷ of the meeting's very busy agenda¹⁹⁸ was devoted to deliberating the draft CPL, and the Government gave the green light to the draft without considering many of the concrete suggestions that had been made. Specifically, the Government sided with MoIT and ignored most of the recommendations in MoJ's evaluation report. Based on comments and government approval, MoIT revised Draft 4, which became Draft 5 in early April 2010.¹⁹⁹ Draft 5 was almost the same as Draft 4 in terms of both structure and concrete provisions, except for some minor modifications in terms of wording.

5.4 THE NATIONAL ASSEMBLY STAGE OF DEBATING AND ADOPTING THE CPL

Following the steps and procedures stipulated in the LoL of 2008, the National Assembly stage of debating and adopting the CPL included verification, a first debate in

¹⁹⁶ Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008) at 141. Sidel observes that "The state [of Vietnam] has sought to encourage the growth of social organizations, at least partly to compensate for the inability of the state to keep pace with social needs in the reform period. At the same time, the state retains management and control over the sector at a level more detailed and specific than in many other countries."

¹⁹⁷ The amount of time the Government spends on each draft law may surprise people who do not know about the practice in the Government's sessions. However, to well-informed observers, it is not surprising at all. Actually, it is common practice that the Government has only about 30 minutes to discuss the contents of a draft law. See Hoang, *Formulating Laws and Ordinances*, *supra* note 17 at 105.

¹⁹⁸ According to *Resolution No. 17/NQ-CP dated 2 April 2010*, this three-day session of the Government ran from 30 March to 1 April 2010. This meeting focused on deliberating many important reports of the Government, such as: the *2009 Supplementary Report on the socio-economic situation* and the *Report on the implementation of the Socio-economic Plan for 2010*; the *Report on the socio-economic situation of the first three months of 2010*; the *2009 Report on the approval of implementation of the State Budget*; the *Report on the Strategy on Social Security for the period 2011 to 2020*; and the *Report on the Program of Social Security for People Living in Rural Areas*. The Government also deliberated and approved a number of decrees regarding residential registration, incentives for investment, and sanctioning of administrative offenses in the field of transportation in large cities. The Government also discussed and approved the draft law-making program for the year 2011. Further, the Government deliberated and approved the drafts of four laws: the *Law on Public Servants*, the *Law on the State Bank* (amended), the *Law on Credit Organizations* (amended), and the *Law on Protection of Consumers' Rights and Interests*.

¹⁹⁹ Draft 5 consisted of 66 articles divided into eight chapters.

the seventh session,²⁰⁰ and a final debate and final vote in the eighth session of the 12 tenured NA members.²⁰¹ The purpose of these various steps and procedures was likely to give opportunities for NA members representing local voices to argue their views before the draft law proposed by the Government was finally approved by the NA. In these various steps, NASC played the leading role of organizing and coordinating the activities of relevant participants (such as the drafting ministry,²⁰² the Verifying Committee, and NA members) in improving and finalizing the draft CPL.

The NA's Committee on Science, Technology and the Environment (CSTE) was assigned by NASC to be the Verifying Committee for the draft CPL (Draft 5).²⁰³

5.4.1 The First Debate

To prepare for the NA's first debate on the draft CPL, CSTE conducted verification activities on Draft 5 after receiving the 25-page Draft 5, a 10-page Submission Report explaining the rationales of the CPL,²⁰⁴ a 35-page Elucidation Report explaining the contents and reasons underlying each article in the draft,²⁰⁵ a 15-page report on actual implementation of the CPO,²⁰⁶ and other relevant reports²⁰⁷ from MoIT.²⁰⁸

²⁰⁰ This session lasted from 20 May to 19 June 2010.

²⁰¹ This session lasted from 20 October to 26 November 2010.

²⁰² i.e. MoIT.

²⁰³ It is worth noting that CSTE was previously assigned as the Verifying Committee for the draft *Law on Quality of Products and Goods* and the draft *Law on Food Safety*. See CSTE, *Report No. 749/BC-UBKHCNMT12 dated 23 October 2009 on verification of the draft Law on Food Safety (Bao cao tham tra so 749/BC-UBKHCNMT12 ngay 23/10/2009 ve du an Luat an toan thuc pham)*.

²⁰⁴ Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers' Rights and Interests (To trinh so 28/TTr-CP ngay 8/4/2010 ve Du an Luat Bao ve quyen loi nguoi tieu dung)*.

²⁰⁵ MoIT, *The Elucidation Report on the draft Law on Protection of Consumers' Rights and Interests (Ban thuyet minh chi tiet ve Du an Luat Bao ve quyen loi nguoi tieu dung)* (8 April 2010).

²⁰⁶ MoIT, *Report No. 27, supra* note 115.

²⁰⁷ Other relevant reports included MoJ's Evaluation Report, MoIT's explanatory report on acceptance of the suggestions in MoJ's Evaluation Report, and especially a 37-page Report on Impact Assessment (RIA) of the draft CPL and a 15-page report on the international experiences of consumer protection. See MoIT, *Report on Impact Assessment, supra* note 176. See also MoIT, *Executive Report on International Experiences regarding Consumer Protection Laws and Recommendations for Vietnam (Bao cao tom tat Nghien cu kinh nghiem quoc te ve xay dung phap luat bao ve nguoi tieu dung va de xuat cho Vietnam)*

On 14 April 2010, the standing body of CSTE convened to conduct an initial verification of Draft 5. As a result, a 12-page Initial Verification Report²⁰⁹ was completed and presented at NASC's meeting to give initial comments and opinions on Draft 5.²¹⁰ After NASC's meeting, CSTE convened its plenary meeting to officially verify Draft 5.²¹¹ Based on this plenary meeting, CSTE completed its official 12-page Verification Report²¹² to submit to the NA.²¹³

According to CSTE's Verification Report, this committee was convinced by MoIT that the adoption of the CPL was necessary. The Verification Report also emphasized that the adoption of the CPL was aimed at achieving the following purposes

[...] enhancing the feasibility and transparency of legal provisions on consumer protection; creating a favourable legal corridor for establishing a healthy business environment in which legitimate interests of both businesses and consumers are effectively protected; enhancing the effectiveness and efficiency of *state*

(Hanoi, 25 October 2009). This report explicitly informed its readers that adoption of a special law on consumer protection was a common practice in the world and that both developed countries as well as developing countries, including Asian countries, had adopted many special laws to protect their consumers. The report also explicitly provided information on foreign laws regarding key issues intended to be addressed in Vietnam's CPL: (1) the definition of "consumer"; (2) consumer rights; (3) unfair commercial practices; (4) consumer contracts; (5) product liability; (6) methods of resolution of disputes between consumers and traders; (7) models of consumer protection agencies; and (8) consumer protection organizations.

²⁰⁸ However, the quality of these reports is questionable. Actually, these documents were prepared by the drafting ministry and are usually not open for public debate.

²⁰⁹ CSTE, *Report No. 956/UBKHCMNT12 dated 16 April 2010 on initial verification of the draft Law on Protection of Consumers' Rights and Interests (Bao cao so 956/UBKHCMNT12 ngay 16/4/2010 Tham tra so bo Du an Luat bao ve quyen loi nguoi tieu dung)*. This report agreed with the Government's Submission Report on the necessity for adoption of a CPL in Vietnam. It also stated that the proposed draft CPL was consistent with the CPV's current policies, ensuring its consistency with other laws in the Vietnamese legal system. However, it also noted that members of the standing body of this committee were divided (although a majority of them agreed with the draft CPL) on a number of issues stipulated in the draft law, such as (1) consumer protection policies; (2) standard contracts; (3) resolution of disputes between consumers and traders by local administrative authorities; (4) simplified civil procedure; (5) consumer protection organizations (their financial sources and their right to initiate lawsuits for consumer protection); and (6) state management of consumer protection.

²¹⁰ This meeting was organized on 17 April 2010. See Nguyen Le, "Should Consumer Protection Organizations Be Entitled to Take Legal Action?" ("To chuc bao ve quyen loi nguoi tieu dung co quyen khoi kien?") (17 April 2010), online: VnEconomy <<http://vneconomy.vn/20100417124325252p0c9920/to-chuc-bao-ve-quyen-loi-nguoi-tieu-dung-duoc-khoi-kien.htm>>.

²¹¹ This meeting was organized on 28 April 2010.

²¹² CSTE, *Verification Report No. 981/UBKHCMNT12 of CSTE dated 13 May 2010 on the draft of the CPL (Bao cao tham tra so 981/UBKHCMNT12 ngay 13/5/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)* [CSTE, *Verification Report 981*, or "Verification Report"].

²¹³ i.e. it was sent to individual NA members before the seventh session of the NA, which began on 20 May 2010.

management of consumer protection; improving mechanisms and agencies, organizations in charge of consumer protection.²¹⁴

The Verification Report also confirmed that the draft CPL was consistent with the CPV's current doctrine²¹⁵ (as previously stated in MoJ's Evaluation Report). The report also agreed with the approach of the draft CPL that consumers should be regarded as weak parties in market relations and needed special or better protection measures.

The Verification Report noted that it was not clear whether the definition of "traders" in Draft 5 was to include certain special services providers such as hospitals and schools.²¹⁶ It also noted that, the draft did not have provisions on a number of newly-emerging consumer transactions such as door-to-door sales and distance sales and urged MoIT to add such provisions or to leave the issues to be regulated by the Government's guiding decrees. It further noted that, although a number of members of CSTE and NASC disagreed with provisions on resolution of disputes between consumers and businesses by administrative authorities, CSTE ultimately accepted these provisions. CSTE also supported provisions on simplified civil procedures applicable to disputes between consumers and businesses. However, CSTE disagreed with provisions about the shifting of the burden of proof from consumers to businesses in consumer civil suits, as well as about provisions stating that consumers did not need to advance court fees when filing legal actions. This committee was concerned that these provisions were too favourable to consumers and that they might generate a flood of civil suits brought by consumers against businesses.²¹⁷

During the process of verification of Draft 5, some members of NASC argued that consumer protection associations should not be empowered to file lawsuits against offending traders without written authorization from each victimized consumer.²¹⁸ Instead, the power to file lawsuits against offending traders in the public interest should be assigned to the People's Procuracy, because this system had been traditionally

²¹⁴ CSTE, *Verification Report 981*, *supra* note 212 at 2 [translated by author, emphasis added].

²¹⁵ However, the report did not specifically cite the sources for the party's directives.

²¹⁶ This issue was simply ignored by MoIT and NASC in the subsequent process of improving the draft CPL.

²¹⁷ CSTE, *Verification Report 981*, *supra* note 212 at 9.

²¹⁸ Nguyen Le, *supra* note 210.

empowered with a similar function.²¹⁹ However, given that the People's Procuracy system was scaling down its functions²²⁰ to move closer to the model of the prosecution system in other countries, this suggestion was not heeded.²²¹ This event seemed to imply that the assumed task of the Soviet-style procuracy system to take care of the public interest was no longer popular in Vietnam. Rather, citizen-based voluntary associations seemed to be gradually gaining more favour from the state in asserting the role of protecting the public interest.

On the afternoon of 18 June 2010, NA deputies spent about an hour and a half discussing Draft 5 at its plenary meeting.²²² This was the first NA debate on the draft CPL. At this debate, most NA members agreed with the Government's explanation of the necessity of and timeliness for adopting a CPL for Vietnam.

Many NA members placed strong emphasis on the fact that consumer protection efforts were unevenly divided among geographical areas in Vietnam. Some NA members from mountainous provinces stressed that consumers in mountainous areas, especially ethnic minority consumers, found it very difficult to exercise even those consumer rights the law expressly granted to them. These NA members opined that the CPL should provide a mechanism to People's Commune Committees to promote consumer protection in mountainous and rural areas. This proposal was widely supported by many NA members. Some NA members strongly urged the DC to provide a very detailed chapter on the power and instruments or measures that People's Commune Committees (i.e. the lowest level of government in Vietnam) and management boards of local markets could employ to sanction offending vendors and to protect consumers in rural and mountainous areas.

²¹⁹ For example, article 19 of the *Ordinance on Civil Procedure* of 1989 stated that the People's Procuracy could initiate civil lawsuits in the public interest in cases in which no private parties had initiated lawsuits. However, this provision had already been repealed when the *Ordinance on Civil Procedure* of 1989 was replaced by the *Code of Civil Procedure* of 2004.

²²⁰ Mark Sidel, "Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam" (2002) 6 *Sing. J.I.C.L.* 42 at 56-57.

²²¹ Later on, at the meeting of the NA to discuss Draft 5 on 18 June 2010 (i.e. the first debate), this proposal was raised again, but it was finally ignored by the DC and NASC without any explanation.

²²² i.e. one day after the NA adopted the *Law on Food Safety* of 2010.

Some NA members argued that provisions on standard contracts in the draft CPL were unnecessary, as contract rules in the *Civil Code* of 2005 were sufficient for protection of consumers.²²³

Some NA members also critiqued the provisions in Draft 5 stating that consumer protection associations could be granted state subsidies for their operations,²²⁴ by arguing that these associations should be regarded as non-governmental organizations and the government should not provide any financial grants to them.²²⁵ In addition, some NA members suggested that the consumer protection function should not be limited to Vinastas and its existing provincial associations. Instead, the CPL should provide a legal basis on which to mobilize other mass associations to participate.

Some NA members (especially those having a background in the court system) expressed concerns about the shift of the burden of proof from consumers to traders in consumer lawsuits. They also expressed concerns about the provisions in the draft CPL stating that consumers did not have to deposit advances on court fees when bringing lawsuits. They argued that these favourable provisions could lead to a flood of consumer suits, causing many problems for businesses. This concern is understandable given that the court system is overloaded with lawsuits.²²⁶

Some deputies also expressed concerns about the lack of clarity in provisions in Draft 5 regarding the roles of state bodies in state management of consumer protection. According to these deputies, this lack of clarity could harm the effectiveness of consumer protection activities. They proposed that an enforcement mechanism with a more clearly defined mandate for MoIT and relevant ministries, as well as for the People's Local Committees, should be more carefully crafted.

Some NA members criticized the provisions in the draft CPL stating that disputes between consumers and traders could be submitted to local administrative authorities (i.e.

²²³ This suggestion was later disregarded by MoIT and NASC.

²²⁴ Articles 29 and 30 of Draft 5.

²²⁵ This critique was not accepted by MoIT, CSTE, or NASC during the subsequent process of improving Draft 5.

²²⁶ See section 3.7. However, this concern was not taken up by NASC during the process of improving the draft CPL.

district People's Committees) for resolution.²²⁷ These NA members agreed with MoJ's Evaluation Report²²⁸ that district People's Committees should not act as a forum for settlement of disputes between consumers and traders. This mission should be handled by the court system.²²⁹

Throughout the first debate of the NA concerning Draft 5, no deputies actually raised serious questions about the CPL's feasibility, particularly about whether MoIT was well-prepared to effectively enforce this law. It seems that NA deputies mainly relied on the Government's Submission Report and CSTE's Verification Report on the topic of Draft 5's feasibility.

5.4.2 Preparing for the Final Debate

After the first debate, CSTE's standing body worked closely with MoIT (mainly legal drafters from VCAD) and the NA's Law Committee to study all contributed opinions by NA deputies to improve Draft 5. This effort resulted in a five-page report²³⁰ that CSTE's standing body submitted to NASC at its session on 20 August 2010. In this report, the standing body of CSTE referred to the following major issues: (1) the status of the CPL in the legal system; (2) state management of consumer protection; (3) the role and legal status of consumer protection associations; and (4) resolution of disputes between consumers and traders through administrative authorities. Explaining the status of the CPL in the legal system, the report referred to the experiences of foreign countries and argued that the CPL alone could not govern all aspects of consumer protection. The report claimed the CPL should focus only on providing special measures consistent with the view of consumers as weak market players. As for "state management of consumer protection", the report sided with MoIT's view that the CPL should only stipulate that

²²⁷ Articles 43 to 49 of Draft 5.

²²⁸ MoJ, *Report No. 662*, *supra* note 189.

²²⁹ NA, "Record of the NA's Discussion on the Afternoon of 18 June 2010" ("Ban tong hop thao luan tai Hoi trung buoi chieu ngay 18/6/2010"), online: NA <<http://www.na.gov.vn/htx/Vietnamese/C1396/C1745/C2028/C2033/default.asp?Newid=39970#T2x2AUilT7F1>>.

²³⁰ CSTE, *Report on Major Issues on Which Divergent Opinions Remained on the Draft CPL (Bao cao nhung van de lon con y kien khac nhau ve du thao Luat Bao ve quyen loi nguoi tieu dung)* (Hanoi, 19 August 2010).

MoIT was assigned as the state authority in charge of state management of consumer protection, and the role of relevant ministries should be left for the Government to specify. As for provisions on the role of consumer protection associations, the report sided with many NA members' suggestions that these organizations should not be limited to Vinastas and its provincial consumer protection associations. Instead, the CPL should create legal foundations for mobilizing the participation of mass organizations such as the Workers' Union, the Women's Union, and Farmers' Associations. As for resolution of disputes between consumers and traders through administrative authorities, the report sided with MoIT about retaining this form in the draft CPL.

At a meeting on 20 August 2010, NASC agreed with most of CSTE's report. However, NASC officially decided that all provisions in the draft CPL on resolution of disputes between consumers and traders through district administrative authorities should be removed. This decision was based on a proposal from the chairperson of the NA's Law Committee, the chairperson of the NA's Judicial Committee and some well-known members of NASC who have a background in law.²³¹ With this decision, it can be said that NASC sided with MoJ's view on this matter as set out in its Evaluation Report²³² in March 2010.²³³

Based on the directions and suggestions from NASC, CSTE and MoIT revised Draft 5, thereby creating Draft 6.²³⁴ Of the noticeable differences between Draft 6 and Draft 5, there are two points worth mentioning here: (1) all provisions on specific

²³¹ Nguyen Ha, "Resolution of Civil Disputes: Where Is the End Point of State Presence?" ("Giai quyét tranh chap dan su: nha nuoc can du den dau?") (20 August 2010), online, VnEconomy <<http://vneconomy.vn/20100820115456117P0C9920/giai-quyet-tranh-chap-dan-su-nha-nuoc-can-du-den-dau.htm>>.

²³² MoJ, *Report No. 662*, *supra* note 189.

²³³ In other words, NASC followed one of the principles of the law-governed state in Vietnam that state powers (i.e. legislative, executive, and judicial powers) have to be clearly allocated among different branches of the state apparatus. Resolution of private disputes was within the mandate of the court system, not that of the administrative authorities.

²³⁴ Draft 6 consisted of 57 articles (9 articles fewer than Draft 5) divided into only six chapters (two chapters fewer than Draft 5). The structure of Draft 6 was as follows: Chapter 1 "General Provisions" (article 1 to 11); Chapter 2 "Responsibilities of Organizations and/or Individuals Conducting Business in Goods and/or Services towards Consumers" (articles 12 to 29); Chapter 3 "Responsibilities of Social Organizations in Protection of Consumers' Rights and Interests" (articles 30 to 32); Chapter 4 "Resolution of Disputes between Consumers and Traders" (articles 33 to 52); Chapter 5 "Responsibilities of State Management for Protection of Consumers' Rights and Interests" (articles 53 to 55); Chapter 6 "Implementation Articles" (articles 56 to 57).

administrative sanctions in article 64 of Draft 5 were removed;²³⁵ and (2) the provision in article 27(5) of Draft 5 on the right of consumer protection associations to challenge state authorities' decisions negatively affecting consumer rights was also removed.²³⁶ In addition, provisions in Draft 5 on resolution of disputes between consumers and traders by District People's Committees were removed from Draft 6.²³⁷

Draft 6 was sent to provincial delegations of NA deputies²³⁸ in late August 2010 for further comments and suggestions. As a result, in September 2010 and early October 2010, many delegations of NA deputies in provinces throughout the nation organized meetings to discuss the draft CPL.²³⁹ Interestingly, at these meetings, several NA members recommended that the draft CPL should include provisions to sanction consumers if consumers "abused" their rights "for their own interests," e.g. lodged groundless complaints or brought "groundless" legal suits against businesses, thereby damaging them.²⁴⁰ Many NA members continued to propose that provisions on state management of consumer protection in the CPL should be further detailed (rather than being stipulated in guiding decrees).²⁴¹

²³⁵ This change was later explained by NASC that provisions on specific administrative sanctions should be left to be stipulated in the future *Law on Dealing with Administrative Offenses*. See NASC, *Report No. 372/BC-UBTVQH12 dated 12 October 2010 explaining the acceptance of opinions and revisions to the draft Law on Protection of Consumers' Rights and Interests (Bao cao so 372/BC-UBTVQH12 ngay 12/10/2010 Giai trinh tiep thu, chinh ly Du thao Luat Bao ve quyen loi nguoi tieu dung)* at 10.

²³⁶ This provision was quietly removed without any explanation from CSTE or NASC.

²³⁷ However, Draft 6 (articles 26 to 29) retained the provision that victimized consumers can submit their complaints to district consumer protection bodies and these authorities shall handle such complaints as if a denunciation of administrative offenses had been reported. This approach was followed in Draft 7 and finally adopted in the CPL (articles 25 and 26).

²³⁸ Provincial Delegations of NA Deputies (*Doan Dai bieu Quoc hoi*) are groups of NA deputies representing constituents in particular provinces. There are 63 Delegations of NA Deputies corresponding to 63 provinces or centrally-run cities in Vietnam.

²³⁹ As reported by the NA website, there were delegations from: Kien Giang Province, Bac Giang Province, Binh Thuan Province, Hanoi, Ba Ria-Vung Tau Province, Lam Dong Province, Ben Tre Province, Lang Son Province, Ha Giang Province, etc. See online: NA <<http://www.na.gov.vn/htx/Vietnamese/C1453/#NTu5wWovgJR8>>.

²⁴⁰ Thanh Truc, "Ha Giang: Meeting to Discuss the Draft of the CPL" ("Ha Giang: Lay y kien ve Du an Luat Bao ve quyen loi nguoi tieu dung") (9 October 2010), online: NA <<http://www.na.gov.vn/htx/Vietnamese/C1453/default.asp?Newid=42789#g0lqrVvMuZcW>>; see also Nguyen Hoan, "Lam Dong: Meeting to Discuss the Draft of the CPL" ("Lam Dong: Lay y kien ve Du thao Luat Bao ve quyen loi nguoi tieu dung") (29 September 2010), online: NA <<http://www.na.gov.vn/htx/Vietnamese/C1453/default.asp?Newid=42546#or5lcl1KfetV>>.

²⁴¹ Nguyn Dang An, "Lang Son: Meeting to Discuss the Draft of the CPL" ("Lang Son: Lay y kien ve Du thao Luat Bao ve quyen loi nguoi tieu dung") (29 September 2010), online: NA <<http://www.na.gov.vn/htx/Vietnamese/C1453/default.asp?Newid=42789#g0lqrVvMuZcW>>.

In September 2010, the standing body of CSTE, under direction from NASC, continued to work with MoIT (mainly officials from VCAD) to improve the draft CPL, especially after CSTE received comments on the draft CPL from provincial delegations of NA deputies. On 12 October 2010, Draft 7 was officially completed and submitted to the NA for final debate.²⁴² Also on this day, NASC (on the advice of CSTE and the DC) issued a 12-page report explaining the acceptance of NA members' opinions.²⁴³

5.4.3 The Final Debate and the Adoption of the CPL

On the afternoon of 29 October 2010, the NA discussed Draft 7 at its plenary meeting (the final debate). At this meeting, some NA members continued to present their suggestions to modify Draft 7. Vu Tien Loc, an NA member who is also VCCI's current chairperson, kept trying to convince the NA that the term "consumer" should include only "individuals". To support his argument, this deputy cited the concepts of "consumer" widely adopted in developed countries. However, this suggestion was not accepted by NASC. A number of NA members also suggested that the CPL should have a separate chapter or a more detailed set of provisions to strictly regulate advertisement activities. Reasons cited were the pervasiveness of misleading advertisements, as well as the fact that Vietnamese consumers are highly influenced by advertisements. However, this proposal was also rejected by NASC because the *Law on Advertisement* was in the process of being drafted and would address this issue. Some NA members also proposed that the CPL should contain an express provision on consumers' rights to boycott goods and/or services and on consumer protection associations' rights to support consumers in this regard. However, this proposal was also rejected. Some NA members also doubted the feasibility of the provision to empower the court to determine (at its own discretion)

²⁴² Draft 7 consisted of 51 articles (6 articles fewer than Draft 6) divided into six chapters as follows: Chapter 1 "General Provisions" (articles 1 to 11); Chapter 2 "Responsibilities of Organizations and/or Individuals Conducting Business in Goods and/or Services towards Consumers" (articles 12 to 26); Chapter 3 "Responsibilities of Social Organizations in Protection of Consumers' Rights and Interests" (articles 27 to 29); Chapter 4 "Resolution of Disputes between Consumers and Traders" (articles 30 to 46); Chapter 5 "Responsibilities of State Management for Protection of Consumers' Rights and Interests" (articles 47 to 49); Chapter 6 "Implementation Articles" (articles 50 to 51). The structure of Draft 7 was exactly the same as that of Draft 6.

²⁴³ NASC, *supra* note 235.

how to allocate the damages awarded against offending traders in lawsuits initiated by consumer protection associations.²⁴⁴ The reason was that this provision opened the possibility that the court would have to invent its own rules for allocating compensation moneys among plaintiffs. This possibility would be totally contrary to the traditional operation of the Vietnamese court system (i.e. the court only applies the law; it does not invent the law).²⁴⁵ However, this concern was ignored by NASC and the adopted CPL still retains the provision.

Based on NA members' comments, NASC directed CSTE and MoIT to revise Draft 7 and produce the final draft used for voting by the NA.²⁴⁶ In comparison with Draft 7, the final draft is almost no different in terms of both the structure and the number of articles.²⁴⁷ However, hundreds of minor changes in wording to avoid redundancies and imprecise words were made. It is likely that the numerous changes in the wording of the final draft reflected the fact that the drafting of a law in Vietnam is dominated by "non-professional" or "amateur" legal drafters who are not really equipped with special language skills needed for legal drafting.

On the afternoon of 17 November 2010, the CPL was officially adopted by the NA. The adopted CPL consists of 51 articles divided into six chapters.²⁴⁸ In comparison with Draft 5 submitted by the Government in April 2010, this law has 15 fewer articles.²⁴⁹ In other words, the NA actually had a visible impact upon the concrete contents of the CPL, rather than simply agreeing with what was proposed by the Government.

²⁴⁴ Article 60 of Draft 5, article 52 of Draft 6, and article 46 of Draft 7.

²⁴⁵ Gillespie, *Transplanting Law Reform*, *supra* note 75 at 212.

²⁴⁶ This final draft was completed on 15 November 2010 and sent to all NA members for a vote on 17 November 2010.

²⁴⁷ This final draft consisted of 51 articles divided into six chapters.

²⁴⁸ Chapter 1 "General Provisions" (articles 1 to 11); Chapter 2 "Responsibilities of Organizations and/or Individuals Conducting Business in Goods and/or Services" (articles 12 to 26); Chapter 3 "Responsibilities of Social Organizations for Protection of Consumers' Rights and Interests" (articles 27 to 29); Chapter 4 "Resolution of Disputes between Consumers and Organizations and/or Individuals Conducting Business in Goods and/or Services" (articles 30 to 46); Chapter 5 "Responsibilities of State Management for Protection of Consumers' Rights and Interests" (articles 47 to 49); Chapter 6 "Implementation Articles" (articles 50 to 51). See my provisional translation of the CPL in Appendix 10.

²⁴⁹ Draft 5 had 66 articles divided into eight chapters.

In comparison with the CPO of 1999, this law is 21 articles longer.²⁵⁰ There is a substantial difference between the underlying assumptions of the CPL and the CPO. The CPL is constructed on the assumption that consumers are vulnerable market players, while the CPO was not expressly based on this assumption. The CPL also contains a number of remarkable new provisions lacking in the CPO, such as provisions on unfair commercial practices (e.g. harassment of consumers, coercive practices, unsolicited goods and/or services) and provisions on unfair terms in standard contracts. In addition, it is quite remarkable that the CPL contains quite a significant number of articles stipulating the mechanisms for resolving disputes between consumers and traders.²⁵¹ This reflects the intention of the DC to remove legal barriers to help consumers have better access to justice.

However, the model of state management of consumer protection in the CPL is not substantially different from that of the CPO except for the fact that authority over consumer protection has devolved more to the district level.²⁵²

5.5 CLOSING OBSERVATIONS

Despite the fact that many new legal rules were finally enacted in the CPL, this law remains incomplete, at least in the following respects:

- Although the CPL prescribes the practices that businesses and consumers are expected or requested to follow,²⁵³ it does not stipulate any specific sanctions to be applied to persons deviating from the prescribed practices, nor does it specify consumer remedies in this regard. In this context, without specifying LNDs, the provisions of the CPL (similarly to the provisions of the CPO) are highly likely to become only “political slogans” rather than “legal rules”.
- The process of drafting the CPL failed to address the two most important “hidden” variables regarding the feasibility of the CPL. These are the financial

²⁵⁰ The CPO of 1999 had only 30 articles divided into six chapters.

²⁵¹ 17 articles (articles 30 to 46 of the CPL), equal to one-third of the total number of articles in this law.

²⁵² Articles 25, 26, and 47 to 49 of the CPL. See section 6.5 for further discussion.

²⁵³ Such as provisions on unfair commercial practices in article 10 of the CPL and provisions on consumer contracts (articles 14 to 19 of the CPL).

variable (how much money the government and other stakeholders are ready to spend on consumer protection programs) and the personnel variable (how much manpower is needed for the implementation of the CPL and where to obtain such resource). As a result, no estimate of the cost of implementing the adopted CPL is projected. The resources likely or able to be allocated for consumer protection activities by the Vietnamese government (at the central and local levels) remain an unknown. In this context, it is reasonable to doubt the political determination of the government and other stakeholders to substantially increase the level of consumer protection in the near future.

- It gives the green light for “simplified civil procedures” to be employed in lawsuits brought by consumers; however, no such simplified civil procedure actually exists in the current legal system to realize this new legal idea. NASC explained to the NA that this new procedure would likely be introduced into the new *Code of Civil Procedure* when the current *Code of Civil Procedure* is replaced. However, there are no clear signals that the current *Code of Civil Procedure* will soon be replaced. As a result, the provisions on “simplified civil procedure” in the CPL will be suspended for many years to come.

To overcome these shortcomings of the CPL, the ball has been passed back to the Government.²⁵⁴ The Government will assume its dominant role in interpreting the actual messages of the CPL through its accompanying decrees.²⁵⁵

Taking the above issues into account, it seems that the format of the CPL has not substantially outgrown the traditional methods of legislative design in Vietnam critiqued by many scholars in the early days of the Doi Moi era.²⁵⁶ Despite the fact that the LoL of

²⁵⁴ In addition to a general article stating that the Government shall specify this law (article 51 of the CPL), the CPL has seven other articles explicitly stating that the Government shall provide implementation guidelines, i.e. articles 7, 14, 19, 26, 28, 29, and 35. See the full text of the CPL in Appendix 10.

²⁵⁵ This practice reflects a tension between the fact that the NA is now more active in asserting its legislative power and the need to produce sufficient laws to regulate a rapidly transitioning economy. This practice is regarded by Vietnamese legal scholars as being reasonable in the context of the NA working on a part-time and non-professional basis. See Le Van Hoe, *Strengthening the National Assembly's Legislative Capacity in the Context of Constructing a Law-Governed Socialist State in Vietnam (Tang cuong nang luc lap phap cua Quoc hoi trong dieu kien xay dung nha nuoc phap quyen xa hoi chu nghia o Vietnam hien nay)* (Hanoi: Judicial Press, 2009) at 49.

²⁵⁶ For example, William A.W. Neilson noted that:

2008 sets forth some provisions to avoid this situation,²⁵⁷ it seems that the LoL of 2008 fails to produce the desired result. Perhaps the *de facto* relatively weak position of the NA in legislative activities helps to sustain this practice.

In addition to the said shortcomings, the CPL also contains numerous technical errors, using words or sentences that could generate great confusion in future application.²⁵⁸ These technical errors are, perhaps, the consequences of the absence of professional legal drafters in the DC and the EG.

In sum, the actual process of drafting and adopting the CPL shows that this was a complex collective decision-making process involving many relevant parties and stakeholders. However, this process was structured by provisions in the LoL and its guiding decrees. My close examination of this process shows that the process of drafting and adopting the CPL was, on the surface, basically consistent with procedures and requirements of the LoL and its guiding decrees.²⁵⁹ However, the level of strict compliance with all requirements and procedures of this law is a matter of debate. Despite this, the LoL actually created more favourable conditions for different interest groups to express their voices during the process of formulating the draft CPL. The effectiveness of such participation for each interest group varied and could also be an

[...] laws passed by the NA tend to be very skeletal documents announcing broad policy directions and commitments of general principles [...] Questions of implementation, rule-making, and policy definitions are left for decrees or other legislative documents. The limits and scope of delegated law-making are rarely articulated.

See Neilson, “Pushing the Limits”, *supra* note 16 at 18. See also Levien Do, “Vietnam’s Revised Constitution: Impact on Foreign Investment” in Carlyle A. Thayer & David G. Marr, eds., *Vietnam and the Rule of Law* (Canberra: Australian National University, 1993) 116 at 118. Do notes that, “in Vietnam, to a greater extent than in the West, laws passed by the NA require further implementing regulations, because laws passed by the NA only contain general guiding principles and statements of intent.”

²⁵⁷ Article 5 of the LoL of 2008 states that the language used in laws shall be “accurate, popular, articulate and easy to understand” and that provisions in LNDs shall be detailed to avoid having to promulgate further LNDs.

²⁵⁸ For example, article 3(7) of this law gives a very confusing definition of “mediation” as “the method of resolving disputes between consumers and traders through a third party.” This definition clearly fails to distinguish “mediation” from other methods of dispute resolution such as arbitration and litigation. Article 16(1)(a) even prohibits traders from exempting consumers from obligations owed to traders. Article 16(1)(i) prohibiting traders from transferring their payment claims against consumers to third parties is another example. Perhaps this prohibition does not reflect the actual intention of legal drafters or law-makers. However, if this prohibition is followed, debt-collecting services in Vietnam offered by many banks and companies could be in serious difficulty.

²⁵⁹ Clear deviations from the requirements of the LoL were the absence of comments from the Ministry of Finance and the Ministry of Internal Affairs on the financial and human resources available for the implementation of the CPL as stipulated in article 35(3) of the LoL of 2008.

issue for open debate. In addition, this case study of the drafting of the CPL shows that choices made by legal drafters and law-makers were not only shaped by the LoL and its guiding decrees, but were also shaped by other norms and constraints embedded in the law-making practice in Vietnam. The actual process of drafting and adopting the CPL also shows that it was a process in which Vietnamese consumers' actual concerns were problematized by the state authorities, and that the drafting of the CPL was seen as one of the concrete ways the Government could help consumers to solve these problems. I will return to these topics in Chapter 7.

The process of drafting the CPL also shows the presence of foreign donors in providing financial assistance as well as expertise for legal drafters to carry out their missions. The actual impacts of this foreign assistance will be discussed in Chapter 6.

Chapter 6

MEASURING THE INFLUENCE OF FOREIGN INPUTS: CHALLENGES AND LIMITATIONS

Chapter 5 described the involvement of foreign experiences and foreign donors during various stages of the drafting of the CPL. In this chapter, I analyze the impacts of such foreign involvement on the key contents of the adopted CPL and attempt to explain the reasons for such impacts.

The key contents of the adopted CPL which are analyzed in this chapter include: (1) the concepts of “consumer” and “trader”; (2) unfair commercial practices; (3) consumer contracts; (4) consumers’ access to justice; and (5) state management of consumer protection.

In this chapter, I argue that most of these provisions owe a huge debt to foreign inputs. However, foreign legal ideas have not impacted these provisions equally. Some provisions are visibly the product of recycling foreign legal ideas, while others are mainly the product of recycling previously existing provisions. Provisions which do not have visible foreign inputs are mainly those relating to state sanctions and administrative enforcement mechanisms.

Because the 116-page *Comparative Study Report (CSR)*¹ prepared by legal drafters from VCAD in September 2008 was employed by VCAD’s legal drafters as the basis for working out the key contents of the draft CPL (especially the initial draft, Draft 1, and Draft 2), I use this report as one of the sources of information to document which foreign legal ideas were actually consulted and received by legal drafters of the CPL.

However, it is very important to note that during the process of drafting the CPL, a number of foreign donors, such as the EU-Vietnam MUTRAP, Maison du Droit Vietnamo-Française (Maison du Droit), CUTS Hanoi Resource Centre (India), and

¹ VCAD, *Comparative Study of Consumer Protection Laws of a Number of Foreign Jurisdictions – Lessons and Recommendations for Key Contents of the Draft Law on Consumer Protection of Vietnam (So sanh luat bao ve nguoi tieu dung mot so nuoc tren the gioi – bai hoc kinh nghiem va de xuat mot so noi dung co ban quy dinh trong Du thao Luat Bao ve nguoi tieu dung cua Vietnam)* (Hanoi: VCAD, 2008).

USAID (the STAR-Vietnam Project)² provided financial assistance and/or expertise to legal drafters of the CPL. This assistance was provided through various channels, such as: providing foreign experts to supply legal information (especially legal information on the European Union’s consumer laws) to legal drafters of the CPL;³ providing Vietnamese translation of foreign laws;⁴ and organizing workshops or conferences at which foreign experts shared their expertise and knowledge.⁵ Coming from countries where liberal ideals, such as limited government, rule of law, and the importance of non-governmental organizations are highly appreciated, it is, perhaps, not a coincidence that these foreign donors were not only active in providing foreign legal information and expertise but also generous in providing financial donations to VCAD to organize workshops to encourage the public and relevant stakeholders (especially consumer protection associations) to engage more deeply in the drafting of the CPL. I rely on relevant documents such as minutes of workshops and research reports to trace the diffusion of foreign legal ideas on consumer protection into the key concrete contents of the CPL.

² The STAR-Vietnam Project provided donations toward organizing the start-up workshop on 11 June 2008 and donations toward completing the Report on Impact Assessment of the draft CPL (RIA). See VCAD Website News, “International Cooperation for Drafting the CPL” (“Hop tac xay dung Luat bao ve quyen loi nguoi tieu dung”), online: QLCT <[http://www.qlct.gov.vn/Web/Content.aspx?distid=2911&lang=vi-VN](http://www qlct.gov.vn/Web/Content.aspx?distid=2911&lang=vi-VN)>.

³ For example, the 68-page EU-Vietnam MUTRAP Report “Upgrading Vietnamese Consumer Protection Legislation” prepared by European legal experts Andrea F. Gagliardi and Carmen Victor on 5 August 2009.

⁴ Provision of a Vietnamese version of France’s *Consumer Code* by Maison du Droit in September 2008 was an example.

⁵ For example, EU-Vietnam MUTRAP provided financial assistance to VCAD, Vinastas and Da Nang’s Department of Industry and Trade to organize five workshops to solicit comments on the draft CPL. Three workshops were held in Da Nang on 27 March 2009, 31 July 2009, and 25 August 2009. One was held on 18 August 2009 in Hanoi and one was held on 18 March 2010 in Ha Tinh province. Participants in these workshops included legal drafters of the CPL, representatives of Vinastas and provincial consumer protection associations, provincial Departments of Industry and Trade, public media, business associations, and representatives of a number of enterprises. See online: MUTRAP <<http://www.mutrap.org.vn/Lists/Posts/AllPosts.aspx>>.

Maison du Droit organized two important workshops in Hanoi. One workshop on commenting on Draft 5 of the CPL (20-21 April 2010) involved the participation of Alexandre David (a judge and an expert on civil procedure working for France’s Ministry of Justice) and Dominique Ponsot (a judge and current the Vice-Chairperson of Maison du Droit), many legal drafters of the CPL, and representatives of a number of ministries and central mass organizations such as the Fatherland Front and the Farmers’ Association. The other workshop, “Consumer Protection: Perspectives from Asia and Europe”, was held in Hanoi on 27 September 2010 (by this time, Draft 6 of the CPL had already been completed). This workshop was attended by consumer protection experts from France, Thailand, Cambodia, Laos and Vietnam, as well as by many legal drafters of the CPL. This workshop focused on highlighting the need to enhance consumer protection activities rather than on commenting on the draft CPL. See online: Maison du Droit <http://www.maisondudroit.org/Actualitevn_01.htm>.

6.1 CONCEPTS OF “CONSUMER” AND “TRADER”

6.1.1 Consumers as Vulnerable Market Participants

One of the key policies underlying the CPL is to provide special measures for consumers as vulnerable market participants to ensure the balance of interests in transactions between consumers and traders.⁶ This policy assumes that consumers require a higher level of protection than normal protection measures available in traditional contract law. This idea was widely welcomed and supported among legal drafters of the CPL, as well as among the general public and Vietnamese lawyers and legal scholars.⁷

From a legal transplantation perspective, it is fair to say that such an idea was not invented by Vietnamese legal drafters, but was actually born in Western countries. Many Western scholars have made great contributions to the elaboration of this idea. Jacob Ziegel,⁸ a Canadian law professor, is one example. According to Ziegel, the process of transformation from a predominantly agrarian society to a predominantly urbanized society generates new problems for consumers.⁹ In an agrarian society, “the products [...] were for the most part uncomplicated, produced or manufactured locally, and buyer and seller dealt with each other on a basis of relative equality.”¹⁰ However, Ziegel continues, all of these assumptions are fundamentally inaccurate given modern market interactions, with today’s new technologies, highly complex products, and widespread use of standard contract terms. As Ziegel puts it:

Every consumer problem exhibits one or more of the following characteristics. First, a disparity of bargaining power between the supplier of goods or services and the consumer to whom they are being offered; secondly, a growing and frequently total disparity of knowledge concerning the characteristics and technical components of the goods or services; and thirdly, a no less striking

⁶ Government, *Submission Report No. 28/TTr-CP dated 8 April 2010 on the draft Law on Protection of Consumers’ Rights and Interests (To trinh so 28/TTr-CP ngay 8/4/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)* at 4-5.

⁷ CSTE, *Verification Report No. 981/UBKHCMNT12 dated 13 May 2010 on the draft CPL (Bao cao tham tra so 981/UBKHCMNT12 ngay 13/5/2010 ve Du an Luat bao ve quyen loi nguoi tieu dung)* at 3.

⁸ Jacob S. Ziegel, “The Future of Canadian Consumerism” (1973) 51 Can. Bar Rev. 191.

⁹ *Ibid.*

¹⁰ *Ibid.* at 191.

disparity of resources between the two sides, whether that disparity reflects itself in a consumer's difficulty to obtain redress unaided for a legitimate grievance or in a supplier's ability to absorb the cost of a defective product as part of his general overhead as compared to the consumer to whom its malfunctioning may represent the loss of a considerable capital investment.¹¹

In line with this way of framing consumer problems, it should be fairly easy for governments to find reasons to justify their presence in consumer goods and services markets. Given the complexity of today's markets, consumer problems should not have to be exclusively solved by consumers themselves; governments should shoulder some of this burden.¹²

For law and economics scholars, the idea that consumers are vulnerable market participants is based on the fact that modern markets are not competitive markets as usually envisioned in traditional economics textbooks.¹³ Consumers face many problems that prevent them from rationally exercising their choices in market relations. Their ability to vote with the "money ballot" is far from being unhampered. Not only do consumers have to deal with large corporations due to the existence of a non-competitive market structure, they also have to face a pervasive problem – a lack of available information.¹⁴ Consumers usually face high costs in trying to obtain and process necessary information in order to make informed choices in market transactions. Due to the existence of these high transaction costs, ideal conditions in which consumers can make rational choices are no longer prevalent. This failure distorts the normal competition mechanism in the market economy. This is especially true when suppliers do not have adequate incentives to provide all necessary information to consumers so that

¹¹ *Ibid.*

¹² It is, therefore, no a coincidence that the emergence of consumer protection laws went hand in hand with the decline of the principle of freedom of contract in the 1960s and 1970s in developed countries. See P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) at 726-742; see also F.H. Buckley, "Introduction" in F.H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (London: Duke University Press, 1999) 1 at 1; Richard Stone, *The Modern Law of Contract*, 8th ed. (London: Cavendish, 2009) at 9.

¹³ Geraint Howell & Stephen Weatherill, *Consumer Protection Law*, 2d ed. (Farnham, UK: Ashgate, 2005) at 3-4; see also Robert Cooter & Thomas Ulen, *Law & Economics*, 5th ed. (Boston: Pearson/Addison Wesley, 2008) at 224-243.

¹⁴ Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at 102-126.

they can exercise rational choices.¹⁵ The ideal of consumer sovereignty, due to market failures, has already lost ground in this reality.¹⁶ In this context, the existence of consumer problems might justify the intervention of government into the market economy if a cost-benefit analysis of such intervention produced a clear, positive result.¹⁷ In line with this argument, governments should also be justified to be present in consumer transactions to make the ideal of consumer sovereignty more achievable.

However, it is worth noting that not all Western scholars acknowledge that consumers, as market participants, have such problems, especially the idea that such problems might justify government intervention. For example, Milton Friedman, one of the key economic thinkers of neo-liberalism, argued that “negative market experiences”, as he called consumer problems, were not sufficient grounds for government intervention. He stated that

[...] perfection is not of this world. There will always be shoddy products, quacks, con artists. But on the whole, market competition, when it is permitted to work, protects the consumer better than do the alternative government mechanisms that have been increasingly superimposed on the market.¹⁸

For Friedman,

[...] the great danger to the consumer is monopoly – whether private or governmental. His most effective protection is free competition at home and free trade throughout the world. The consumer is protected from being exploited by one seller by the existence of another seller from whom he can buy and who is eager to sell to him.¹⁹

Therefore, for most neoliberals, except for antitrust or competition laws solving problems of “non-competitive” market structures (i.e. eliminating or effectively constraining market monopolies or market power), almost all forms of consumer protection regulations have brought more harm to consumers than good.²⁰ The implicit consequence

¹⁵ Suppliers or producers usually tend to hide information which they see as not beneficial to them.

¹⁶ Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2d ed. (Oxford: Oxford University Press, 2007) at 64.

¹⁷ *Ibid.* at 61.

¹⁸ Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt Brace Jovanovich, 1980) at 222.

¹⁹ *Ibid.* at 226.

²⁰ Geoffrey E. Wood, *Fifty Economic Fallacies Exposed* (London: Institute of Economic Affairs, 2002) at 24.

of this argument is that consumer problems should be fixed exclusively by consumers themselves. Government should not share any part of this burden.

A close look at the history of consumer movements in developed countries shows that the underlying ideology providing a frame for recognizing, defining and analyzing consumer problems is not neo-liberalism.²¹ Actually, the underlying ideology of consumer movements and consumer protection laws usually goes far beyond the framework of neo-liberalism.²²

In Vietnam today, the arguments of Ziegel rather than those of Friedman seem to be more widely supported by Vietnamese scholars. A research report on the current situation of legal provisions on consumer protection, which was published by the Institute of Legal Sciences in 2008 (right before the CPL was drafted), noted that market relations between consumers and traders (suppliers) are asymmetric in the following respects: (1) information regarding quality, value, uses and other benefits as well as potential risks or harmful effects of goods and services available on the market; (2) bargaining power (especially the ability to negotiate and formulate purchasing conditions due to the fact that traders are experienced market players); (3) market power; and (4) financial capacity to assume the risks associated with consumption of goods and services.²³

The existence of such asymmetries is argued as being sufficient to justify certain government intervention through consumer protection laws. The authors of this report were also of the opinion that the reason for such asymmetries becoming more visible in

²¹ Robert O. Herrmann & Robert N. Mayer, "U.S. Consumer Movement: History and Dynamics" in Stephen Brobeck, ed., *Encyclopedia of the Consumer Movement* (California: ABC-CLIO, 1997) 584; Josie Fernandez, "Asian-Pacific Consumer Movement" in Stephen Brobeck, ed., *Encyclopedia of the Consumer Movement* (Santa Barbara, CA: ABC-CLIO, 1997) 38.

²² For example, as stated on its website, Consumers International (CI), founded in 1960, is a world federation of consumer groups that, working together with its members (more than 220 members in 115 countries), serves as the independent and authoritative global voice for consumers. CI is expected to build a powerful international movement to help protect and empower consumers everywhere. The ideal of CI is to work to put "the rights of consumers at the heart of decision-making" and fight for "a fair, safe and sustainable future for all consumers in a global marketplace increasingly dominated by international corporations." CI recognizes and promotes eight basic consumer rights, i.e. (1) the right to satisfaction of basic needs; (2) the right to safety; (3) the right to be informed; (4) the right to choose; (5) the right to be heard; (6) the right to redress; (7) the right to consumer education; and (8) the right to a healthy environment. See online: Consumers International <<http://www.consumersinternational.org/who-we-are/about-us>>.

²³ MoJ – Institute of Legal Sciences, *Legal Provisions on Consumer Protection in Vietnam – The Actual Situation and Orientations for Improvement (Phap luat bao ve nguoi tieu dung Vietnam – Thuc trang va huong hoan thien)* (Hanoi: Law Science Information Bulletin, January 2008) at 5-6.

the current economy is the rapid process of industrialization and transformation of Vietnamese society from a predominantly agricultural society to a more industrialized and more urbanized society, especially since 1986, when Vietnam moved from a centrally planned economy to a market economy.²⁴ In this new scenario, consumers face more complex and highly technological products. The distance between consumers and original producers is growing. Trust or assumption that goods and services are safe and beneficial as expected becomes an important factor in consumer decisions.²⁵

It should be noted that the report of the Institute of Legal Sciences was written by a number of researchers after they participated in close cooperation with a research program under the aegis of CIDA – the Vietnam Legal Reform Assistance Project (LERAP).²⁶

Subsequently, the Institute of Legal Sciences' research report was shared with VCAD's legal drafters, and the idea that consumers should be regarded as weak parties in transactions with traders was widely agreed to among legal drafters of the CPL. This idea was attractive perhaps because it promised to provide drafters with a key reference point for establishing a more comprehensive system of consumer protection. This viewpoint was also attractive to other stakeholders of the CPL in the sense that it was seen as a potential basis for various stakeholders to explore and imagine a Vietnamese consumer protection regime in line with their own preferences. The reason was quite simple. The idea of seeing consumers as vulnerable market participants could justify proposals to establish a transaction-based consumer law in Vietnam beyond the traditional contract rules. Concretely, supporters of this model argued that traditional contract law (as

²⁴ *Ibid.* at 7.

²⁵ However, one of the shortcomings of this report is that it failed to recognize that consumers' key disadvantages would be expressed differently across different kinds of consumer transactions. In certain kinds of consumer transactions (such as transactions relating to used or second-hand products, transactions relating to door-to-door sales or distance sale contracts), consumers' disadvantages were more visible. Therefore, the authors of this report did not clearly point out the relationship between the level of government intervention and the level of presence of consumers' disadvantages in specific consumer transactions.

²⁶ LERAP assisted the Institute of Legal Sciences to organize a workshop on "Legal Mechanisms for Consumer Protection: Vietnamese Practice and International Experiences" on 14-15 August 2007 in Hanoi. At this workshop, some Canadian lawyers and officials from Québec were invited to present Québec's experiences regarding consumer protection, especially regarding roles of consumer protection agencies, consumer associations, class action mechanisms, etc. Key officials from VCAD also attended this workshop. Further, after the workshop, VCAD invited Canadian experts to visit VCAD's office and continued to share their experiences with VCAD.

stipulated in the current *Civil Code* and the current *Commercial Law*) is based on an unrealistic assumption of equality between contracting parties. As a result, these rules are unfit for consumers.²⁷ In addition, supporters of this model also argued that, if the current legal system is not constructed on the assumption of the existence of vulnerable consumers, there will be many legal and practical barriers that exclude consumers from effective access to justice. As a result, to enhance consumers' self-help efforts, certain legal barriers, especially in procedural rules, should be removed.²⁸

The idea of seeing consumers as vulnerable market participants could also be used to justify establishing a state-based consumer protection regime, extending the presence of state power in market interactions through various means such as inspection, licensing, administrative fines, and prosecution. It is not a coincidence that many NA members proposed that consumer protection should be the responsibility of society as a whole, but that “the state must assume its central and leading role.”²⁹ Draft 6 of the CPL³⁰ clearly stated in article 4(4) on “principles of consumer protection” that “protecting consumers’ legitimate rights and interests is the joint responsibility of the whole society *in which the state assumes the central role.*”³¹ This paragraph was later rephrased in article 4(1) of Draft 7 to read “protecting consumers’ legitimate rights and interests is the joint responsibility of the whole society *in which the state assumes the leading role.*”³² However, perhaps because the concrete meanings of the concepts “central role” and “leading role” were too difficult to explain,³³ these words were removed in the final draft of the CPL, which was then adopted.³⁴ As a result, article 4(1) of the adopted CPL simply

²⁷ MoJ – Institute of Legal Sciences, *supra* note 23 at 39-47.

²⁸ Bui Nguyen Khanh, “A Number of Comments and Suggestions for the Draft Law on Consumer Protection” (“Mot so y kien dong gop cho du thao Luat bao ve quyen loi nguoi tieu dung”), (2010) 5 J. of State & L. (Vietnam) 78 [Bui, “Comments and Suggestions”]. It is worth noting that Khanh was a legal drafter of the CPL.

²⁹ CSTE, *supra* note 7 at 5.

³⁰ The draft was made based on comments from NA members during the debate on 17 June 2010.

³¹ Emphasis added.

³² Emphasis added.

³³ This is despite the fact that *Report No. 372/BC-UBTVQH12 dated 12 October 2010* issued by NASC clearly states on page 4 that “generally speaking, delegations of NA deputies agree to the view that the State must assume the central and leading role in consumer protection.”

³⁴ Unfortunately, I found no relevant reports from the NA explaining this change.

stipulates that “protecting consumers’ legitimate rights and interests is *the joint responsibility of the state and the whole society*.”³⁵

Actually, the adopted CPL of Vietnam seems to reflect both of these approaches. Among its 51 articles are 17 articles stipulating mechanisms for resolving consumer complaints or disputes between consumers and traders in which many new provisions are introduced to make it easier for consumers to access the justice system.³⁶ The CPL also contains a number of provisions on consumer contracts in articles 14-21. These provisions can be regarded as elements of a transaction-based consumer protection regime or self-help-based consumer protection regime. However, the CPL also has one chapter on state management³⁷ and many articles stipulating traders’ general responsibilities, which, if violated, could result in the offending traders being fined or even prosecuted.³⁸ These provisions can be said to be elements of a state-based consumer protection regime.

Reflecting the nature of this hybrid model, article 5 of the CPL, entitled “State policy on protection of consumers’ rights and interests”, sets out Vietnam’s consumer protection policies as follows:³⁹

- The state creates favourable conditions for organizations and/or individuals to actively participate in protection of consumers’ rights and interests;
- The state encourages organizations and/or individuals to apply and/or develop modern technologies to produce and/or supply safe, quality goods and/or services;
- The state deploys frequent and uniform measures to manage and supervise traders’ legal compliance;
- The state mobilizes all resources to invest in infrastructure; develops human resources for bodies or organizations so that they can implement protection of consumers’ rights and interests; frequently provides advice, assistance, propaganda, guidance, and dissemination of knowledge to consumers.

³⁵ Emphasis added.

³⁶ See section 6.4.

³⁷ Articles 47-49. Other provisions relating to state management of consumer protection can also be found in articles 25-26 regarding resolving consumer complaints through administrative authorities.

³⁸ Articles 10-13 of the CPL.

³⁹ See article 5 of the CPL.

However, despite the self-help approach being given the green light, the CPL was carefully designed to avoid language that directly empowers consumers. Instead, the state-based approach is given a prominent role in consumer protection. This approach is substantially different from that of developed countries in North America and Europe.⁴⁰

6.1.2 Definitions of “Consumer” and “Trader”

Consumer protection law is a set of rules that protects consumers from traders’ abuses. Therefore, one of the very first tasks law-makers or legal drafters have to undertake in formulating a piece of consumer protection legislation is to define the term “consumers”, so that consumers come under the protection of this legislation. The next important task is to define “traders.” Defining “consumer” and “trader” is not simply a matter of logical reasoning. It has its own policy implications. For example, a broad definition of “consumer” would require a more comprehensive consumer protection regime. On the other hand, a narrow definition of “consumer” could undermine the social basis for activities of consumer protection organizations, but could also lighten the legal burden on the business community. Similarly, a broad definition of “trader” could extend the possibility that many market players or suppliers could be subject to the application of the CPL, while a too limited definition of “trader” could significantly reduce the coverage of the CPL. Therefore, it is not surprising that the concept of “consumer” and the concept of “trader” were sites for struggle among interested groups during the process of drafting the CPL.

In addressing the proper definition of “consumers”, Vietnamese legal drafters looked to foreign experiences to find solutions. In the CSR completed by the EG in September 2008, the authors of the report accurately pointed out that the concept of “consumer” was not the same across foreign jurisdictions.⁴¹ In most developed countries

⁴⁰ August Horvath & John Villafranco, eds., *Consumer Protection Law Developments* (Chicago: A.B.A. Section of Antitrust Law, 2009) at 729.

⁴¹ VCAD, *supra* note 1 at 20. However, it is noteworthy that this report contains certain technical errors. For example, it states that consumer protection law in Canada (except for Québec) stipulates that the concept of “consumer” includes not only “natural persons” but also “legal persons”. This information is simply inaccurate. Perhaps, the fact that this report was conducted without reliable foreign experts’ comments was an important reason for this error.

consumers are generally understood as “natural persons”.⁴² Legal persons are excluded from the concept of “consumer” in consumer protection statutes.⁴³ However, contrary to this dominant viewpoint, some jurisdictions (such as India⁴⁴ and Taiwan⁴⁵) define “consumers” as including both natural persons and legal persons.⁴⁶

In Vietnam, the *Ordinance on Protection of Consumers’ Rights and Interests* (CPO) of 1999 offered an ambiguous definition of “consumer” as follows: “consumer means person purchasing and/or using goods and/or services for the purpose of consumption or living activities of individuals, families, or organizations.”⁴⁷ In this definition, it is unclear whether the concept of “person” includes only “natural person” or whether it could also include “legal person”. However, given the existence of the word “organization” at the end of this definition, Vinastas and legal drafters from the drafting ministry argued that this definition includes “legal person”.

Based on this fact, legal drafters from Vinastas and the drafting ministry were of the view that the definition of “consumer” in the CPL should be defined to include not only “natural person” but also “legal person”.⁴⁸ This position was shared by some legal

⁴² Article 1(e) of Québec’s *Consumer Protection Act* states that “‘consumer’ means a natural person, except a merchant who obtains goods or services for the purposes of his business.” *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* defines “consumer” as “any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession.” See Francis Rose, ed., *Blackstone’s Statutes on Commercial and Consumer Law 2008-2009*, 17th ed. (Oxford: Oxford University Press, 2008) 539. Article 13 of the *Civil Code* of Germany of 2002 explicitly explains that “a consumer means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.” See Germany’s *Civil Code*, online: Gesetze-im-internet <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000P13>.

⁴³ Howell & Weatherill, *supra* note 13 at 365.

⁴⁴ Article 2(1)(d) and (1)(l) of India’s *Consumer Protection Act* of 1986. See India’s *Consumer Protection Act* of 1986, online: NIC <<http://fcamin.nic.in/Events/EventDetails.asp?EventId=591&Section=Acts+and+Rules&ParentID=0&Parent=1&check=0>>. Extracts of this act in this dissertation are based on the English version found here.

⁴⁵ Article 2(1) of Taiwan’s *Consumer Protection Law* states that “the term ‘consumers’ means those who enter into transactions, use goods or accept services for the purpose of consumption”. See Taiwan’s *Consumer Protection Law*, online: Ministry of Justice, Government of Taiwan <http://law.moj.gov.tw/Eng/news/news_detail.aspx?id=189>. Extracts of this law in this dissertation are based on the English version found here.

⁴⁶ VCAD, *supra* note 1 at 20, 110.

⁴⁷ Article 3(1) of the CPL.

⁴⁸ This position was expressed in Draft 1 (article 3(1)) which stated that “‘consumer’ means individual or organization purchasing or using goods and/or services without the purpose of business.”

scholars in Vietnam.⁴⁹ However, legal drafters representing the business community (VCCI) criticized this approach, arguing that individual consumers were most vulnerable and, given the limited resources of the Government, excluding legal persons from the concept of “consumer” could provide a better level of consumer protection. VCCI also argued that a definition of “consumer” that included only “individual consumer” (natural person) created legal harmonization with major Vietnamese trading partners.⁵⁰

The view that “consumers” should include “legal persons” was also discussed by some foreign experts at workshops during the process of drafting the CPL. For example, in a workshop held by Maison du Droit and VCAD in April 2010 to comment on the draft CPL, French experts advised that this view was not reasonable because it could be abused by enterprises to seek unfair protection from the application of this law.⁵¹ However, this advice was ignored by VCAD.

It seems that the definition of “consumer” in the adopted CPL better reflects the requirements of a number of local groups, including Vinastas and a number of public organizations. As a result, the final version of this definition in the CPL was constructed almost exactly the same as the definition of “consumer” in the CPO of 1999.⁵² With this definition, consumers, as protected by the adopted CPL, include not only “individual consumers” (natural persons) but also legal persons such as companies buying goods or services without the purpose of re-supplying.

The debate over the definition of “consumer” continued throughout the two-year process of drafting the CPL, but ended in the preservation of the *status quo*. This suggests that legal drafters and law-makers actually looked to foreign countries (especially

⁴⁹ MoJ Website News, “Making Consumer Protection Law: Making a Law for the Future or Present Moment?” (“Xay dung Luat Bao ve nguoi tieu dung: Xay dung luat cho tuong lai?”) (19 January 2010), online: MoJ <http://www.moj.gov.vn/p/tag.idempotent.render.userLayoutRootNode.target.n65.uP?uP_root=me&cmd=item&ID=14531>.

⁵⁰ The dissatisfaction with the definition of “consumer” was raised again by a representative of VCCI before the NA (speech of Vu Tien Loc, Chairperson of VCCI, before the NA on 17 November 2010) that “consumers” should include only “individual consumers”. He argued that this is the conventional definition widely accepted by consumer laws throughout the world, except for a very few countries which state otherwise. However, his argument was not ultimately heeded by NASC.

⁵¹ Maison du Droit, *Proceedings of a Workshop on the Draft Law of Consumer Protection (Ky yeu Hoi thao Du thao Luat Bao ve nguoi tieu dung)* (Hanoi, 20-21 April 2010) at 5-7.

⁵² Article 3(1) of the CPL states that “‘consumer’ means a person purchasing and/or using goods and/or services for the purpose of consumption and/or living activities of individuals, families, or organizations.”

developed countries and neighbouring countries) to seek solutions to a divisive issue. However, when foreign experiences provided diverse approaches, the choice was finally determined by the internal politics behind the drafting process which were shaped by the local conditions.

As for the definition of “trader”, the adopted CPL used a lengthy term, i.e. “organization and/or individual conducting business in goods and/or services”⁵³ (hereinafter “trader”). This is also the term used in the CPO without detailed explanation.⁵⁴ The question about who is a “trader” became very important in drafting the CPL because its answer directly relates to the coverage of the CPL. During the process of drafting and discussing the CPL, a number of issues were also raised by relevant authorities such as: Are lawyers “traders”? Are education centres or schools also “traders”?⁵⁵

The documents relevant to the process of drafting the CPL did not show that legal drafters consulted foreign experiences to resolve these questions.

Actually, the definition of “trader” did not appear in either the initial drafts, Draft 1 or Draft 2. In Draft 2, the term “merchant” (*thuong nhan*) in the sense of “registered trader”⁵⁶ was used to refer to the other party in a consumer transaction. Accordingly, this concept excluded individuals conducting business without official business registration (unregistered vendors or unregistered traders) who are quite pervasive at local markets. The EG and the DC were of the opinion that these small traders should not assume all obligations stipulated by the CPL and that the application of all provisions of the CPL to these unregistered traders would be impossible to enforce.⁵⁷ However, this approach was severely criticized in the process of public consultation, evaluation from MoJ, as well as in discussion by the NA. Under these pressures, legal drafters of the CPL had to make concessions by including “unregistered vendors” in the definition of “trader”.⁵⁸ These

⁵³ Originally, in Vietnamese, “*to chuc, ca nhan kinh doanh hang hoa, dich vu.*”

⁵⁴ Article 4 of the CPO.

⁵⁵ See section 5.4.1.

⁵⁶ Article 6(1) of the *Commercial Law* of 2005.

⁵⁷ I obtained this information from an interview with a member of the EG of the CPL during my fieldwork in Hanoi on 12 August 2010.

⁵⁸ Article 3(2) of the CPL defines a “trader” as

concessions paved the way for Commune People's Committees to extend their presence in local markets.⁵⁹

It is also worth noting that the definition of “traders” in article 3(2) of the CPL includes only “for-profit” suppliers.⁶⁰ With such definition of “trader”, the CPL covers almost all market relations between consumers and traders in Vietnam, even including relations between banks and their clients and relations between insurance companies and their clients.⁶¹ However, it is certainly not obvious that this law covers relations between lawyers and their clients,⁶² or private schools and their students, because the concept of “trader” in the adopted CPL includes only “for-profit” organizations and individuals.⁶³ Nevertheless, it is quite certain that this law does not cover relations between public schools or other public organizations and their customers, as these public organizations

[...] an organization and/or individual conducting one, several or all of the stages of the business process, from production to sale of products or provision of services in the market for profit, including: (a) Merchants as stipulated in the Commercial Law; and (b) unregistered individuals conducting frequent and independent commercial activities [i.e. unregistered vendor].

⁵⁹ The adopted CPL also contains one article (i.e. article 7) relating to “protection of consumers’ rights and interests in transactions with unregistered vendors” as follows:

- (1) Based on the provisions in this Law and the relevant legal provisions, the Government shall stipulate detailed guidance on protection of consumers’ rights and interests in their transactions with unregistered individuals conducting frequent and independent commercial activities.
- (2) Based on provisions of this Law, provisions of the Government and local specific conditions, Commune-level People’s Committees [...] must implement concrete measures to secure quality, quantity, and safety, including food safety, for consumers purchasing and/or using goods and/or services from unregistered individuals conducting frequent and independent commercial activities.

⁶⁰ This definition seems to be extremely limited in terms of coverage in comparison with the concept of “traders” in a number of foreign jurisdictions from which many legal ideas were borrowed by legal drafters of the CPL. For example, article 3 of Québec’s *Consumer Protection Act* states that “non-profit legal persons cannot invoke their non-profit status to avoid the application of this Act.” Article 4 of this act also states that “the government and the governmental departments and agencies are subject to the application of this Act.” In European countries, the concept of “trader” in consumer law is usually defined to be broader than the concept of “for-profit” trader. See Hans Schulte-Nölke, *EC Consumer Law Compendium – Comparative Analysis*, European Commission, 2008, at 732, online: Europa<http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf>.

⁶¹ It is noteworthy that financial services are also regulated by other laws such as the *Law on Credit Institutions* of 1997 (as amended in 2004 and replaced by a new law in 2010) and the *Law on Insurance Business* of 2000 (as amended in 2010). Given this, the CPL is considered as supplementary to these laws.

⁶² The *Law on Lawyers* of 2006 says nothing on the issue of whether services provided by lawyers to their clients are “for-profit” services.

⁶³ For example, article 20 of the *Law on Education* of 2005 explicitly states that it is prohibited to organize education activities for profit.

are not deemed to carry on “profit-seeking activities.”⁶⁴ This legal choice seems to be perfectly consistent with the traditional model of state management in Vietnam in which public sectors are usually not placed under the close and effective scrutiny of their clients. From a legal transplantation perspective, foreign experience has not left a visible impact on the definition of “trader” as stipulated in the adopted CPL.

6.2 UNFAIR COMMERCIAL PRACTICES

Compared with the CPO of 1999, provisions prohibiting a number of unfair commercial practices are a new aspect of the adopted CPL.

Unfair commercial practices, or unfair trade practices, have been widely regulated in developed countries through various means such as private law remedies for misleading practices, self-regulation, administrative regulation and even criminal prosecution.⁶⁵ However, the model of regulation of unfair commercial practices in each country usually reflects institutional history and the traditions of government-industry relations in that country.⁶⁶

From a legal transplantation perspective, it can be said that the decision to include provisions on unfair commercial practices in the CPL, and the format of these provisions, were the products of legal borrowing.

Before starting to draft the CPL, the authors of the CPR (mainly officials from VCAD) – who were also the persons actually writing every sentence of the provisions on unfair commercial practices – mentioned the foreign experiences of eight jurisdictions.⁶⁷ the EU,⁶⁸ the UK,⁶⁹ France,⁷⁰ Québec (Canada),⁷¹ Australia,⁷² Singapore,⁷³ Malaysia⁷⁴ and Thailand.⁷⁵

⁶⁴ NASC, *Report No. 372/BC-UBTVQH12 dated 12 October 2010 explaining the acceptance of opinions and revisions to the draft CPL (Bao cao so 372/BC-UBTVQH12 ngay 12/10/2010 Giai trinh tiep thu, chinh ly Du thao Luat Bao ve quyen loi nguoi tieu dung)* at 5.

⁶⁵ Ramsay, *supra* note 16 at 347.

⁶⁶ *Ibid.*

⁶⁷ VCAD, *supra* note 1 at 30-41.

⁶⁸ *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* (‘Unfair Commercial Practices Directive’). [UCPD].

The authors of the CSR were convinced that it was common among jurisdictions that three kinds of practices (as classified by the EU *Unfair Commercial Practices Directive* – the UCPD) were generally prohibited, i.e. misleading actions, misleading omissions, and aggressive practices.⁷⁶ The authors of this report recommended that the future CPL of Vietnam should contain provisions prohibiting these three kinds of unfair commercial practices, although they also knew very well that there were already provisions in Vietnam prohibiting misleading or false advertisements and prohibiting mislabelling.⁷⁷ Perhaps, the authors of the CSR were convinced that such prohibitions in the existing legal system of Vietnam did not adequately address the concept of unfair

⁶⁹ *Consumer Protection from Unfair Trading Regulations* (2008) issued by the UK Office of Fair Trading in 2008.

⁷⁰ Article L121-1 (prohibiting false or misleading advertisement); article L122-3 (prohibiting unsolicited goods and/or services); article L122-6 (prohibiting pyramid selling); and article L122-8 (prohibiting traders from taking advantage of consumers' weaknesses or ignorance in consumer transactions) of France's *Consumer Code*. See France's *Consumer Code*, online: UPL <http://195.83.177.9/upl/pdf/code_29.pdf>. Extracts of this code in this dissertation are based on the English version found here.

⁷¹ Provisions in Québec's *Consumer Protection Act* (articles 215 to 243), particularly article 219 (prohibiting traders or advertisers from making false or misleading representations to consumers), article 220 (prohibiting misrepresentation of benefits and functions of goods and/or services), article 221 (prohibiting misrepresentation of components or properties of goods and/or services), article 222 (prohibiting misrepresentation regarding age and manufacturing method of goods), articles 223-225 (transparency regarding price), articles 226-227 (prohibiting unreasonable refusal to honour warranty promises), article 228 (prohibiting misleading omissions), and article 230 (prohibiting unsolicited goods and/or services). See Québec's *Consumer Protection Act*, online: CANLII <<http://www.canlii.org/en/qc/laws/stat/rsq-c-p-40.1/15313/rsq-c-p-40.1.html#history>>. Extracts of this act in this dissertation are based on the English version found here.

⁷² Provisions in article 52 (prohibiting misleading or deceptive conduct) of the *Trade Practice Act* of 1974.

⁷³ Provisions in articles 4 and 5 of Singapore's *Consumer Protection (Fair Trading) Act* of 2003 which prohibit traders from using misleading or deceptive practices. See Singapore's *Consumer Protection (Fair Trading) Act* of 2003, online: AGC <[http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2003-ACT-27-N&doctitle=CONSUMER%20PROTECTION%20\(AIR%20TRADING\)%20ACT%202003%0A&date=latest&method=part](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2003-ACT-27-N&doctitle=CONSUMER%20PROTECTION%20(AIR%20TRADING)%20ACT%202003%0A&date=latest&method=part)>. Extracts of this act in this dissertation are based on the English version found here.

⁷⁴ Provisions on misleading and deceptive conduct, false representation and unfair practices in Malaysia's *Consumer Protection Act* of 1999, such as article 9 (prohibiting misleading conduct relating to nature, manufacture methods, characteristics of goods and/or services), article 10 (prohibiting false or misleading representation), article 12 (prohibiting of misleading indications as to price), article 13 (prohibiting "bait" advertisement), and article 14 (prohibiting misleading practices with respect to gifts).

⁷⁵ Provisions in article 22 of Thailand's *Consumer Protection Law* of 1979 regarding false or misleading advertisement or labelling.

⁷⁶ VCAD, *supra* note 1 at 40-41.

⁷⁷ *Ibid.* at 41.

commercial practices as widely understood in other jurisdictions.⁷⁸ Actually, the authors of the CSR were accurate on this point because “false and misleading advertisement” and “mislabelling” were only two concrete practices among various types of misrepresentations or unfair commercial practices that were prohibited to traders.

Among the laws of the eight foreign jurisdictions examined by the authors of the CSR, perhaps the UCPD’s format of the prohibition against unfair commercial practices left the most visible mark on early drafts of the CPL.⁷⁹ For instance, the initial draft contained many provisions which are very similar to provisions in the UCPD. For example, article 25 of the initial draft gave a general definition of “unfair commercial practices” somewhat similar to a definition in the UCPD.⁸⁰ The three articles of the initial draft stipulated three kinds of unfair commercial practices, i.e. “misleading practices” (article 26), “harassment of consumers” (article 29), and “coercive practices” (article 31) which are quite similar to provisions in articles 6(1), 7, 8 and 9 of the UCPD.

It should be noted that most provisions on unfair commercial practices stipulated in the initial draft were retained in Draft 1,⁸¹ Draft 2,⁸² Draft 3,⁸³ Draft 4,⁸⁴ and Draft 5.⁸⁵ In other words, these provisions went through the CPL drafting process quite smoothly without significant challenges from the public, MoJ or the Government. After the discussion of Draft 5 by the NA in June 2010 (the first debate), and of Draft 6, Draft 7 and the final draft of the adopted CPL, all articles on unfair commercial practices were coalesced into one article with the title “Prohibited Practices”.⁸⁶ Specifically, article 10(1) to (5) of the adopted CPL reads as follows:

⁷⁸ For example, article 2(d) of the UCPD explains that “business-to-consumer commercial practices” and “commercial practices” mean “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

⁷⁹ It should be noted that authors of the CSR were also legal drafters who actually wrote the draft CPL, especially, the initial draft and Draft 1.

⁸⁰ The UCPD also provides a definition of “unfair commercial practices” in article 5(2).

⁸¹ Articles 25, 28, and 30.

⁸² Articles 7, 8, and 9.

⁸³ Articles 10, 11, and 12.

⁸⁴ Articles 11, 12, and 13.

⁸⁵ Articles 11, 12, and 13.

⁸⁶ Article 10 of Draft 6, article 10 of Draft 7 and also article 10 of the adopted CPL.

1. Traders shall not deceive or mislead consumers by means of advertising or by hiding information or providing inadequate, inaccurate or distorted information about any of the following:
 - (a) goods and/or services supplied by those trader;
 - (b) reputation, business capacity, or capacity to provide goods and/or services of those trader;
 - (c) terms and characteristics of the transaction between consumers and those traders.
2. Traders shall not harass consumers by means of marketing goods and/or services against the will of consumers on more than one occasion and shall not prevent consumers from carrying on the normal course of their work or lives.
3. Traders shall not coerce consumers by means of the following behaviours:
 - (a) employing force or threatening to use force or other means to cause harm to life, health, reputation, dignity or property of consumers;
 - (b) taking advantage of difficult circumstances of consumers or taking advantage of natural calamities or epidemics to coerce consumers into transactions.
4. Traders shall not carry out trade promotion activities, or make offers to directly transact with persons having no civil capacity as stipulated by the civil laws.
5. Traders shall not request consumers to pay for unsolicited goods and/or services.⁸⁷

However, it should be noted that the language of provisions on unfair commercial practices in the UCPD is much more concrete and detailed than the very abstract language in the provisions of the adopted CPL on the same topic. For example, while the UCPD specifically names 31 unfair commercial practices regarded as “misleading commercial practices”, the CPL (article 10(1)) only mentions in very general and abstract language the prohibition against misleading practices relating to three aspects of consumer transactions.⁸⁸ From a consumer perspective, this kind of language is certainly less friendly than that of the UCPD. Perhaps, such employment of general and abstract language in the initial draft was consistent with the tradition of the legislative language in Vietnam because, during the whole process of improving the draft CPL, including public consultation, evaluation and discussion by MoJ, the Government, and the NA, no one

⁸⁷ Article 10 of the CPL.

⁸⁸ Namely: (a) goods and/or services supplied by traders; (b) reputation, business capacity, or supply capacity of traders; (c) substance and/or characteristics of transactions between consumers and traders.

raised concerns about the language of such provisions and the likely negative impacts it could have on ordinary consumers.

In addition, the authors of the initial and of following drafts only focused on determining the practices to be prohibited by this law. Proportionate sanctions applicable to these prohibited practices were not clarified. In fact, provisions on specific sanctions applicable to violators committing unfair commercial practices in foreign jurisdictions were simply ignored. Perhaps, legal drafters of the CPL thought that proper and concrete sanctions for violations of the CPL should be left for them to tailor via government decrees.

However, the fact that article 10(1) imitates the UCPD in prohibiting misleading practices while a number of specific misleading practices are already prohibited in the current *Competition Law, Ordinance on Advertisement*⁸⁹ and Decree 89 (2006) on mandatory labelling,⁹⁰ generates overlaps and inconsistencies in the legal system of Vietnam. It does not seem that authors of the CPL sufficiently understood the systemic legal impacts of this newly imported provision.

Experiences in many developed countries show that it is not necessary to urge consumers to file direct actions against traders carrying on unfair commercial practices. For certain types of unfair commercial practices, especially false or misleading representation of goods and services, competitors rather than consumers are seen as being in a better position to file legal actions.⁹¹

In the European Union, the UCPD not only allows consumers but also explicitly grants competitors of offending traders the right to file legal action with respect to unfair commercial practices or to bring unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.⁹² However, competitors' rights to file legal proceedings against offending traders were not explicitly discussed during the process of drafting the CPL in Vietnam. The CPL only mentions the rights of consumers and consumer protection organizations to

⁸⁹ See section 4.3.1.

⁹⁰ See section 4.3.2.

⁹¹ Horvath & Villafranco, *supra* note 40 at 610.

⁹² Article 11 of the UCPD.

challenge unfair commercial practices.⁹³ Vietnamese legal drafters and law-makers are, perhaps, influenced by the traditional communitarian view of Confucianism, which stresses a preference for harmony rather than struggle or competition⁹⁴ and, thus, fails to see competitors as having any specific role in the enforcement of the CPL.⁹⁵

6.3 CONSUMER CONTRACTS

The existence of provisions on consumer contracts is also a new aspect of the adopted CPL in comparison with the CPO of 1999. According to Geraint Howells and Stephen Weatherill, the rationale for controlling consumer contracts lies in the imbalance between consumer and trader (supplier).⁹⁶ This was also acknowledged by legal drafters of the CPL in Vietnam when designing concrete provisions on consumer contracts.⁹⁷

According to Iain Ramsay, the consumer laws of many countries use the following techniques to regulate the contractual relationship between consumers and traders: (1) information remedies; (2) the detailed regulation of terms through administrative regulation or the creation of inalienable rights; (3) the control of the supply of terms, directly through administrative pre-clearance or indirectly by licensing entry into a particular market; and (4) negotiation of standard terms by a consumer

⁹³ Articles 25, 31 and 41 of the CPL.

⁹⁴ Pham Duy Nghia, “Confucianism and the Conception of Law in Vietnam” in John Gillespie & Pip Nicholson, eds., *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: Asia Pacific Press, 2005) 76 at 80. The author notes that “the need to maintain balance and harmony is stressed in all aspects of life [...] and acknowledged by most Vietnamese.”

⁹⁵ However, it should be noted that, according to article 58(1) of Vietnam’s *Competition Law* of 2004, enterprises are entitled to lodge complaints with VCAD when they deem their interests have been infringed by their competitors’ violations of the *Competition Law*. Unfortunately, among unfair commercial practices prohibited by the adopted CPL, based on article 45(3) of the *Competition Law* of 2004, enterprises can only lodge a complaint with VCAD when they deem their interests have been infringed by their competitors’ false or misleading advertisements.

⁹⁶ In the capacity to bargain contractual terms and conditions and in some other areas. See Howell & Weatherill, *supra* note 13 at 261.

⁹⁷ Nguyen Nhu Phat, “A Number of Theoretical Issues Relevant to the Law on Consumer Protection” (“Mot so van de ly luan xung quanh Luat bao ve quyen loi nguoi tieu dung”) (2010) 2 J. of State & L. (Vietnam) 28 at 28; Nguyen Thi Hong Hanh, “The Need for Regulation of General Business Conditions” (“Nhu cau kiem soat dieu kien thuong mai chung”) (2009) 9 J. of State & L. (Vietnam) 36 at 36; Nguyen Nhu Phat, “General Business Conditions and the Principle of Freedom of Contract” (“Dieu kien thuong mai chung va nguyen tac tu do khe uoc”) (2003) 6 J. of State & L. (Vietnam) 42 at 42; Bui, “Comments and Suggestions”, *supra* note 28 at 79.

bargaining agent (including the development of model contracts).⁹⁸ In addition, plain language legislation is considered one of the most widely used techniques for regulating standard consumer contracts in many countries.⁹⁹ Similar information was available to legal drafters of the CPL.¹⁰⁰

Actually, the inclusion of provisions on consumer contracts in the adopted CPL can also be seen as a product of legal transplantation. In order to prepare to draft the CPL, the authors of the CSR conducted an inquiry into foreign experiences regarding this issue. The authors of the CSR consulted provisions on consumer contracts in the following five jurisdictions:¹⁰¹ Québec (Canada),¹⁰² France,¹⁰³ the EU,¹⁰⁴ Taiwan,¹⁰⁵ and Malaysia.¹⁰⁶ The authors came to the conclusion that there was a universal principle among consumer laws of these jurisdictions that consumers and traders cannot contract out of consumer rights granted by consumer protection laws.¹⁰⁷ The authors of the CSR also noted that provisions on standard consumer contracts were important components of consumer protection laws of jurisdictions under examination. These provisions were generally more

⁹⁸ Ramsay, *supra* note 16 at 166.

⁹⁹ *Ibid.*

¹⁰⁰ VCAD, *supra* note 1 at 41-52.

¹⁰¹ *Ibid.* at 42-52.

¹⁰² Provisions in Québec's *Consumer Protection Act*, particularly article 8 (annulment of contract due to unfair terms), article 10 (prohibited terms unilaterally imposed by traders), article 11 (consumer arbitration), article 17 (interpretation of unclear contract terms in favour of consumers), article 26 (language of consumer contracts), article 27 (contracts to be signed), article 33 (consumers bound), articles 34-54 (warranties), articles 54 (1)-(14) (distance sales contracts), articles 55-65 (direct sales contracts), articles 66-150 (consumer credit), and articles 151-181 (automobiles and motorcycles).

¹⁰³ Provisions in France's *Consumer Code*, particularly, articles L121-16 to L121-20-16 on distance sales contracts, and articles L121-21 to L121-33 on direct sales contracts.

¹⁰⁴ Particularly, provisions in *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*. It is surprising to me that authors of the CSR did not mention *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, *Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises* (the "doorstep selling directive"), and *Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts* (the "distance sales directive").

¹⁰⁵ Particularly, provisions on standard contracts in articles 11 to 17 of Taiwan's *Consumer Protection Law* of 1994 (as amended in 2003).

¹⁰⁶ Particularly, provisions in Malaysia's *Consumer Protection Act* of 1999 such as article 6 (no contracting out of consumer rights granted by the act), article 17 (future services contracts), and articles 57-65 on contracts for supply of services.

¹⁰⁷ VCAD, *supra* note 1 at 50.

detailed and more comprehensive than similar provisions in standard contracts in Vietnam's *Civil Code* of 2005.¹⁰⁸ The authors of the CSR also noted that Québec's *Consumer Protection Act* was one of the foreign consumer protection laws having the most comprehensive and clear provisions on consumer contracts.¹⁰⁹ Similar praise was also given to France's *Consumer Code*.¹¹⁰ However, the authors also noted the provision in article 17 of Taiwan's *Consumer Protection Law* about the power of certain central consumer protection agencies to force a number of industries to issue mandatory standard contract terms applicable to that sector.¹¹¹ This provision in the Taiwanese law seemed to inspire the authors of the CSR to justify the role of a central consumer protection agency [i.e. VCAD] to intervene into standard contracts and to supervise the substance of these contracts – an idea which could be easily accepted given the traditional thinking about state economic management prevalent in Vietnam.

Based on this analysis, it can be concluded that provisions on consumer contracts in the CPL of Vietnam, at least in its early drafts, were highly influenced by Québec's *Consumer Protection Act*, France's *Consumer Code* and Taiwan's *Consumer Protection Law*.

Based on these foreign influences and being aware of the fact that written contracts between consumers and traders in Vietnam also have many problems from the perspective of consumer protection, most members of the EG and the DC were convinced that the CPL should have provisions on consumer contracts (i.e. beyond contract rules already stipulated in the *Civil Code* of 2005), especially standard consumer contracts.

Some techniques of governing written consumer standard contracts in foreign consumer laws were borrowed to design provisions on written consumer standard contracts in Vietnam. Borrowings included techniques such as the requirement of plain

¹⁰⁸ *Ibid.* at 50-51. Detailed discussion of the provisions regarding standard contracts in the *Civil Code* of 2005 was presented in section 4.4.

¹⁰⁹ VCAD, *supra* note 1 at 47.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at 43. Article 17 of Taiwan's *Consumer Protection Act* reads as follows:

The competent authorities at the central government level may designate certain industries, and set forth by public notice the mandatory and prohibitory provisions of standard contracts to be used by them. Articles in standard contracts of a standard contract in violation of the publicly posted standard contracts set forth in the preceding paragraph shall be null and void [...] Competent authorities may at any time dispatch officials to audit standard contracts used by business operators.

language,¹¹² methods of interpretation of unclear contractual terms, provisions on invalid terms (i.e. unfair terms), reasonable notice of contract terms or general transactional conditions, and registration of certain standard contracts or certain general transactional conditions.

However, some provisions on specific consumer contracts, such as door-to-door sales contracts, distance sales contracts and sales contracts relating to used goods, are not concretely stipulated in the adopted CPL, despite the fact that legal drafters knew that these special consumer contracts were highly regulated in foreign jurisdictions such as Québec (Canada),¹¹³ France,¹¹⁴ and Taiwan.¹¹⁵

As a result, except for the absence of specific provisions on direct sales contracts and distance sales contracts, most provisions relating to consumer contracts in the adopted CPL can be traced to their foreign origins.

6.3.1 Interpretation of Unclear Contractual Terms

The technique of interpreting contracts in favour of consumers was also used by legal drafters of the CPL. In fact, this technique was already used in the *Civil Code* of 1995 and in the *Civil Code* of 2005; these two codes contain provisions stating that a contract between two parties of different bargaining power should be interpreted in favour of the weaker party. However, these two versions of the *Civil Code* did not expressly state that consumers were the weaker parties in contractual relations. The legal drafters of the CPL intentionally designed a provision in the CPL to overcome this shortcoming of the *Civil Code*. Thus, article 15 of the CPL states that

¹¹² For example, article 14(2) of the CPL states that “[i]n the event the contract [between trader and consumer] is written, the language of the contract must be clear and understandable. The contract must be in Vietnamese, except as otherwise agreed by contracting parties or otherwise stipulated by law.” This provision is likely influenced by article L133-2 of France’s *Consumer Code*, which states that “contract terms proposed by professionals to consumers or non-professionals must be presented and written in a clear and comprehensible manner.”

¹¹³ Articles 54(1)-54(14) (distance sales contracts), articles 55-65 (direct sales contracts), and articles 151-181 (automobiles and motorcycles) of Québec’s *Consumer Protection Act*.

¹¹⁴ Articles L121-16 to L121-20-16 on distance sales contracts, and articles L121-21 to L121-33 on direct sales contracts in France’s *Consumer Code*.

¹¹⁵ Articles 18-20 of Taiwan’s *Consumer Protection Law*.

[...] in circumstances in which there are different understandings of the content of a contract, the organization and/or individual having the mandate to resolve the relevant dispute¹¹⁶ shall interpret this content in favour of the consumer.¹¹⁷

This provision was found in all drafts of the CPL. This shows that the legal drafters were very consistent about this matter, and this provision was also widely supported by the public and the NA.

The origin of this provision can be found in many foreign consumer protection laws studied by legal drafters before drafting the CPL. For example, article 17 of Québec's *Consumer Protection Act* clearly states that "in case of doubt or ambiguity, the contract must be interpreted in favour of the consumer."¹¹⁸ Article L133-2 (paragraph 2) of France's *Consumer Code* also states that "in the event of doubt, they are interpreted in the sense which is most favourable to the consumer or the non-professional." Similarly, article 11 of Taiwan's *Consumer Protection Law* also states that "where the terms and conditions of standard contracts are ambiguous, interpretations shall be made in favour of the consumers."¹¹⁹

6.3.2 Invalidity of Unfair Contractual Terms

The CPL (article 16 (1)) explicitly stipulates nine types of contractual terms deemed to be invalid as follows:

- (a) terms that exclude the responsibilities of the trader towards consumers as stipulated by law;
- (b) terms that exclude or limit the right of a consumer to lodge complaints or file lawsuits;
- (c) terms that allow the trader to unilaterally modify other terms of the contract already made with the consumer or to unilaterally modify terms and conditions of sale and provision of services that are not concretely stipulated in the contract;
- (d) terms that allow the trader to unilaterally determine that the consumer has to perform an obligation;

¹¹⁶ It is not clear from the texts of the CPL who has this mandate. However, perhaps, the intention is to target courts and mediation/arbitration services centres.

¹¹⁷ Article 15 of the CPL.

¹¹⁸ This provision was adopted in 1978.

¹¹⁹ This provision was adopted in 1994.

- (e) terms that allow the trader to determine or change the price at the time of delivery of goods or provision of services;
- (f) terms that allow the trader to unilaterally interpret the terms of the contract when there are different interpretations of the contract;
- (g) terms that exclude the liability of the trader in the event that the trader deals in goods and/or services through a third party;
- (h) terms that coerce the consumer to perform his/her obligations even when the trader does not perform his/her obligations; and
- (i) terms that allow the trader to transfer his/her rights and obligations to a third party without the consent of the consumer.¹²⁰

All nine of these terms went throughout the drafting process quite smoothly without significant challenges from MoJ, the Government, or the NA. Many of these terms can be said to have direct foreign origins. For example, the provision in article 16(1)(a) can be found in similar form in Malaysia's *Consumer Protection Act*.¹²¹ The provision in article 16(1)(b), (c), and (d) can be found in Québec's *Consumer Protection Act*.¹²²

However, unlike the list of terms in Québec's *Consumer Protection Act*, the list of "unfair" terms in article 16(1) of the adopted CPL is exhaustive. In other words, this list is far from amounting to the general prohibition on unconscionable terms in consumer contracts in Québec's *Consumer Protection Act*.¹²³ Perhaps, by following this legislative design, authors of the CPL were motivated by the traditional instrumental view of the

¹²⁰ See article 16(1) of the CPL.

¹²¹ Article 6(1) of Malaysia's *Consumer Protection Act* of 1999 states that "the provisions of this act shall have effect notwithstanding anything to the contrary in any agreement."

¹²² Article 11.1 of Québec's *Consumer Protection Act* states that "any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited." Article 11.2 of this act states that "any stipulation under which a merchant may amend a contract unilaterally is prohibited [...]." Article 11 of this act states that "any stipulation whereby a merchant reserves the right to decide unilaterally [...] that the consumer has failed to satisfy one or another of his obligations [...] is prohibited." Article 10 of this act states that "any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative is prohibited."

¹²³ Article 8 of Québec's *Consumer Protection Act* states that

[...] the consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.

court system in Vietnam. That is a system which operates only within a strictly designated boundary of jurisdiction granted by law.¹²⁴

6.3.3 Control of Standard Consumer Contracts

Many provisions on standard consumer contracts in the adopted CPL can also be seen as having foreign origin. For example, article 17(1) of the adopted CPL, which states “in entering into a standard contract, the trader shall grant the consumer a reasonable period of time to examine the contract”, has been influenced by Québec’s *Consumer Protection Act* and Taiwan’s *Consumer Protection Law*. Specifically, article 27 of Québec’s *Consumer Protection Act* states that “the merchant must sign the written contract duly filled out, give it to the consumer and grant him a sufficient time to become aware of its terms and scope before signing it.” The first paragraph of article 11.1 of Taiwan’s *Consumer Protection Law* also has similar provisions.¹²⁵

In addition, according to article 19(1) of the CPL,

Traders supplying goods and/or services categorized as essential goods and/or services designated by the Prime Minister have to register their standard contracts [...] with the competent state management body on protection of consumers’ rights and interests.¹²⁶

Based on the available documents relating to the drafting of the CPL, it is unclear whether this provision has foreign origins. However, some provisions in Taiwan’s

¹²⁴ See section 3.7.

¹²⁵ It reads as follows:

Before business operators intend to make a standard contract with consumers, a reasonable period of no less than thirty (30) days must be given to consumers for them to review the contents of all terms and conditions thereof.

¹²⁶ In this paragraph, there are two points in need of clarification. The first point is the list of essential goods and/or services and the second point is the term “the competent state management body” which is empowered to provide “registration of standard contracts”. Unfortunately, the list of essential goods and/or services mentioned in this article was not clearly explained during the process of drafting the CPL. However, it can be reasonably inferred that the authors of the CPL had some “candidates” in their minds, such as water and electricity, although it is still unclear whether such services as banking services, insurance services and transportation services (e.g. airlines and trains) would be on the list. The actual contents of this list will become clear only when the Prime Minister (at the proposal of the Minister of Industry and Trade) issues an official decision on this matter during the future implementation of the CPL. In terms of the “competent management body” mentioned in this article, based on article 48(2) of the CPL, it can reasonably be inferred that this body is MoIT (and, actually, it is very likely that VCAD will assume this role).

Consumer Protection Law regarding the role of the central government in reviewing standard contracts might possibly have been a source for Vietnamese legal drafters to design the said provision in article 19(1) of the CPL.¹²⁷ Article 11.1 of Taiwan's *Consumer Protection Law* states that the central competent authority may select a particular industry to periodically review standard contracts used in that industry. In addition, article 17 of Taiwan's *Consumer Protection Law* also allows the central competent authority to issue standard contract terms which are to be mandatorily followed by businesses in certain designated industries.

Article 19(2) of the adopted CPL states that:

The competent State management body on protection of consumers' rights and interests, at its discretion or at the request of consumers, may request traders to repeal or modify standard contracts [...] in cases in which these standard contracts [...] are found to infringe upon consumers' rights and interests.

This provision is interpreted together with article 48(2) of the CPL to mean that MoIT (perhaps, VCAD) is empowered to police the unfairness of terms and conditions in standard consumer contracts and in general transaction conditions. From a legal transplantation perspective, at first glance, the provisions in article 19(2) can be said to be influenced by similar provisions in France's *Consumer Code* on the *Commission des clauses abusives*.¹²⁸ Such legal transplantation could generate new concerns for the Vietnamese business community that might not be experienced in France. For example, the procedure whereby MoIT (or VCAD) exercises the new mandate is still unclear. The CPL says nothing about the specific procedure for registration of standard consumer

¹²⁷ Article 11.1 of Taiwan's *Consumer Protection Law* states that the central competent authority may select a particular industry to periodically review standard contracts used in that industry.

¹²⁸ Article L132-2 of France's *Consumer Code* states that "the Commission des clauses abusives, under the auspices of the minister for consumer affairs, is aware of the standard agreements normally proposed by professionals to non-professional or consumer contracting parties. It is responsible for finding out whether or not these documents contain terms which could be of an abusive nature." Article L132-3 of France's *Consumer Code* states that a "[...] case may be referred to it either by the minister for consumer affairs, or by approved consumer protection associations, or by interested professionals. Cases may also be referred to it automatically." Article L132-4 of France's *Consumer Code* states that "the Commission recommends the deletion or amendment of clauses of an abusive nature. The minister for consumer affairs may, either automatically, or at the request of the commission, make these recommendations public although they may not contain any information likely to permit identification of individual situations." Furthermore, article L132-5 of France's *Consumer Code* states that "every year the commission compiles a report on its work and may propose any legislative or regulatory changes that it deems desirable. This report is made public."

contracts or about specific procedures for MoIT to police the substance of standard consumer contracts. This lack of clarity may generate concerns for the business community, such as whether MoIT would provide fair hearings to accused traders before issuing its decisions on the invalidity of contractual terms or general transaction conditions. Similarly, if the accused traders are not satisfied with MoIT's decisions, it is not clear whether they would have recourse elsewhere to challenge these decisions. Unluckily, the current legal system in Vietnam does not seem to provide any firm guidance for clarifying these concerns. In addition, the CPL and the current legal system do not provide any clear guidance on the sanctions applied to traders who ignore requests from MoIT to remove "unfair" terms in standard consumer contracts.

Unfortunately, during the process of drafting the CPL, the state's capacity to assume these new tasks was not discussed and clarified. In addition, it is very likely that uncertainty relating to regulation of standard consumer contracts will be left to be resolved by specifying LNDs issued by the Government or MoIT.

6.3.4 Door-to-door Sales and Distance Sales Contracts

Being aware of the existence of special provisions on door-to-door sales contracts and distance sales contracts in consumer laws in many countries, the EG, in the early days of drafting the CPL, decided to include some provisions on these topics. For example, the initial draft in September 2008 contained article 44 on distance sales contracts¹²⁹ and article 46 on door-to-door sales contracts.¹³⁰ In Draft 1, these proposed provisions were retained. However, they were removed during the process of creating Draft 2, in order to address the arguments raised by some legal drafters that these

¹²⁹ According to article 44 of the initial draft, a distance sales contract is an agreement between a consumer and an organization and/or individual conducting business in goods and/or services (the supplier) by means of telecommunication. Distance sales contracts must include at least the following information: (a) name of the organization and/or individual conducting business in goods and/or services and its telephone number, mailing address and head office; (b) costs of delivery of goods (if any); (c) methods of payment and delivery of goods; (d) withdrawal right of consumers and the limits to this right; (e) the price of the goods. This article also stated that, within seven days of the consumer receiving the goods or accepting use of the services, the consumer could cancel the contract without explanation. The supplier was obliged to refund the consumer's money within 30 days of the consumer's decision to cancel the contract.

¹³⁰ According to article 46, a door-to-door sales contract was defined as a sales contract by which the supplier sold its goods at the residence or working area of consumers, without prior invitation. This article also empowered consumers with the right to return the goods within three working days of the sale.

provisions were too favourable to consumers.¹³¹ This issue was not subsequently raised through the process of evaluation and discussion of the draft CPL by MoJ and the Government.¹³² Draft 5 submitted to the NA for the first debate did not have any provisions on door-to-door sales contracts or distance sales contracts.

However, in the NA's first debate on Draft 5, some NA members opined that numerous new sales techniques such as door-to-door sales, distance sales and internet-based sales were rapidly emerging in Vietnam and these new transactions exposed consumers to many risks. They stressed that the contractual rules in the *Civil Code* (based on the presumption of equality between sellers and buyers) were no longer suitable for governing these kinds of new transactions. They urged MoIT to supplement new provisions addressing these stated problems. Their proposal was later heeded by NASC. The Explanatory Report of NASC on Draft 7 in October 2010 noted that:

[...] regarding new forms of transactions negatively affecting the interests of consumers: As proposed by NA members, the CPL should have provisions on special sales transactions such as door-to-door sales, distance sales, internet-based sales [...] However, due to the diversity in the forms of these new types of consumer transactions, the law authorized the government to issue documents providing for these contents.

That is why article 14(4) of the adopted CPL contains a provision that “the Government issues provisions on specific transactions with consumers.” It is likely that, if the government and MoIT closely follow the guidance from the NA, the Government will issue a decree stipulating provisions on door-to-door sales contracts and distance sales contracts.

6.4 IMPROVING ACCESS TO JUSTICE

Of the 51 articles of the adopted CPL, there are 17 articles stipulating channels for resolving disputes between consumers and traders. This significant number clearly shows

¹³¹ See section 5.3.4.

¹³² It is noteworthy that, during this period, European experts Andrea F. Gagliardi and Carmen Victor made numerous recommendations for improving Draft 2 of the CPL in the EU-Vietnam MUTRAP Report of 5 August 2009, including proposals that the draft CPL contain provisions on door-to-door sales contracts and distance sales contracts by mirroring provisions in EU consumer laws. However, these proposals were not heeded by the DC.

the intention of the authors of the adopted CPL to design a better self-help system for consumers in Vietnam.

According to article 30(1) of the adopted CPL, disputes between consumers and traders can be resolved through four channels, namely, negotiation, mediation, arbitration and litigation.

In order to draft provisions on resolution of disputes between consumers and traders, legal drafters of the CPL also looked to foreign experiences. According to the CSR, provisions on resolution of disputes between consumers and traders were examined in the following jurisdictions:¹³³ France,¹³⁴ Taiwan,¹³⁵ South Korea,¹³⁶ and China.¹³⁷

Based on this comparative study, the authors of the CSR concluded that there were generally three channels for resolving disputes between consumers and traders, namely, negotiation (between consumers and traders), mediation (especially by consumer associations, business associations and administrative authorities), and litigation (including individual lawsuits brought by individual consumers, collective actions brought by groups of consumers, or representative actions brought by consumer associations on the authorization of consumers).¹³⁸ However, many legal drafters also knew of the existence of small claims courts or special consumer tribunals with

¹³³ VCAD, *supra* note 1 at 70-72.

¹³⁴ Particularly, provisions in articles L421-1 and L421-2 (on the right of consumer associations to bring legal action in the public interest, in order to force offending traders to stop their illicit behaviours or to remove illicit clauses from the contract or the standard contract offered to consumers), articles L422-1, L422-2 and L422-3 (on representative actions conducted by consumer associations at the authorization of consumers).

¹³⁵ Particularly, articles 43 to 55 of Taiwan's *Consumer Protection Law*, especially provisions in article 43 (on traders' handling of consumer complaints), articles 44-46 (on mediation between consumers and traders by county mediation councils), articles 47-48 (on special tribunals for consumer disputes), articles 49-50 (on the right of consumer associations to bring legal actions for violations of consumer rights), article 51 (on punitive damages), article 52 (on waiving court fees for lawsuits brought by consumer associations), article 53 (on the right of consumer associations to file injunctions against offending traders), articles 54-55 (on collective action).

¹³⁶ Particularly, the provisions stipulated in articles 53-76 of South Korea's *Framework Act on Consumers* of 2006. See online: KCA <http://www.kca.gov.kr/web/img/kca/eng/10_1>. Extracts of this Act in this dissertation are based on the English version found here.

¹³⁷ Particularly, the provisions stipulated in articles 34-39 of China's *Law on Protection of Consumers' Rights and Interests* of 1993. According to article 34 of this law, "a dispute about the rights and interests of the consumer arising between the consumer and the operator may be settled through the following channels: (1) settling through mediation with the operator; (2) requesting the consumer association to mediate; (3) making complaint to the relevant administrative department; (4) applying to the arbitration organ for arbitration according to the arbitration agreement with the operator; and (5) bringing a suit to the people's court."

¹³⁸ VCAD, *supra* note 1 at 62-72.

simplified procedures – which were regarded as very consumer-friendly – in many foreign countries such as Canada, France, Malaysia, Taiwan and India.¹³⁹

As for consumer arbitration, despite the CSR saying nothing about this method,¹⁴⁰ thanks to information provided by U.S. and French experts during the process of drafting the CPL, legal drafters also knew that foreign consumer laws recognized arbitration as a method of resolving disputes between consumers and traders. However, they also knew that the question of validity of arbitration clauses in consumer contracts, especially standard consumer contracts, had been a topic for academic debate in developed Western countries for the previous few decades.

The United States and France offer two opposing positions on this issue. In the United States, arbitration clauses are generally recognized for their validity, even in standard consumer contracts.¹⁴¹ However, in France, arbitration clauses are prohibited from being included in consumer contracts, although consumers are permitted to submit their disputes to arbitration.¹⁴²

All of the previously described knowledge about foreign laws regarding resolution of disputes between consumers and traders left a visible impact on provisions in the adopted CPL. The adopted CPL offers consumers four main channels through which they can resolve their complaints: negotiation, mediation, consumer arbitration, and litigation.¹⁴³ Evidence of foreign influences can be found in most provisions about these issues.

¹³⁹ Nguyen Van Thanh, “Necessary Contents in Law on Consumer Protection” (“Cac noi dung can co trong Luat bao ve quyen loi nguoi tieu dung”) (Presentation at the workshop “Consumer Protection Law in Vietnam – Reality and Orientation for Improvement” (“Phap luat bao ve nguoi tieu dung o Vietnam - thuc trang va huong hoan thien”) held by Hanoi Law University, Hanoi, 10 September 2010). It is worth noting that Thanh is a legal expert working for VCAD and one of the legal drafters of the CPL.

¹⁴⁰ The authors of this report knew about article 11.1 of Québec’s *Consumer Protection Act*, which states that “any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited” and that “if a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.” See VCAD, *supra* note 1 at 45.

¹⁴¹ Gene A. Marsh, *Consumer Protection Law in a Nutshell*, 3d ed. (St. Paul, MN: West Group, 1999) 36.

¹⁴² Maison du Droit, *supra* note 51 at 35.

¹⁴³ Articles 30 to 46 of the CPL.

Negotiation: It seems that provisions in Taiwan’s *Consumer Protection Law* on negotiation between consumers and traders in resolving consumer complaints have impacted upon similar provisions in the CPL of Vietnam. For instance, according to article 31(1) of the adopted CPL, consumers are entitled to request the trader to negotiate when they deem that their legitimate rights and interests have been infringed upon. Article 31(2) of the adopted CPL dictates that the requested trader shall receive and “negotiate with the requesting consumer within 7 days from the date of reception of the request.” Article 43 of Taiwan’s *Consumer Protection Law* states as follows:

When a consumer dispute arises between consumers and business operators relating to goods or services, consumers may file a complaint with the business operators [...] Business operators shall properly handle the complaint filed by consumers within 15 days of such complaint.

However, it could also be argued that article 31 of the CPL was the product of recycling the former provisions of Decree 55 (2008).¹⁴⁴

Out-of-court mediation: It is difficult to determine which jurisdictions have had the most influence on provisions on mediation in the adopted CPL. However, it is reasonable to state that the existence of mediation for resolution of disputes between consumers and traders in jurisdictions such as France, Taiwan, China, and South Korea helped to inspire legal drafters of the CPL to add provisions on out-of-court mediation in this law. Concretely, article 33 of the adopted CPL stipulates that “traders and consumers are entitled to negotiate to submit their disputes to a third party¹⁴⁵ [...] to mediate on their behalf.” Mediation activities have to follow principles stated in article 34 of the CPL “ensuring objectivity, integrity, good will and lack of fraud”. Further, mediators “shall ensure the secrecy of information relevant to the mediation, except as otherwise agreed

¹⁴⁴ Article 15 of this decree states that upon detecting that their lawful rights and interests are infringed upon, consumers or their lawful representatives may lodge complaints with the trader that has supplied the goods or services. Article 18 of this decree states that the “defendant” traders shall settle consumers’ complaints within seven working days after receiving the complaints.

¹⁴⁵ The CPL does not clearly stipulate whether this third party could be a consumer protection organization, VCAD or any other agency. As a matter of fact, VCAD and consumer protection organizations (for example, Vinastas or provincial consumer protection associations) provide free mediation services to consumers and traders. Article 35 of the CPL stipulates that “Organizations or individuals satisfying conditions set forth by the Government are entitled to establish mediation organizations to resolve disputes between consumers and traders.” With this provision, it seems that the Government has given the green light to set up privately-run professional mediation centres to resolve disputes among consumers and traders. However, this matter will remain unsettled until specifying decrees issued by the Government are adopted.

by the parties or otherwise stipulated by legal provisions.”¹⁴⁶ The CPL also has provisions on minutes of mediation activities.¹⁴⁷

However, in the context of the well-established position in Vietnam that agreements among consumers and traders resulting from out-of-court mediation are not officially recognized as final and binding among parties,¹⁴⁸ the CPL does not offer any chance to break away from this tradition. In reality, article 37 of this law continues to restate this tradition by stipulating that if one party does not voluntarily implement the minutes of mediation, the remaining party has to file a lawsuit to the court for resolution.¹⁴⁹

Based on the provisions of article 37, out-of-court mediation for resolution of disputes between consumers and traders may be understood significantly differently than out-of-court mediation in jurisdictions in which agreements between disputing parties can be certified and enforced by the courts.

Consumer arbitration: It seems quite clear that the provisions on consumer arbitration in the adopted CPL tend to lean toward French and Québécois law rather than U.S. law. Specifically, article 38 of the CPL acknowledges that disputes between consumers and traders can be resolved through arbitration;¹⁵⁰ however, arbitration clauses in standard contracts are not binding on consumers.¹⁵¹

¹⁴⁶ Article 34(2) of the CPL.

¹⁴⁷ Article 36 of the CPL.

¹⁴⁸ Bui Nguyen Khanh, “Legal Provisions on Resolution of Disputes in Business Activities” (“Phap luat ve giai quyet tranh chap trong kinh doanh”), in Le Minh Toan, *et al.*, *Vietnamese Economic Law (Luat Kinh te Vietnam)* (Hanoi: National Political Press, 2006) 465 at 474); see also Bui Nguyen Khanh, “Legal Provisions on Resolution of Disputes in Business Activities” (“Phap luat ve giai quyet tranh chap trong kinh doanh”), in Nguyen Nhu Phat, ed., *The Textbook on Vietnamese Economic Law (Giao trinh Luat kinh te Vietnam)* (Hanoi: Public Security Press, 2009) 406 at 413. It is noteworthy that Khanh was a legal drafter of the CPL.

¹⁴⁹ Article 37 of the CPL.

¹⁵⁰ It is worth noting that arbitration is currently governed by the *Law on Commercial Arbitration* of 2010 (which replaced the *Ordinance on Commercial Arbitration* of 2003). Articles 24 and 25 of this law state that arbitration centres have to get the permission from the Minister of Justice in advance for establishment and they can start to operate only upon registration with provincial Departments of Justice.

¹⁵¹ Article 38 of the CPL. A similar provision can also be found in article 17 of the *Law on Commercial Arbitration* of 2010.

Litigation: The CPL provides for two major new provisions which are seen as being favourable to consumers.¹⁵² The first is the provision on “simplified civil procedure” applicable to a number of simple lawsuits brought by individual consumers. The second is the provision on the right of consumer protection organizations (or social organizations participating in consumer protection activities)¹⁵³ to bring legal actions against offending traders without express written authorization from consumers.

The introduction of “simplified civil procedure” applicable to a number of lawsuits brought by individual consumers is seen as an effort to remove unreasonable legal barriers and enhance consumers’ access to justice.¹⁵⁴ Article 41(2) of the adopted CPL stipulates that simplified civil procedure will be applied to lawsuits brought by consumers when these lawsuits meet all three of the following conditions:

- (1) the plaintiff is an individual consumer and the defendant is a trader directly supplying goods and/or services to the plaintiff;
- (2) the lawsuits are simple, with clear evidence; and
- (3) the value of the transaction is equal to or less than 100 million VND [i.e. equal to \$ 5,000 USD].¹⁵⁵

Given the above-mentioned provision, it can be interpreted that the CPL does not create a new specialized court in the current court system. Instead, the current court system still assumes the task of resolving disputes between consumers and traders. However, in certain lawsuits (meeting the said three conditions), a simplified rather than normal civil procedure will be applied, with the hope that this simplified procedure will help resolve lawsuits more swiftly. This approach was regarded as a product of learning from the model of small claims courts and consumer tribunals in foreign jurisdictions.¹⁵⁶

¹⁵² Other important provisions include the provision to exempt plaintiffs in lawsuits brought by consumers from the obligation to advance court fees, and the provision to shift the burden of proof from plaintiffs (consumers or consumer protection organizations) to defendants (accused offending traders). Specifically, article 43(2) of the CPL states that “consumers bringing lawsuits to protect their rights and legitimate interests are exempted from advancing the court fees.” In addition, article 42(2) of the CPL states that “traders shall prove to be faultless in causing damage to consumers.”

¹⁵³ Originally, legal drafters of the CPL only proposed that consumer protection associations or organizations should have this right. This position was maintained until Draft 5 of the CPL. However, NASC decided to grant this right to all social organizations [i.e. mass organizations] participating in consumer protection, including all social organizations that are members of the Fatherland Front. The adopted CPL follows this approach.

¹⁵⁴ Bui, “Comments and Suggestions”, *supra* note 28 at 83.

¹⁵⁵ See article 41(2) of the CPL.

¹⁵⁶ Bui, “Comments and Suggestions”, *supra* note 28 at 83.

In the process of drafting, the idea of introducing a simplified civil procedure applicable to certain lawsuits brought by individual consumers (although this was introduced into the CPL in Draft 2) was seen as “too new” for the current justice system because it was not found in the *Code of Civil Procedure*, and the existing legal community in Vietnam could not imagine how the new mechanism would operate.¹⁵⁷ Initially, legal drafters even designed quite detailed provisions on simplified civil procedure in the draft CPL. For example, article 46 of Draft 2 stipulated that the court of first instance for resolving lawsuits through simplified civil procedure is the District People’s Court (except for lawsuits the Provincial People’s Court decides to take from the District People’s Court to resolve). This article also stipulated a detailed procedure. Accordingly, within 16 working days¹⁵⁸ from the time of receiving a petition from consumers, the District People’s Court should resolve the case. Article 47 of Draft 2 even stipulated that judgments or decisions of the court in lawsuits resolved through simplified civil procedure would be final and binding.¹⁵⁹ No parties could appeal the judgments or the decisions of the court. This idea was said to be influenced by French law.¹⁶⁰

However, this approach was severely critiqued by MoJ and many NA members. Critics of this approach were of the opinion that the CPL should only stop at stipulating that certain consumer lawsuits could be resolved through simplified civil procedure. Detailed provisions on simplified civil procedure should be the mission of the *Code of Civil Procedure* rather than of the CPL. The adopted CPL follows this position. In other words, the transplantation of simplified civil procedure was blocked by the existence of long-established thinking among legal community members in Vietnam that all provisions regarding civil procedure should be stipulated only in the *Code of Civil Procedure*. Given that there is no guarantee there will be an amendment to the current *Code of Civil Procedure* to introduce a detailed simplified civil procedure, it is very

¹⁵⁷ MoJ Website News, *supra* note 49.

¹⁵⁸ The limitation period for normal civil lawsuits (as stipulated in articles 167, 172, and 179 of the *Code of Civil Procedure*) is about six months.

¹⁵⁹ This provision was totally contrary to articles 243 and 245 of the *Code of Civil Procedure* that stated that, within 15 days of the District People’s Court pronouncing its judgment, the litigators or their representatives have the right to lodge their appeals against judgments or decisions of the first-instance court to and suspend or stop the resolution of cases in order to request the immediate superior court to conduct re-trials according to the appellate procedures.

¹⁶⁰ Maison du Droit, *supra* note 51 at 38.

unlikely that the provisions on simplified civil procedure incorporated in the CPL will produce any positive impacts on consumers.¹⁶¹

As for the provision that social organizations participating in consumer protection can initiate lawsuits in the public interest even without authorization from individual consumers, this idea was originally proposed by Vinastas at the beginning of drafting the CPL in June 2008.¹⁶² This idea was widely shared among legal drafters of the CPL. It also went smoothly throughout the process of drafting and adopting the CPL without significant critiques from the public, MoJ or NA members. This idea was ultimately stipulated in article 28(1)(b) of the adopted CPL. The CPL also has a number of provisions on procedure for exercise of this right by social organizations.¹⁶³ Despite the fact that, in relevant reports produced through the CPL drafting process, drafters did not reveal the connection between the provisions in article 28(1)(b) and foreign experience,¹⁶⁴ certain foreign jurisdictions had similar provisions, of which the legal drafters were aware. For example, the right of consumer protection organizations to initiate lawsuits against offending traders without authorization from individual

¹⁶¹ The experience of British Columbia shows that it may take many years to see the benefits of popularizing fast-track small claims courts. See Office of the Attorney-General for British Columbia, *Provincial Small Claims Court Pilot*, online: Attorney-General, Government of British Columbia <http://www.ag.gov.bc.ca/courts/small_claims/info/pilot.htm>.

¹⁶² See section 5.3.2

¹⁶³ For example, article 44(1) of the CPL states that “Social organizations participating in a consumer protection lawsuit shall properly notify the public about the lawsuit and shall be responsible for the information provided, ensuring that this information does not affect the normal operation of [defendant] traders.” Article 44(2) of this law stipulates that “The notification required in Paragraph 1 of this article shall contain the following information: (a) the name and mailing address of the social organization participating in the consumer protection lawsuit [i.e. the plaintiff]; (b) the identity of the [defendant] traders; (c) the subject of the lawsuit; (d) the procedure and time limit for consumers to register to participate in the lawsuit.” According to article 44(3) of the CPL, “The court shall, within 3 working days from acceptance of the lawsuit, publicly post the information about its filing as stipulated in civil procedural legal provisions.” In addition, article 45 of the CPL also states that “The judgments or decisions of the court in civil lawsuits initiated by social organizations shall be publicly posted at the filing office of the court or disclosed in the public media.” Regarding allocation of damages recovered from such a lawsuit, article 46 of the CPL stipulates that “The damages in civil lawsuits about the protection of consumers’ rights and interests initiated by the social organization participating in consumer protection for the purpose of the public interest shall be allocated in accordance with the judgment and decision of the court.”

¹⁶⁴ NASC, *supra* note 64 at 6. This report simply explained that consumer protection organizations can exercise this right in the public interest, especially when offending traders cause damage to large numbers of consumers but each individual consumer suffers only a small amount of damage, giving insufficient incentive for each individual consumer to bring a the lawsuit.

consumers is also found in France's *Consumer Code*,¹⁶⁵ South Korea's *Framework Act on Consumers*,¹⁶⁶ and Taiwan's *Consumer Protection Law*.¹⁶⁷

This new mandate for consumer protection organizations is said to be an alternative solution to help consumers to mobilize their collective power through consumer protection organizations, given that Vietnam has not adopted a class action regime.¹⁶⁸ The reason legal drafters of the CPL did not introduce a class action mechanism for consumers' lawsuits was perhaps because they knew that this type of litigation was too new to the legal community in Vietnam and would strain the capacity of the current court system.¹⁶⁹

However, the legislative wisdom of drafting provisions in the CPL promoting use of the court system by consumers and consumer protection organizations to assert their rights against offending businesses is a matter of debate. As many previous studies show, litigation is generally not a preferred method of dispute resolution in Vietnam.¹⁷⁰ In addition, as the current court system has many problems in terms of both its caseload and its competence,¹⁷¹ whether this legislative decision, without strong support from the court system, actually benefits consumers is doubtful. It is, perhaps, no coincidence that

¹⁶⁵ Particularly, provisions in articles L421-1 and L421-2 (on the right of consumer associations to bring a legal action in the public interest, to force offending traders to stop their illicit behaviours or to remove illicit clauses from the contract or the standard contract offered to consumers), articles L422-1, L422-2 and L422-3 (on representative actions conducted by consumer associations at the authorization of consumers).

¹⁶⁶ Article 70 of this act allows not only consumer protection organizations but also the Korean Chamber of Commerce and Industry, and a number of non-profit organizations, to exercise this right.

¹⁶⁷ Article 28(8) of Taiwan's *Consumer Protection Law* states that one of the tasks of consumer protection groups is "filing consumer litigation". Article 49 of Taiwan's *Consumer Protection Law* stipulates that "a consumer protection group, which has been established for more than 3 years after its approval, has obtained upon application a rating of excellence by the Consumer Protection Commission, maintains a special staff dealing with consumer protection, and meets any of the following requirements, may, with the approval of the consumer ombudsman, bring in its own name an action for damages to consumers."

¹⁶⁸ Bui, "Comments and Suggestions", *supra* note 28 at 83.

¹⁶⁹ Class action litigation usually requires highly skilled lawyers, very clear special rules of procedure, and an expert court. It seems that none of these features is available in the current legal system of Vietnam.

¹⁷⁰ See Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Leiden: Martinus Nijhoff, 2007) at 269-272; See also Nguyen Hung Quang & Kerstin Steiner, "Ideology and Professionalism: The Resurgence of the Vietnamese Bar" in Gillespie & Nicholson, *supra* note 94, 191 at 197-198

¹⁷¹ See section 3.7.

provisions on court proceedings in the CPL were critiqued by many NA members with backgrounds in the court system during the NA's first debate over the draft CPL.¹⁷²

6.5 STATE MANAGEMENT AND STATE SANCTIONS

6.5.1 State Management of Consumer Protection

The adopted CPL has three articles (articles 47 to 49) stipulating mechanisms for state management of consumer protection. According to these articles, state management of consumer protection is carried out by the administrative system, including the Government, MoIT, other ministries and ministerial-level agencies, and People's Committees at all levels (i.e. provincial People's Committees, district People's Committees, and commune People's Committees).

The Government is assigned the role of implementing "the uniform state management of consumer protection"¹⁷³ while MoIT is the agency responsible to the Government for carrying out this task.¹⁷⁴ Other ministries are to cooperate with MoIT (within their mandates) in this regard.¹⁷⁵ The local People's Committees are assigned to conduct state management of consumer protection within their own localities.¹⁷⁶

In particular, the CPL gives MoIT the following powers in carrying out state management of consumer protection:¹⁷⁷

- Issuing or preparing and submitting to the competent state organs to issue policies, strategies, plans, programs, projects, and LNDs on consumer protection; and organizing the implementation of said documents;
- Managing consumer protection activities of social organizations and mediation organizations;

¹⁷² See section 5.4.1.

¹⁷³ Article 47(1) of the CPL.

¹⁷⁴ Article 47(2) of the CPL.

¹⁷⁵ Article 47(3) of the CPL.

¹⁷⁶ Article 47(4) of the CPL.

¹⁷⁷ See article 48 of the CPL.

- Managing standard contracts and general transaction conditions as stipulated in article 19 of the CPL;
- Propagating and disseminating laws on consumer protection;
- Giving advice or assistance to raise public awareness of consumer protection;
- Creating an information database for the purpose of consumer protection;
- Providing training and education for the purpose of consumer protection;
- Conducting inspections and check-ups; handling complaints and denunciations; and dealing with offenses of consumer protection within its mandate.
- Cooperating internationally regarding consumer protection.

Compared to MoIT's mandate over consumer protection as stipulated in Decree 55 (article 24(1)), the above-mentioned mandate of MoIT is not substantially different except for the new mandate of “managing standard contracts and general transaction conditions” and “managing consumer protection activities of social organizations.” As for the new mandate of “managing consumer protection activities of social organizations”, as shown in Chapter 5,¹⁷⁸ Vinastas openly criticized the addition of this provision in the CPL by arguing that this matter should be settled in the future *Law on Associations*. However, the suggestions by Vinastas were not heeded. In fact, this new mandate is simply a restatement of the provision already stated in the 2001 *Law on the Organization of Government* that the ministry must conduct state management of “activities of non-governmental associations in its sector or field.”¹⁷⁹

It is noteworthy that the CPL does not authorize MoIT and local authorities to initiate independent lawsuits to ask the court to order the disgorgement of profits and the repayment of money to consumers in restitution or rescission as some consumer protection agencies in developed countries have done.¹⁸⁰ In the process of drafting the CPL, this issue was not explicitly raised by the EG, the DC, stakeholders, the public or any relevant state authorities, including the Government and the NA. Perhaps the idea

¹⁷⁸ See section 5.3.4.

¹⁷⁹ Article 23(7) of the *Law on the Organization of Government* of 2001.

¹⁸⁰ For example, the US Federal Trade Commission (FTC) has exercised this authority since the mid-1970s. See Horvath & Villafranco, *supra* note 40 at 276-277. It is worth noting that experts from the US FTC provided frequent advice to legal drafters of the CPL; however, I found no evidence that this matter was seriously raised among legal drafters during the drafting of the CPL.

that state authorities could initiate independent lawsuits to protect consumers in the public interest was too new for the conventional thinking underlying the traditional model of state management in Vietnam.

In addition, with the provision in article 47(3) of the CPL that “ministries and ministerial-level agencies, within their mandates, shall cooperate with MoIT to carry out state management over protection of consumers’ rights and interests”, the whole system of state management of consumer protection (including the system of inspection, licensing, direct imposition of administrative sanctions, etc.) currently run by other ministries¹⁸¹ and their local affiliates was left untouched. Perhaps the reform of such a long-established model of state management was well beyond the mission of this law. However, with the decision to leave the current system on consumer protection run by other ministries untouched, the CPL failed to provide an effective mechanism to overcome the problem – well known by legal drafters and MoIT – that the current consumer protection regime lacks an effective mechanism coordinating relevant ministries in the collective effort of consumer protection.¹⁸² Despite the fact that legal drafters had already looked to foreign jurisdictions to solicit lessons, it seemed that they did not find a desirable model to imitate.¹⁸³ Apparently, foreign experiences have not left any visible impacts on provisions regarding mandates of relevant ministries in consumer protection.

According to article 49 of the CPL, the local People’s Committees (i.e. provincial People’s Committees, district People’s Committees, and commune People’s Committees) are empowered to conduct the following activities:

¹⁸¹ Such as the Ministry of Public Health, the Ministry of Science and Technology, the Ministry of Culture, Sports and Tourism, the Ministry of Information and Communication, and the Ministry of Finance.

¹⁸² CSTE, *supra* note 7 at 3-4.

¹⁸³ MoIT, *Executive Report on International Experiences regarding Consumer Protection Laws and Recommendations for Vietnam (Bao cao tom tat Nghien cu kinh nghiem quoc t eve xay dung phap luat bao ve nguoi tieu dung va de xuat cho Vietnam)* (Hanoi, 25 October 2009). According to this report, legal drafters studied the model of consumer protection agencies or councils in the following 12 jurisdictions: Taiwan, Japan, Thailand, the US, Australia, Malaysia, India, China, France, South Korea, Singapore, and Canada. However, the authors of this report (mainly VCAD officials) were of the view that the current model in Vietnam remains suitable. However, they recommended that each ministry should have a specialized unit in charge of consumer protection. In addition, the task of resolving consumer complaints (currently belonging to VCAD) should be devolved to local administrative authorities to help consumers have better access to the official consumer protection system.

- Issuing or preparing and submitting to the competent state organs to issue and implement LNDs on consumer protection;
- Managing consumer protection activities of social organizations and mediation organizations in their localities;
- Propagating and disseminating laws on consumer protection in their localities;
- Giving advice or assistance to raise public awareness of consumer protection in their localities;
- Conducting inspections and check-ups; handling complaints and denunciations; and dealing with offenses of consumer protection within their respective mandates.

The provisions in article 49 of the CPL have some new elements regarding the mandate of local governments in consumer protection which did not exist before the adoption of the CPL. However, there were some provisions on this topic that were set forth in Decree 55 (article 25). Accordingly, only provincial People's Committees (with the assistance of the provincial Departments of Industry and Trade) had consumer protection mandates. Decree 55 said nothing about the role and mandate of lower People's Committees, i.e. district People's Committees and commune People's Committees. The newly adopted CPL, as stated in its article 49, empowers not only the provincial People's Committees but also district People's Committees and commune People's Committees in terms of consumer protection.

The provisions in articles 48 and 49 reflect MoIT's (and VCAD's) intention to devolve more consumer protection powers to local governments, especially to the district People's Committees.¹⁸⁴ This move is regarded as being consistent with the general spirit

¹⁸⁴ Article 25(1) of the CPL states that, upon discovering traders' offenses against the CPL, consumers and/or consumer protection associations have the right to request the district state management bodies dealing with consumer protection [i.e. district People's Committees or their subordinate bodies] to handle these offences. According to article 26 of the CPL, the district People's Committees must investigate to determine whether traders are violating the CPL. If the alleged traders are found to have violated the CPL, the district People's Committees may sanction these traders in accordance with LNDs on administrative offenses. In addition, the district People's Committees may impose the following sanctions: (a) forcing traders to recall and destroy the impugned goods or to cease providing the impugned service; (b) suspending or temporarily suspending the operation of the traders; and (c) forcing the traders to remove terms which violate consumers' rights and interests in standard contracts. According to article 26(4), traders who are repeat offenders will be included on the "black list" of traders violating consumers' rights and interests.

of administrative reform in Vietnam, in which increased decentralization is visible in many areas of state management.¹⁸⁵ However, it is worth noting that commune and district People's Committees throughout the country were not consulted before the CPL was drafted to see whether they were ready to assume the new mandate. As a result, this devolution may raise serious questions about how to ensure that 11,000 commune People's Committees and 700 district People's Committees in 63 provinces and centrally-run cities¹⁸⁶ can exercise their new mandate in a systematic manner that does not distort the messages of the CPL.

Tracing the process of drafting the CPL, it is quite clear that, in the early days of the drafting process, officials from VCAD represented in the DC and the EG intended to reform the existing provisions in Decree 55 on state management bodies in consumer protection. In fact, these officials proposed creating a specialized agency on consumer protection at the central level (some legal drafters proposed creating a National Committee on Consumer Protection)¹⁸⁷ to improve the effectiveness and efficiency of coordination among ministries dealing with consumer problems. This agency would be assigned the power to conduct independent investigations to deal with serious consumer problems. A new system of local consumer protection agencies would also be created.¹⁸⁸

However, this idea was not widely shared among all legal drafters (especially legal drafters coming from the Government Office, MoJ, and other ministries). Opponents of this idea argued that creation of a new agency for consumer protection was not consistent with the current policy of administrative reform (in order to make the administrative system slimmer) in Vietnam.¹⁸⁹ Members of the DC and the EG finally (by

¹⁸⁵ Martin Gainsborough, *Vietnam: Rethinking the State* (London: Zed Books, 2010) at 55. In this book, Gainsborough explains that decentralization and recentralization are the inevitable by-products of the transformation in Vietnam from a centrally planned economy to a market economy.

¹⁸⁶ These local governments usually have many governance problems. See section 3.6.2.

¹⁸⁷ It seems this proposal was intended to address the well-known institutional problem of ineffective coordination among relevant ministries and agencies in implementation of consumer protection provisions. This idea was, perhaps, inspired by the model of similar institutions in Thailand and Japan.

¹⁸⁸ Articles 66 to 69 of the initial draft; articles 60 to 62 of Draft 1; articles 54 to 56 of Draft 2.

¹⁸⁹ The current policy of administrative reform in Vietnam is stipulated by the Prime Minister's *Decision No. 136/2001/QĐ-TTg dated 17 September 2001 ratifying the Overall Program on Administrative Reform for the period of 2001-2010*. This decision requires that the apparatus of the Government and ministries be reformed to make them slimmer and more responsive. UNDP, the World Bank, the IMF and many other foreign donors such as USAID, and JICA have been resource supporters of this program. See the Ministry

the end of 2009) reached an agreement to give up the idea of creating a new system of consumer protection agencies. Instead, the existing system of consumer protection bodies (i.e. MoIT and the local People's Committees) will be used and given new mandate if necessary.

This position was reflected in Draft 3 and was consistent through all the remaining drafts of the CPL, as well as in the adopted CPL. In other words, the model of state management of consumer protection in the CPL has been channelled to fit with the traditional model of state management seen in most sectors in Vietnam. Within this framework, the underlying liberal ideas arising from the principle of people's sovereignty such as the value of transparency, publicity and accountability of state agencies are usually underestimated. This is visibly different from the situation in developed countries.¹⁹⁰ Also within this framework, state agencies regard public consumers as a targeted group to be "managed" rather than as clients/customers or "consumers" of their services. It is unlikely that MoIT will be forced to treat stakeholders, such as the business community and consumer protection organizations, as their partners rather than their inferiors. In this context, the idea that MoIT and other relevant agencies (especially local governments) can cooperate with certain targeted businesses or business associations to construct and implement voluntary compliance programs, or to construct codes of conduct for certain sectors, is very unlikely to be implemented. In addition, the CPL also does not provide any legal basis for MoIT and People's Committees to use certain "soft" measures in implementing the CPL, such as giving alerts or warnings to traders to urge them to change their compliance behaviours before "administrative sanctions" are actually issued. The CPL also fails to provide any legal basis for securing transparency in the operations of MoIT (and VCAD) and People's Committees regarding consumer protection. Further, it fails to provide a better framework for preventing and curbing corruption relating to the application of consumer protection provisions. It says nothing about revealing to consumer protection organizations and the public the actual allocation of funds and resources by the government for consumer protection. Finally, it fails to

of Internal Affairs, "Projects on Administrative Reform" ("Cac du an cai cach hanh chinh"), online: Cai cach hanh chinh <<http://caicachhanhchinh.gov.vn/PortalPlus.aspx?vi-VN/News/71//108022//>>.

¹⁹⁰ Ramsay, *supra* note 16 at 508-509.

provide a functional mechanism for consumer protection organizations and the public to urge MoIT and local People's Committees to faithfully support an appropriate level of consumer protection.

From a legal transplantation perspective, it can be said that foreign experiences did not persuade Vietnamese legal drafters and law-makers to substantially revise the current model of state management of consumer protection. In the context of an administrative system having many problems with competence, funding, and integrity, as previously discussed,¹⁹¹ the wisdom of committing to the expansion of the state presence in market transactions is questionable.

6.5.2 State Sanctions for Violations of the CPL

The design of sanctions for offenses against consumer rights was highly contested during the process of drafting and adopting the CPL, and resulted in some of the most significant changes from draft to draft. As shown in Chapter 4, the sanctions then applicable to unfair commercial practices as well as to other forms of infringement upon consumer rights were widely regarded as too lenient.¹⁹² This fact was also well known to legal drafters of the CPL (especially, legal drafters from VCAD and the Institute of State and Law) since the earliest days of drafting the law. Many NA members were also aware of this during the process of debating the draft CPL.

Legal drafters were also well aware that a number of consumer protection statutes in foreign jurisdictions (such as France, Québec, British Columbia, Singapore, Malaysia, Taiwan, China, South Korea) had concrete and comprehensive provisions on sanctions applicable to administrative and criminal offenses against consumer rights, especially those applicable to unfair commercial practices.¹⁹³ For example, article L122-8 of France's *Consumer Code* states that traders taking advantage of their consumers' weaknesses in consumer transactions could be punished by five years of imprisonment and a fine of €9,000. Article L213-1 of this code states that traders deceiving consumers

¹⁹¹ See section 3.6 and section 4.5.

¹⁹² See section 4.5.

¹⁹³ VCAD, *supra* note 1 at 72-81.

may be punished by two years of imprisonment and a fine of €37,500. Article 278 of Québec's *Consumer Protection Act* states that a person convicted of an offence constituting a prohibited practice is liable (a) in the case of a natural person, to a fine of \$600 to \$15,000; and (b) in the case of a legal person, to a fine of \$2,000 to \$100,000. Article 25(1) of Malaysia's *Consumer Protection Act* also imposes criminal sanctions upon traders carrying out unfair commercial practices. These foreign experiences actually inspired the legal drafters of the CPL to design a system of sanctions applicable to violations of the CPL.

The legal drafters of the CPL (especially those from VCAD and the Institute of State and Law) were quite serious and persistent in their efforts to design concrete and comprehensive provisions on sanctions or remedies applicable to violations of consumer laws. Therefore, it was not coincidental that legal drafters intentionally designed a whole separate chapter on settlement of offenses in the initial draft of the CPL. However, the adopted CPL contains only one article on this issue.

One of the first barriers that legal drafters of the CPL faced in following the idea of providing concrete sanctions applicable to offenses of the CPL was the provision on penalties in Vietnam's 1999 *Criminal Code*. This statute (article 2) clearly states that no laws except for this code are allowed to set forth provisions on "specific criminal offenses" and "specific forms of criminal penalties".¹⁹⁴ The existence of this provision forced all legal drafters to give up any ideas of designing criminal sanctions applicable to offenses under the CPL. Put another way, the *Criminal Code* prevents all legislative efforts in stipulating penalties and offenses in the CPL. In this context, except for some provisions on criminal offenses relating to consumer protection (such as deceiving consumers, publishing fraudulent advertisements, dealing in counterfeited goods) already available in the *Criminal Code*, other violations of consumer rights, irrespective of their seriousness, are not prosecuted by the prosecution offices. It is also noteworthy that, as corporate criminal liability is not known in the current Vietnamese legal system, the idea of prosecuting corporate traders for violations against consumer rights through criminal proceedings is also impossible.

¹⁹⁴ Article 2 of the *Criminal Code* of 1999.

Faced with these barriers created by the *Criminal Code*, the EG and the DC attempted to go a different way; they attempted to design a number of supplementary administrative sanctions in the draft CPL. Based on the well-known fact that offending businesses were concerned about having their consumer violations publicly disclosed, the EG and the DC were convinced that the threat of public disclosure of offenses committed by offending businesses would be a good deterrent.¹⁹⁵ Unluckily, no existing laws (prior to the adoption of the CPL) provided any legal foundation for application of this sanction. The EG and the DC were also informed by legal experts from the Institute of State and Law that the *Ordinance on Dealing with Administrative Offenses* (adopted in 2002) did not contain a sanction for confiscation of earnings or profits gained by committing offenses.¹⁹⁶ The EG and the DC were also convinced that confiscation or disgorgement of profits gained through offenses against the rights of consumers should be supplemented in the draft CPL.¹⁹⁷

As a result, there were two new types of administrative sanctions that the EG and the DC consistently suggested the policy-makers and law-makers should adopt (in addition to the available administrative sanctions), i.e. confiscation of profits gained by offending traders and public disclosure of offenses and names of offending traders. These administrative sanctions can be applied directly by administrative authorities in charge of the CPL (such as VCAD, provincial Departments of Industry and Trade, and People's Committees) once these authorities discover violations. Although there are no documents relevant to the drafting of the CPL showing the specific foreign origins of these two proposed sanctions, these sanctions were products of learning from foreign experiences.¹⁹⁸ In fact, such sanctions have been employed in a number of developed countries such as Australia and the United Kingdom for a long time.¹⁹⁹

¹⁹⁵ Perhaps, legal drafters constructed this proposal also based on the assumption in Vietnamese culture that high importance is attached to "face saving". As noted by Pham Duy Nghia, "the respect and opinion of the community is crucial to the life of each individual" and "fear of bad public opinion still motivates the Vietnamese." See Pham, *supra* note 94 at 80-81.

¹⁹⁶ Bui, "Comments and Suggestions", *supra* note 28 at 78.

¹⁹⁷ Nguyen Van Thanh, *supra* note 139 at 17.

¹⁹⁸ In his presentation at a workshop at Hanoi Law University on 10 September 2010, Nguyen Van Thanh, a legal drafter of the CPL revealed that these two proposed sanctions were products of learning foreign experiences. See Nguyen Van Thanh, *ibid.* at 17.

¹⁹⁹ Ramsay, *supra* note 16 at 508.

From the initial draft (23 September 2008) to Draft 5 (April 2010) submitted to the NA, the drafts of the CPL always contained provisions on administrative sanctions which included all remedies stipulated in the *Ordinance on Dealing with Administrative Offenses* of 2002²⁰⁰ and the two newly proposed sanctions. However, such proposed provisions were severely criticized by MoJ, whose members argued that such administrative sanctions should only be stipulated in legal normative documents dealing with administrative offenses.²⁰¹ MoJ also argued that the new *Law on Dealing with Administrative Offenses* was being drafted by the ministry to replace the *Ordinance on Dealing with Administrative Offenses* of 2002. Shortcomings of the ordinance (if any) were expected to be compensated for by the new law. It seemed that MoJ was quite insistent in its stance that, except for the *Ordinance on Dealing with Administrative Offenses*, no other ordinances or laws should have provisions regarding the forms of administrative sanctions.²⁰²

Despite the fact that the DC of the CPL did not listen to this recommendation from MoJ, and the Government also gave the green light to these debated provisions in the draft CPL, many NA committees (especially the NA's Law Committee) and NA members shared MoJ's approach.²⁰³ As a result, the two newly proposed administrative sanctions were basically removed from the draft of the CPL submitted for the NA to discuss in October and pass in November 2010.²⁰⁴ The adopted CPL contains only one article²⁰⁵ "dealing with violations against rights and interests of consumers" as follows:

²⁰⁰ Such as warnings, fines, withdrawal of licenses or certificates, temporary or permanent termination of operations, confiscation of instruments used for committing offenses, recall of unsafe products, and correction advertisements. See Article 12 of the *Ordinance on Dealing with Administrative Offenses* of 2002.

²⁰¹ It should be noted here that MoJ was in charge of this issue.

²⁰² MoJ, *Report No. 662/BC-HDTD dated 17 March 2010 on evaluation of the draft Law on Protection of Consumers' Rights and Interests (Bao cao so 662/BC-HDTD ngay 17/3/2010 tham dinh du thao Luat Bao ve quyen loi nguoi tieu dung)*.

²⁰³ Nguyen Ha, "Resolution of Civil Disputes: Where is the End of State Presence?" ("Giai quyet tranh chap dan su: nha nuoc can du den dau?") (20 August 2010) online: VnEconomy <<http://vneconomy.vn/20100820115456117P0C9920/giai-quyet-tranh-chap-dan-su-nha-nuoc-can-du-den-dau.htm>>.

²⁰⁴ However, article 26(4) of the CPL allows the district state management body on consumer protection to publicize the name of offending traders who repeat their violations.

²⁰⁵ Article 11 of the CPL.

- (1) Individuals violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to administrative sanctions or criminal prosecution, and shall provide compensation if causing damage, as stipulated by law.
- (2) Organizations violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to administrative sanctions, and shall provide compensation if causing damage, as stipulated by law.
- (3) Individuals taking advantage of their position or power, violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to discipline or criminal prosecution, and shall provide compensation if causing damage, as stipulated by law.
- (4) The Government shall issue detailed provisions dealing with administrative offenses in the area of protection of consumers' rights and interests.

Accordingly, no criminal liability is applied against offending corporate entities, as the law in Vietnam states that only an individual (natural person) can be held criminally liable. The ceiling fine for administrative offenses for offending traders (including traders as legal persons) is not generally more than 70 million VND (equal to \$3,500 USD), regardless of the size of the offending trader or the seriousness of the offence.²⁰⁶ Disgorgement of profits or repayment to consumers in restitution or rescission is not available. As a result, the complaint that the current state sanctions applicable to offending businesses are too lenient²⁰⁷ has not been effectively resolved by the CPL.

The fact that the traditional way of designing articles dealing with offenses was used in article 11 of the CPL may actually have disappointed most members of the EG and some members of the DC (especially first-time legal drafters from VCAD) who were not very familiar with the established legal drafting practice in Vietnam. However, this result does not surprise well-informed observers of the legislative practice of the NA. Most of the more than 200 laws adopted during the Doi Moi era (except for the *Criminal Code*, the *Civil Code*, the *Commercial Law*, and the *Ordinance on Dealing with*

²⁰⁶ Article 14(2)(c) of the *Ordinance on Dealing with Administrative Offenses* of 2002 (as revised in 2007 and 2008).

²⁰⁷ The maximum fine for each violation of the CPL as stipulated in article 14(2)(c) of the *Ordinance on Dealing with Administrative Offenses* is 70 million VND (equal to \$3,500 USD), irrespective of whether the traders are natural persons or legal persons and of the seriousness of the violation. See section 4.6.

Administrative Offenses) have been designed in the same way. The *Law on Quality of Products and Goods* of 2007 and the *Law on Food Safety* of 2010, the two statutes most closely linked to the CPL, were also designed in essentially the same manner.

The failure of legal drafters to introduce a concrete and comprehensive system of sanctions applicable to violations of consumer laws in order to address perceived shortcomings clearly shows how difficult it is to challenge well-established legal thinking in Vietnam. Simply referring to foreign experience is insufficient to convince the current policy-making community in Vietnam to change their minds.

6.6 BRIEF CONCLUSIONS

A detailed analysis of key legal provisions in the CPL regulating consumer transactions shows that, thanks to foreign inputs, this law provides many new legal rules on consumer protection to the current Vietnamese legal system. As a result, this law offers consumers and consumer protection organizations many new weapons in their fight against offending businesses. Clear examples are the new provisions regarding the prohibitions against several unfair commercial practices (misleading practices, coercive practices, harassment, etc.) and the provisions regarding the fairness of contract terms between consumers and traders. Another example is the new provision regarding the right of consumer protection organizations and other social organizations participating in consumer protection to file independent legal actions to protect consumer rights in the public interest. However, whether the CPL ensures a marked advance for consumer protection is debatable. The reason for this is that these supplemental provisions²⁰⁸ may generate new overlaps and inconsistencies in the legal system, which may reduce the effectiveness of these provisions in application. In addition, as an incomplete law,²⁰⁹ the adopted CPL is only the initial step; the Government must continue to craft the real messages of this law. This law will need numerous guiding LNDs in order to be implemented. At the very least, MoIT and the Government will have to issue guiding

²⁰⁸ The CPL contains no provisions stating that it shall prevail over other laws (such as the *Civil Code* and the *Code of Civil Procedure*) when they are in conflict.

²⁰⁹ See section 5.5.

LNDs on the following issues: direct sales and distance sales contracts; registration of standard contracts employed by traders providing essential goods and services; mediation centres; specific offenses of the CPL and respective sanctions; and specific mandates of provincial, district, and commune People's Committees to enforce the CPL. Moreover, whether the existing administrative system and court system is prepared to assume the role of implementing the CPL is also a matter of debate. In addition, the CPL still operates within the traditional model of state management. Accordingly, a scattered system of agencies lacking a clear mechanism of coordination has been mobilized to fight against consumer law violations. This model also fails to acknowledge the role of consumer protection organizations and business associations or sector associations as important partners, rather than simply as inferior organizations under the "management" of the state authorities. Similarly, this model fails to provide reasonable foundations for improving transparency, accountability, integrity and effectiveness in the operation of state authorities in fighting against consumer law violations. This system is, perhaps, not yet a consumer-driven system in the sense that consumers and their associations provide the impetus for making state authorities work in the best interests of consumers.

As for the technique of legal transplantation, it is quite clear that the legal drafters did not model the CPL after the consumer law of any specific jurisdictions. Instead, legal drafters created a bank of knowledge about various foreign experiences and selected certain elements from various foreign consumer laws to construct their content and solutions in the drafts of the CPL. The involvement of many foreign donors in the process of drafting the CPL seemed to further facilitate this approach. In addition, legal drafters, in many cases, did not copy the entirety of a legal rule, but usually copied only its constituent parts. For example, legal drafters copied the provisions on kinds of practices to be prohibited, but did not fully copy its provisions on corresponding applicable sanctions. Legal drafters also refused to copy the mechanisms ensuring that such prohibitions were complied with.

As for critical moments of legal transplantation in the process of drafting the CPL, it is fair to say that foreign legal experiences exerted their most visible influence prior to the Draft 2 stage. In other words, reception of foreign legal ideas mainly occurred before the draft CPL was officially introduced to solicit public comments. Legal drafters who

had knowledge about foreign consumer laws (due to participating in research on foreign consumer protection experiences or due to their educational backgrounds in foreign countries) were persons responsible for this influence. From the time the draft CPL was introduced for public comment to the time it was debated and adopted by the NA, pressures to change the contents of the draft mainly came from internal sources. In other words, the period from Draft 2 to the final draft can be seen as the period in which local voices were raised to reshape the ideas borrowed from foreign sources so that they fit better with local needs. However, foreign ideas and foreign expertise provided by international donors in the post-Draft 2 period remained important in confirming or correcting legal drafters' knowledge about foreign experiences. Nevertheless, in the case of drafting and adopting the CPL, information about foreign experience provided after Draft 2 did not leave many visible impacts upon the subsequent drafts of the CPL.²¹⁰

In the next chapter, I will use the key findings presented in this chapter to test the validity of claims in Watson's legal transplantation theory and the Seidmans' legislative theory.

²¹⁰ However, the definition of "defective goods" in the CPL was an exception. American experts left visible impacts in this area. See section 5.3.4.

Chapter 7

TESTING WATSON'S LEGAL TRANSPLANTATION THEORY AND THE SEIDMANS' LEGISLATIVE THEORY

After discussing in detail the drafting of the CPL and its key policy options, in this chapter, I return to answer the key question initially posed in Chapter 1: To what extent are Vietnam's experiences of drafting and adopting the CPL to improve the legal regulation of consumer transactions consistent with the insights and claims of Alan Watson's legal transplantation theory and of the Seidmans' legislative theory?

The key argument in this chapter is that the empirical evidence from the case study of drafting and adopting the CPL in Vietnam does not quite fit with Watson's legal transplantation theory. The evidence shows that legal transplants actually took place in the sense that foreign experiences provided important sources of ideas and inspiration for legal drafters and law-makers in Vietnam in formulating the CPL. However, the process of legal transplantation is sometimes not easy. In other words, different types of foreign legal ideas do not travel equally easily across Vietnam's borders to be accepted as part of its legal system. In fact, different types of foreign consumer protection rules could potentially face different barriers and different levels of difficulty in being transplanted.

I also argue that the actual experience of drafting and adopting the CPL does not totally fit with the Seidmans' four-phase institutionalist problem-solving legislative theory. The actual experience of drafting and adopting the CPL can be fairly described as a problem-solving process. However, it is far from the informed and effective problem-solving process that the Seidmans' theory impliedly advocates.

These arguments are based on key findings concerning the nature and culture of law-making in Vietnam as exposed during the drafting and adoption of the CPL. Therefore, before making and proving my arguments, I begin this chapter by briefly examining the nature and culture of law-making in Vietnam.

7.1 THE NATURE AND CULTURE OF LAW-MAKING IN VIETNAM

7.1.1 The Nature of Law-making Process

Tran Ngoc Duong, former Vice-Chairperson of the Office of the NA and a well-known legal theory scholar in Vietnam, once stated that law-making is an open process in which alternative solutions compete to become the chosen optimal solutions which reflect the will, aspirations and common interests of a society in solving problems arising from the operation and development of that society.¹ In this statement, Tran seems to touch the core of law-making as a lobbying process full of interactions among relevant competing interest groups and stakeholders.² Actually, as shown in Chapter 5,³ the law-making process starts well before the drafting begins. This is because drafting is always preceded by an approved legislative initiative (the sponsoring ministry's request for legislation), which must survive the lobbying process within the Government and the Party and make it onto the NA's five-year or annual law-making agenda.

Tran also argues that laws “represent the quintessence of the collective wisdom” of the elites directly elected by the people (i.e. NA members) and “reflect the highest common interests of the society” and the people.⁴

It seems that Tran has theorized about the role of law-making as identifying and curing society's problems. Unfortunately, he does not provide any concrete guidelines on how to realize such ideals. Perhaps he believes that strictly following the LoL might produce such desirable laws.

In contrast with Tran's view, the law-making process is caricatured by some legal scholars in Vietnam as a process in which a small group of public servants sits idly in an air-conditioned room, blockaded by four walls and imagines or “invents” the words and

¹ Tran Ngoc Duong & Ngo Duc Manh, *Operation and Organizational Model of the National Assembly and the Government for Vietnam's Law-Governed Socialist State (Mo hình to chuc va Phuong thuc hoat dong cua Quoc hoi, Chinh phu trong Nha nuoc phap quyen xa hoi chu nghia Vietnam)* (Hanoi: National Political Press, 2008) at 53.

² However, given the lack of political transparency in Vietnam, it is not easy to fully document and measure all lobbying efforts.

³ See sections 5.1 & 5.2.

⁴ Tran & Ngo, *supra* note 1 at 53.

sentences of a statute without knowing much about the real world outside.⁵ The complex process of drafting, debating, and adopting the CPL as shown in Chapter 5 does not seem to fully confirm this view of law-making activities. However, such a caricature is important in reminding legal drafters and law-makers to be more realistic and serious in carrying out their mission.

From a less theoretical, but more practical perspective, one of my friends, who is experienced in drafting LNDs thanks to his more than 20 years of work in a department of legal affairs (*Vu Phap che*) of a ministry in Vietnam, once told me that, from his personal experience in drafting laws and LNDs, he found the law-making process to be a wrestling game in which “one person pushes forward while [at least] two others push back” (“*mot nguoi day toi con hai nguoi day lui*”). His implication is that law-making activities are quite messy and that new policy ideas can survive only after being fiercely attacked during a long process of debate and struggle. In other words, for him, the law-making process is a struggle in which participants fight to advance or secure their interests or positions. The process of introducing new ideas into the legal system is full of hardship and contention. In this process, only a very few new ideas will eventually reach their destination and be incorporated into adopted laws. Members of the EG and the DC (under the guidance of the drafting ministry) are expected to be persons who craft new policy ideas (new legal rules). They must prepare to defend what they propose. In the meantime, all other involved persons, despite being evaluators (MoJ), deliberators and approvers (the Government), or adopters (i.e. NA members or NA Committees) will assume the role of “pushing back”, that is of challenging new initiatives and protecting the *status quo*. Perhaps my friend has given quite an accurate description of the process of law-making in Vietnam.

However, this description still fails to give due attention to some aspects of the Vietnamese law-making process, such as the voices of stakeholders outside the public sector. In my friend’s view, the law-making process remains exclusively the work of the state apparatus, involving interactions among its various components. His account describes nothing about the interaction between the state apparatus and the society

⁵ Nguyen Ngoc Dien, “Lawmaking Should Be Regarded as an Item of Investment” (“*Lam Luat can nhu mot vu dau tu*”) (12 November 2010), online: VietnamNet <<http://tuanvietnam.vietnamnet.vn/2010-11-12-lam-luat-can-nhu-mot-vu-dau-tu>>.

outside (especially between legal drafters and the public). Furthermore, this account tends to overemphasize the critical role rather than the constructive role of MoJ,⁶ the Government⁷ and, especially, NA members.⁸

Based on the actual experience of drafting and adopting the CPL in Vietnam, linked with Watson's legal transplantation theory and the Seidmans' legislative theory, the following points on the nature of the law-making process in Vietnam can be deduced:

Firstly, the law-making process is a collective decision-making process with elements of a problem-solving process. Drafting and adopting a law is certainly an intentional state act. Without a purpose, law-making becomes meaningless, and purposeless law-making is hardly acceptable to most states in today's complex and challenging world. In Vietnam, as shown in Chapter 5,⁹ drafting a law is always preceded by the survival of a legislative initiative. Once a legislative initiative is included on the NA's five-year or annual legislative agenda, it becomes a projected national lawmaking priority made public. In addition, as an example of intentional action, the law-making is a process full of consideration and calculation.¹⁰ The drafting and adoption of the CPL in Vietnam was obviously a purposeful activity. It was initiated to respond to consumer problems and institutional problems perceived by the state. The initiation of this law started with a process of problematization.

As discussed in chapter 5, the CPL was initiated when MoIT and relevant stakeholders (especially consumer protection associations and the general public) grasped the existence of new problems faced by consumers and the failures of the existing legal

⁶ MoJ, in its role as gatekeeper for the Government concerning the consistency of the legal system, evaluates draft laws and advises the Government about whether they are consistent with the Constitution and other Vietnamese laws. MoJ also examines whether a draft law is feasible or not. See article 36(3) of the LoL of 2008.

⁷ According to article 39 of the LoL of 2008, based on the drafting ministry's proposal and comments from other ministries, the Government determines whether a draft law is suitable for submitting to the NA for debate and approval.

⁸ According to article 53 of the LoL of 2008, NA members are entitled to provide their comments and suggestions for improving a draft law. NASC, as a gatekeeper of the NA, determines how to incorporate such suggestions into a draft law.

⁹ See sections 5.1 & 5.2.

¹⁰ However, the extent to which such calculation and consideration is rational and well-informed is a matter of debate.

system to deal with these problems.¹¹ Together with the drafting process, legal drafters and relevant participants recognized the problems to be addressed in a more comprehensive and serious manner.¹² The activities carried out by or at the request of legal drafters to identify consumer problems (through conducting social surveys) and to identify the problems with the existing consumer protection provisions are conspicuous examples supporting this reflection.¹³ In addition, the legal solutions in the adopted CPL were actually designed with the intention of better solving consumer problems and related issues. The underlying logic here is that the perceived failures of the existing legal system in dealing with new challenges in a satisfactory manner became timely opportunities for legal drafters and law-makers to import new legal solutions into the existing legal system. Perhaps, this is also the logic of law reform in Vietnam from a functional perspective.

However, it is worth noting that law-making is not only a process through which the Government and the state acknowledge and respond to public problems; it can also be a process of excluding problems from consideration. This is because, in drafting the CPL, the NA had a rare opportunity to seriously examine, discuss and solve consumer and related problems. However, in the context of the NA's busy agenda, any problems that were not recognized or identified during the drafting process missed their chance to be presented, examined, discussed and solved. As previously shown in Chapter 5,¹⁴ many consumer problems (such as consumer problems relating to specific consumer contracts and transactions in used goods) and problems associated with the enforcement of consumer protection provisions (such as shortcomings of the traditional model of state management of consumer protection) were not adequately identified or recognized by legal drafters. They were bypassed and will be less likely to be solved in the near future. If justice delayed is justice denied, such failures to acknowledge problems will become

¹¹ See section 5.2.

¹² Of course, as I described in section 5.2 and section 5.3, this problematization was far from being perfect.

¹³ See section 5.3.

¹⁴ See section 5.3.3.

the conditions for sustaining problematic practices. In other words, the law-making process could become a process of ignoring public problems.¹⁵

As a problem-solving process, the law-making process can also be seen as a social inquiry process. Thanks to the process of drafting the CPL, for the first time, consumer problems were looked at closely by many segments of society, including not only the policy-makers, scholars¹⁶ and business community,¹⁷ but also the mass media¹⁸ and the general public. In other words, the event of drafting the CPL provided a chance to direct more public attention as well as governmental attention to consumer problems. In short, we can say that drafting the CPL was a process in which Vietnamese society investigated itself in order to better understand its current problems.

Secondly, the law-making process is a political process. The drafting of a law is a political game in which legal drafters and relevant agents representing different segments of society work together and also compete with each other to realize their own intentions or to advance their own positions. In other words, the law-making is a process in which divergent interests in society struggle to be recognized and acknowledged by the legal system.¹⁹ In the case of the CPL, the key drivers of most provisions were the sponsoring MoIT (especially VCAD), Vinastas, and VCCI.²⁰ In many situations, these three

¹⁵ Of course, this reasoning may be challenged by the argument that, given the shortage of resources, the government of Vietnam should focus on only dealing with selected key problems rather than waging war against so many problems, then losing the war.

¹⁶ The discussion of consumer protection by legal scholars was summarily reviewed in section 1.2.

¹⁷ It is not a coincidence that VCCI maintained a forum on consumer protection law beginning in July 2009, online: VIB Online <<http://www.vibonline.com.vn/vi-VN/Forum/Topic.aspx?ForumID=200>>.

¹⁸ It is not a coincidence that VietnamNet, a widely-known news website in Vietnam, in early 2009 opened a special news section reporting on consumer problems. See VietnamNet, “VietnamNet Opens a News Section on Consumer Protection” (“VietNamNet mo Chuyen muc Bao ve nguoi tieu dung”) (13 January 2009), online: VietnamNet <<http://vietnamnet.vn/bvkh/2009/01/823664/>>. A similar news section was also maintained by VTC News (a well-known internet-based television station in Vietnam) and Vinastas, beginning in early 2009. See online: VTS News <<http://vtc.vn/430-0/kinh-te/bao-ve-nguoi-tieu-dung/index.htm>>.

¹⁹ This finding seems consistent with Neilson’s observation on law reform in Vietnam some years ago that “law reform in Vietnam, at the end of the day, arises from highly internalised seemingly-endless rounds of debate, compromises and tradeoffs amongst stakeholder Ministries, regional interests and, in some cases, the Party.” See William A.W. Neilson, “Competition Laws for Asian Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (Abingdon, UK : Routledge, 2006) 291 at 312.

²⁰ Of course, I have no intention of downplaying the importance of MoJ, other ministries, the Government and CSTE, NASC, and the NA in this process. These authorities also played important roles in shaping the contents of the CPL, as shown in Chapter 5 (see sections 5.3 and 5.4).

identifiable interest groups struggled with each other and, occasionally, final choices were made through concessions. These groups were all winners in some instances but losers in others. For example, MoIT finally succeeded in setting up a traditional model of state management. MoIT (and VCAD) is now equipped with new authority and new tools of management.²¹ It also succeeded in devolving some of its authority to local governments (especially the authority handling consumer complaints).²² MoIT further succeeded in introducing the initial legal basis for applying simplified civil procedure to lawsuits brought by individual consumers to draw the court system into consumer protection activities.²³ Vinastas succeeded in convincing the law-makers to empower Vinastas and its affiliated consumer protection associations to file independent lawsuits against offending traders.²⁴ It also succeeded in convincing the law-makers to accept the proposal that the central government and local governments should provide financial grants for its operation.²⁵ VCCI, at least, for quite a considerable time during the drafting process, succeeded in removing specific provisions on direct sales contracts and distance sales contracts from the draft.²⁶ However, sometimes, these three identified interest groups failed to realize their initial intentions. For example, MoIT failed to convince the law-makers to allow disputes between consumers and traders to be adjudicated through district administrative authorities.²⁷ Vinastas failed to successfully defend its proposal to set up the Consumer Protection Fund under its management.²⁸ VCCI failed to defend its proposal that the definition of “consumer” should not be extended to legal persons like companies or public organizations.²⁹

²¹ See section 6.5.1.

²² *Ibid.*

²³ See section 6.4.

²⁴ *Ibid.*

²⁵ Article 29 of the CPL.

²⁶ See section 6.3.4.

²⁷ See section 5.4.2.

²⁸ See section 5.3.5.

²⁹ See section 6.1.1.

In line with the political nature of the law-making process is the fact that this process is also dialogical.³⁰ This reflection is supported by the fact that the draft CPL was sent to the public, to provincial governments and ministries for comments,³¹ and these comments were studied by legal drafters to improve the draft CPL. The process of drafting the CPL also helped to create a forum for exchange of ideas about solutions to consumer problems among relevant parties. The important changes made to Draft 2 in creating Draft 3 regarding protection of consumer privacy and unregistered traders are good examples.³² The law-making process was also an opportunity for MoJ, the Government and NA members not only to play a critical role in debating, deliberating and approving the contents of the CPL drafts, but also to play a constructive role in this process by suggesting important changes to the drafts submitted by MoIT. The inclusion of provisions requesting the Government to issue decrees on specific consumer contracts in the adopted CPL at the NA's request is a good example.³³

Thirdly, the law-making process is a process in which foreign experiences can actually be employed for the purpose of drafting new laws. As shown in Chapter 5,³⁴ to utilize foreign experiences, VCAD and legal drafters conducted many important activities right from the early days of drafting the CPL. These activities included: selecting a number of foreign consumer laws and translating them into Vietnamese; conducting a comparative study of foreign consumer laws to determine the core content usually stipulated in such laws; and conducting study tours in France and China.³⁵

In addition, in the very early days of drafting the CPL, VCAD also invited many foreign donors to provide assistance. As previously shown,³⁶ replying to VCAD's invitation, many foreign donors such as USAID (the STAR-Vietnam Project), the EU-

³⁰ However, the extent to which it is an effective dialogical process is a matter of debate.

³¹ See section 5.3.4.

³² It is worth noting that provisions on protection of consumer privacy and provisions on unregistered traders were incorporated into the draft CPL only starting with Draft 3. The decision to add these provisions was based on public consultation. In the adopted CPL, these provisions are found in articles 6 and 7. See section 5.3.5.

³³ See section 6.3.4. In accordance with articles 37, 39 and 52 of the LoL, comments and suggestions from MoJ, the Government, and NA members have to be studied before being incorporated into a draft law.

³⁴ See section 5.3.3.

³⁵ *Ibid.*

³⁶ *Ibid.*

Vietnam MUTRAP, CUTS HRC (India), and Maison du Droit actively participated.³⁷

They assisted VCAD and legal drafters through a variety of activities at various moments in drafting the CPL. Typically, they provided information on foreign laws or foreign expertise. They also provided financial assistance to help VCAD and legal drafters carry out costly activities such as social surveys, workshops, and impact assessments of the draft CPL. Through such assistance, VCAD and legal drafters gained better knowledge of consumer problems in Vietnam, as well as knowledge of foreign experiences of consumer protection. It is fair to say that the foreign donors helped VCAD and legal drafters to overcome their two most basic challenges: the shortage of state funds and the lack of expertise in dealing with consumer protection problems.³⁸

In sum, the case study of the law-making process of the CPL tends to show that the nature of the current law-making process in today's Vietnam is no longer monolithic. It does not fit with a top-down model of decision-making, although it is not a totally bottom-up process either. The process contains within itself both a process of social inquiry and negotiation. This CPL case study seems to confirm Mark Sidel's view that the traditional instrumental theory of law-making (i.e. the top-down approach to designing a law) can no longer effectively explain and analyze what is occurring in law-making activities in Vietnam.³⁹

7.1.2 A Law-making Culture in Vietnam

The experience of drafting and adopting the CPL helps us to recognize that legal drafters and law-makers, in designing specific legal rules, are not without constraints when identifying and selecting optimal solutions. In reality, their behaviours and their choices are governed and shaped not only by official constraints (i.e. written legal rules or formal rules stated in the Constitution or the LoL) but also by many informal constraints and unwritten rules. Unwritten rules include not only implicit conventions

³⁷ Details of the contributions of these foreign donors have been documented in Chapter 5 (sections 5.3.2, 5.3.3, and 5.3.4) and Chapter 6.

³⁸ See sections 5.3.2, 5.3.3 and 5.3.4.

³⁹ Mark Sidel, "Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam" (2002) 6 *Sing. J.I.C.L.* 42 at 44.

existing among legal drafters and members of the legal community in Vietnam, but also “rules” created through their beliefs and/or intellectual inertia. In this chapter, I refer to both formal and informal rules as the law-making culture;⁴⁰ these rules place effective constraints upon the choices of legal drafters and law-makers in Vietnam. The following are the key constraints that shaped the choices of legal drafters and law-makers in designing specific provisions in the CPL:

Political constraints: Despite the fact that the CPL further strengthens and legitimizes consumer rights in Vietnam, it has been carefully drafted so as not to facilitate the emergence of “independent” consumer associations which could challenge state authorities. In other words, the concept of “independent” consumer associations as usually understood in many Western countries would not be fully accepted in Vietnam. “Independent” consumer associations are, perhaps, seen as problems rather than solutions to consumer protection issues in Vietnam. The decision to remove from the CPL the right of consumers to set up their own associations and the decision to place consumer protection associations under the supervision of MoIT are examples which confirm this speculation.⁴¹ In addition, accepting a so-called “grass roots” consumers’ association would be likely contrary to the overarching authority of the Fatherland Front and Vietnam’s long-standing policy of controlling the growth of non-governmental organizations.⁴²

Implicit constitutional constraints: The law-making process is visibly shaped by the actual relationship between the NA and the Government, especially by the relatively weak role of the NA in the law-making process.⁴³ As shown in Chapter 3,

⁴⁰ My concept of law-making culture here is simpler than the concept of “legal culture” employed by Nicholson and other comparative legal scholars. A thoughtful and informative discussion of the concept of “legal culture” can be found in Penelope (Pip) Nicholson, “Legal Culture ‘Repacked’: Drug Trials in Vietnam” in Penelope (Pip) Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008) 71 at 89-102; see also David Nelken, “Comparing Legal Cultures” in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Oxford: Blackwell, 2004) 113.

⁴¹ See sections 5.3.5 and 6.5.1.

⁴² Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008) at 141. Sidel observes that “The state [of Vietnam] has sought to encourage the growth of social organizations, at least partly to compensate for the inability of the state to keep pace with social needs in the reform period. At the same time, the state retains management and control over the sector at a level more detailed and specific than in many other countries.”

⁴³ See section 3.5.

despite the fact that the NA no longer simply “rubber stamps” laws proposed by the Government, the hegemony of the Government over the NA’s activities, including legislative activities, seems to remain an implicit norm.⁴⁴ Actually, given that the NA meets twice a year and only works about 80 days in each year, the NA’s agenda is very busy with a long list of draft laws waiting to be discussed and approved.⁴⁵ As most NA members are part-time members without independent budgets,⁴⁶ and usually lack both the expertise and the resources to directly prepare draft laws or to make substantial changes to draft laws submitted to them, it seems that the current NA is not well-prepared or ready to assume a more active role in law-making activities.⁴⁷ It is, therefore, not surprising⁴⁸ that, although many NA members urged NASC to improve the draft CPL to make it more detailed (especially to provide provisions on specific consumer contracts, state management and state sanctions), NASC simply advised that it should be left to the Government to issue guiding decrees about these issues.⁴⁹ As a result, the adopted CPL conforms to the traditional form of almost all statutes adopted by the NA in the sense that these laws tend to be relatively short and set out the general scope of the proposed law,

⁴⁴ See section 3.5.

⁴⁵ Tran & Ngo, *supra* note 1 at 317. Tran and Ngo note that, every year, the NA has only enough time to debate and approve about 70% of the draft laws submitted by the Government.

⁴⁶ It is widely known in Vietnam that NA members working on a part-time basis are paid only a monthly allowance of less than 1,000,000 VND (i.e. less than \$50 USD). See Thuy Chung “Four Years in the NA: A Look Back” (“Nhìn lại 4 năm nghị trường”) (2 March 2011), online: VietnamNet <<http://vietnamnet.vn/vn/chinh-tri/10079/dung-de-ai-do-nghi-minh-la--quan-xanh-.html>>.

⁴⁷ However, there is heated debate among legal scholars and experts in Vietnam about the balancing point at which both the Government and the NA share the burden of legislative activities. For example, Phan Trung Ly, Vice-Chairperson of the NA’s Law Committee, argues that the NA should assume a more meaningful role as a law-making body (i.e. it should take an interventionist role in shaping the concrete contents of draft laws) while many other scholars (for example, Nguyen Si Dung and Bui Ngoc Son) argue that the dominance of the Government in law-making activities is a natural principle, and the NA should limit its legislative role to checking whether a draft law submitted by the Government ensures a balance between the demands of state management and public interests. Accordingly, the NA should not be too active in shaping the concrete contents of draft laws. See Phan Trung Ly, *Vietnamese National Assembly: Organization, Operation, and Renovation (Quoc hoi Vietnam: To chuc, hoat dong, va doi moi)* (Hanoi: National Press, 2010) at 57; see also Bui Ngoc Son, *Perspectives on Legislative Power (Nhung goc nhìn lap phap)* (Hanoi: National Political Press, 2006) at 25-26; see also Nguyen Si Dung, *Matters of Life: One Perspective (The su: Mot goc nhìn)* (Hanoi: Knowledge Press, 2007) at 91-92.

⁴⁸ Of course, time constraints, lack of resources, and lack of skills associated with the drafting process could also be important reasons. In addition, as law is the product of the struggle among conflicting stakeholders participating in the drafting process, some contentious issues were simply “shelved” by the DC to avoid further disagreement. The removal of provisions on the Consumer Protection Fund in Draft 2 is a good example. See section 5.3.5.

⁴⁹ See sections 5.4.1. & 5.4.2.

leaving the lead ministry with the main responsibility for drafting the implementation decree and other subordinate LNDs required to communicate the adopted law's real messages and to bring it into effect.⁵⁰ In other words, the experience of the law-making process of the CPL seems to reflect that neither the NA nor the Government is ready to change the current implicit norms inherent in their legislative roles.

Legal constraints from the LoL of 2008: Those drafting and adopting laws in Vietnam have to follow every step, procedure, and requirement in the LoL and its guiding decree. Basically, the drafting and adoption of the CPL followed (at least on the surface) these requirements. However, many requirements of the LoL were only formally obeyed. The requirement that the DC (and the EG) had to prepare a comprehensive report on assessment of potential impacts (RIA) of the CPL as stipulated in article 33 of the LoL of 2008 is a clear example. This article and Decree 24 (article 38) requires that an RIA has to clearly state the problem to be solved, the intended objectives of the proposed policy, alternative solutions and the best solution to the problem based on a cost-benefit analysis. The DC of the CPL actually carried out and prepared the RIA. However, as admitted by some members of the EG during my fieldwork in August 2010, RIA was prepared to justify the already-decided options (and already-decided provisions) rather than to subject these provisions to more serious scrutiny. This was true especially with respect to clarifying perceived problems, inquiring into their origins and designing proper solutions.⁵¹

In addition, an RIA should be prepared before the DC and the EG actually draft a law. However, the LoL of 2008 only requires that an RIA should be completed before the completion of Draft 3 (i.e. before MoJ evaluates the draft law). In the formulation of the CPL, the RIA was misused as a tool to protect the contents of the draft law in the face of MoJ, the Government and the NA, rather than being an instrument for members of the DC and the EG to better frame perceived problems and to have a better and more balanced view in analysis of the perceived problems or to craft more suitable solutions.

⁵⁰ Nguyen Duy Quy & Nguyen Tat Vien, *Vietnam's Law-Governed Socialist State of the People, from the People, and for the People: Theory and Practice (Nha nuoc phap quyen XHCN Viet Nam cua dan, do dan, vi dan: Ly luan va thuc tien)* (Hanoi: National Political Press, 2008) at 236.

⁵¹ See section 5.3.4.

The LoL of 2008 (article 35 (3)) also requires that the Ministry of Internal Affairs and the Ministry of Finance give their opinions on important aspects of enforcement of a draft law such as personnel, organizational matters and financial resources. However, during the process of drafting the CPL, these two ministries were silent on these matters. In addition, the DC never made clear the financial and human resources that the Government would pledge to improve the current situation of consumer protection in Vietnam.

The requirement of ensuring the internal consistency of the entire legal system is explicitly stated in the LoL.⁵² The newly adopted CPL is required to have internal consistency with the Constitution and other current laws. It is expected a new law will not undermine the integrity of the legal system. However, this principle was not fully followed in drafting the CPL. The newly-adopted CPL incorporates a number of provisions that would likely be found inconsistent with the current Vietnamese legal system.⁵³ It seems that the role of MoJ and the NA Verifying Committee as stipulated by the LoL to identify internal inconsistencies, conflicts and redundancies was not completely effective.⁵⁴

The provision prohibiting traders to “transfer their rights over consumers” to third parties is a clear example. This provision is clearly inconsistent with the provision of the *Civil Code* of 2005 that states creditors can transfer their claims over debtors without obtaining prior consent from those debtors.⁵⁵ Actually, this provision of the CPL is economically inefficient in the sense that it does not promote specialization in business activities. Traders cannot obtain assistance from debt collecting companies without the prior consent of their consumers. The provision empowering the court to decide how to allocate the damages recovered in a lawsuit brought collectively by consumer protection associations⁵⁶ is another example. With this new provision, without concrete guidance

⁵² Article 32(2d), article 36(3)(c), and article 43(3) of the LoL of 2008.

⁵³ For examples, provisions on unfair commercial practices (article 10 of the CPL) as analyzed in section 6.2 and provisions on state management (articles 25, 26, 47, 48, and 49 of the CPL) as analyzed in section 6.5.1.

⁵⁴ Articles 36 and 43 of the LoL of 2008.

⁵⁵ Article 309 of the *Civil Code* of 2005.

⁵⁶ Article 46 of the CPL.

from the Supreme People's Court, a court accepting a collective lawsuit brought by a consumer protection association will have to invent new legal rules to distribute the damages recovered in the lawsuit. As the courts (especially the inferior courts) in Vietnam are not expected to invent or create new legal rules, courts accepting lawsuits brought by consumer protection associations may face hard choices.⁵⁷

The failure to strictly comply with the complex steps and requirements of the LoL perhaps reflects a tension between the need to ensure a “checks and balances” mechanism in the law-making process and the need to produce large numbers of LNDs in responding to rapid social and economic transformations in Vietnam today.

Continued commitment to the traditional state management model: The experience of drafting the CPL clearly shows the legal drafters' and law-makers' continued commitment to the traditional state management model. As presented in Chapter 3, the traditional state management model supports the idea that the state is the key solution to public problems. Laws are regarded as instruments of the state which help society conform to state intentions, rather than as instruments the public can use to constrain and place pressure upon the state to meet their needs. This model also downplays the requirements for transparency and accountability of administrative authorities. It allows state management agencies to stand in a higher position than all other organizations and individuals in society. Other components of society, including non-governmental organizations, are usually regarded as targeted groups to be managed, rather than as partners in state management.⁵⁸

All of these aspects of the traditional model seem to be visible in the drafting of the CPL. It is, perhaps, not a coincidence that there is no mechanism to make state management authorities (MoIT, VCAD, local People's Committees) accountable to consumers for their operations. In other words, a consumer-centred approach is not embraced in designing provisions in the CPL on state management of consumer protection. It is, perhaps, also not a coincidence that transparency and accountability of state management authorities in consumer protection escaped being problematized during the drafting of the CPL. Similarly, the CPL grants MoIT and provincial People's

⁵⁷ See section 5.4.3.

⁵⁸ See section 3.3.

Committees power to strictly “manage” or supervise the activities of consumer protection associations.⁵⁹ Consumer protection associations, (even though they are placed under the umbrella of the Fatherland Front) are still seen as a target for “state management” rather than as partners of the state. Consumer protection associations are also not expected to become a source of pressure on state authorities in terms of consumer protection.⁶⁰

The traditional state management model also justifies provisions that sustain hegemonic administrative authority over the court system. The provision on the authority of MoIT (VCAD will likely assume this role in future enforcement of the CPL) to request traders employing standard contracts with unfair terms to remove or modify these terms⁶¹ is good evidence of this. This provision appeared in the initial draft, and is totally new in comparison with the legal provisions on consumer protection existing before the adoption of the CPL. This provision is said to be modelled on provisions from a number of European countries.⁶² However, judicial review of administrative and regulatory rulings and decisions is simply ignored. This is very different from the practice in Western countries.⁶³ Article 19(2) of the CPL directly authorizes MoIT (likely VCAD) to impose injunctions at its own discretion.⁶⁴ The court system has no voice in this process. It is interesting that this provision of the CPL did not generate any challenges from MoJ, the Government, or the NA (although many NA members have a background in the court system). The reason for this phenomenon, perhaps, is that it has been a traditional characteristic of the state machinery in Vietnam that the administrative system is always

⁵⁹ Articles 48(2) and 49(2) of the CPL.

⁶⁰ See section 6.5.1.

⁶¹ Article 19(2) of the CPL.

⁶² See section 6.3.3.

⁶³ For example, section 10 of the United Kingdom’s *Unfair Terms in Consumer Contracts Regulations of 1999* states that “It shall be the duty of the Director [General of Fair Trading] to consider any complaint made to him that any contract term drawn up for general use is unfair.” However, the Director General of Fair Trading of the United Kingdom (an equivalent agency of VCAD) has to apply to the competent court for an injunction to prevent the continued use of unfair terms as stipulated in section 12 of the said regulation. See *Unfair Terms in Consumer Contracts Regulations of 1999*, online: Legislation <<http://www.legislation.gov.uk/uksi/1999/2083/contents/made>>.

⁶⁴ It is noteworthy that administrative cease-and-desist orders are a common feature of a number of regulatory laws in Western jurisdictions. Such orders may be reviewed by the courts on certain procedural grounds. They are used sparingly to stop egregious trading practices deemed to be seriously damaging to market relations. See, for example, Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2d ed. (Oxford: Hart, 2007) at 382-383; August Horvath & John Villafraanco, eds., *Consumer Protection Law Developments* (Chicago: A.B.A. Antitrust Law Section, 2009) at 257-266.

regarded as a very powerful branch, while the court system is widely regarded as being comparatively less experienced and underresourced.⁶⁵

7.2 TESTING WATSON'S THEORY

Actual occurrences and pervasiveness of legal transplants: The experience of drafting the CPL provided actual examples of the use of legal transplants. Many important ideas and provisions of the CPL are conspicuous products of legal transplantation, such as: the view of consumers as weak parties in market relations with traders; the provision on unfair commercial practices; the provision on standard contracts; the provision on the right of consumer protection associations to file independent lawsuits against offending traders; and the idea that consumers' lawsuits should be subject to simplified civil procedure.⁶⁶ In other words, legal transplants are not only possible, they actually take place. These legal transplants usually reflect the legal drafters' intentional choices⁶⁷ and their success in persuading the public and the law-makers to accept such importation.

Except for the sustained commitment to the traditional model of state management, the markers of legal transplantation can be seen in the five key policy issues in the CPL.⁶⁸ In other words, the experience of drafting and adopting the CPL in Vietnam seems to confirm that legal transplantation not only actually occurs but also is one of the main ways of formulating the ideas incorporated into Vietnamese laws. Specifically, foreign legal ideas and foreign legal models actually provide references for the design of most of the legal solutions and provisions in the CPL.

⁶⁵ Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Leiden: Martinus Nijhoff, 2007) at 83; see also Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Oxford: Hart, 2009) at 37. In addition, it is worth noting again that the Supreme People's Court did not send their representatives to participate in the DC and EG of the CPL.

⁶⁶ See sections 6.1.1, 6.2, 6.3, & 6.4.

⁶⁷ It is not a coincidence that legal drafters decided to translate many foreign consumer protection laws, conduct a comparative study of foreign consumer protection laws, undertake study tours in foreign countries, and invite foreign donors to provide expertise. See section 5.3.2.

⁶⁸ i.e. the concept of "consumer" and "trader", unfair commercial practices, consumer contracts, consumers' access to justice, and state management of consumer protection.

Integrity of legal meaning during legal transplantation: The experience of drafting the CPL shows that legal meaning is not totally lost through legal transplantation. However, in some cases, it is transformed. In other words, the meaning of many borrowed legal terms or borrowed legal rules is constructed in a way that is shaped both by the original foreign meaning and local conditions rather than simply by imitating 100% of the legal meaning as understood in other jurisdictions. The concept of “consumer” and the concept of “trader” are clear examples. Once received into the CPL of Vietnam, the concept of “consumer” was not simply understood to include only “individual consumer” as usually understood in European and North American countries.⁶⁹ This concept was also constructed to include legal persons purchasing goods and services beyond the purpose of re-supplying.⁷⁰ This transformation of meaning is a product of debate and argument among different interest groups.⁷¹

The concept of “trader” is understood as including not only “registered trader”, as in many jurisdictions, but is also understood to include “unregistered” vendors in local markets in rural areas. However, at the same time, this concept is understood to include only “profit-seeking” organizations and individuals. It has not been broadened to include public service organizations or public authorities, or other not-for-profit organizations, as in a number of other jurisdictions.⁷²

Another example of the adaptation of legal transplants to the Vietnamese context is the provision on MoIT’s new mandate⁷³ in supervising consumer contracts to directly remove their unfair terms. This provision also has its origin in developed countries.⁷⁴ However, given that Vietnam is a jurisdiction having a sustained commitment to the traditional model of state management,⁷⁵ in which administrative authorities may assume many roles which are usually regarded as belonging to the court system in developed

⁶⁹ This is despite the fact that most of the legal transplants in the CPL find their origins in consumer protection laws from developed countries, as shown in Chapter 6 (sections 6.2, 6.3 & 6.4).

⁷⁰ See section 6.1.2. However, whether such reconstruction of the concept of “consumer” is a wise policy option is a matter of debate.

⁷¹ See section 6.1.2.

⁷² See section 6.1.2.

⁷³ Actually, VCAD will very likely assume this role.

⁷⁴ See section 6.3.3.

⁷⁵ See section 7.1.2.

countries,⁷⁶ receipt of this legal transplant may generate new concerns for the business community about the fairness of MoIT in exercising this new mandate.⁷⁷

These three examples seem to refute Pierre Legrand's claims that legal meaning cannot travel.⁷⁸ However, they also seem to confirm Andrew Harding's claims that legal meaning, through legal transplantation, cannot escape from being localized or transformed.⁷⁹ The reason for this is perhaps that, in the process of transplantation, local legal drafters or law-makers perceive the meaning of foreign legal ideas through the prisms of their own local knowledge and reinterpret the meaning of foreign legal ideas so that they become compatible with this knowledge.

Social ease of legal transplants and degree of transferability: The experience of legal transplantation occurring in the drafting of the CPL provides many examples that refute Watson's claim that legal transplantation is socially easy.⁸⁰ Despite the fact that legal transplantation actually took place during the process of drafting and adopting the CPL, it was highly constrained by the context and the politics of the law-making process in which it operated. The actual process of drafting and adopting the CPL shows that foreign legal ideas were successfully incorporated into the adopted CPL only after they passed through a series of "filters" created by legal drafters, business interests, other ministries, the public, MoJ, the Government, the NA's Verifying Committee, NASC, and the plenary NA. As previously noted, these participants' behaviours and choices are integral to the dynamics of the law-making culture.⁸¹

Among these participants, legal drafters (who are also the core researchers) are the very first persons exposed to foreign legal ideas and they are the principal conduits and filters responsible for most examples of legal transplantation. However, even when foreign legal ideas are attractive enough to convince legal drafters to adopt them, there is

⁷⁶ For example, MoIT can directly decide to remove unfair terms from consumer contracts without challenging such terms before the court.

⁷⁷ See section 6.3.3.

⁷⁸ Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 M.J.E.C.L. 111 at 120.

⁷⁹ Andrew Harding, "Global Doctrine and Local Knowledge: Law in South East Asia" (2002) 51 I.C.L.Q. 35 at 45.

⁸⁰ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens, GA: University of Georgia Press, 1993) at 95.

⁸¹ See section 7.1.2.

nothing to ensure that they will escape from being challenged by other participants. So, in practice, the public, MoJ, the Government, the NA's Verifying Committee, NASC, and NA members can raise challenges to imported foreign legal ideas.

Some foreign legal ideas seem to travel smoothly and easily through local "filters", but others are rejected from the very beginning, and yet others are halted on the way to their destinations.

Examples of foreign legal ideas that travelled quite smoothly through the law-making process of the CPL include the following: the idea that consumers should be regarded as weak market players and should be entitled to a special protection regime;⁸² the idea that unfair commercial practices such as misleading practices, coercive practices, and the provision of unsolicited goods and services should be prohibited in the CPL,⁸³ the idea that a number of unfair terms in consumer contracts should be regarded as being void;⁸⁴ the idea that consumer protection associations should receive certain grants from the state for consumer protection activities;⁸⁵ and the idea that consumer protection associations have the right to file independent lawsuits against offending businesses.⁸⁶ All of these foreign legal ideas were new to the existing local knowledge in Vietnam but they were perceived as necessary to increase benefit to consumers. They also did not pose any significant challenges to the positions of different stakeholders participating in the drafting of the CPL.

Examples of foreign legal ideas which were received by legal drafters at first, rejected during the drafting, and finally revived, include the following: the idea of regulating door-to-door sales and the idea of regulating distance sales through the use of mandatory forms of contracts and cooling-off periods.⁸⁷ These ideas were first received by legal drafters from VCAD and Vinastas in the initial draft and in Draft 1. However,

⁸² See section 6.1.1.

⁸³ See section 6.2.

⁸⁴ See section 6.3.2.

⁸⁵ See section 5.3.3. The study tour in France helped legal drafters to be further convinced that consumer protection associations should have opportunities to receive financial assistance from the state. This provision is set forth in article 29(1) of the CPL.

⁸⁶ See section 6.4.

⁸⁷ See section 6.3.4.

these ideas were critiqued by VCCI and legal drafters agreed to remove them from the draft CPL. Nevertheless, a number of NA members urged that these ideas be incorporated again into the CPL. As a result, the CPL delegated the Government to issue decrees to provide guidelines on these matters.⁸⁸

An example of a foreign legal idea that was rejected from the outset was the idea of allowing consumers to initiate class action lawsuits. No legal drafters or other participants in the drafting and adoption of the CPL seriously raised this issue, although this type of lawsuit was known to legal drafters and lawyers in Vietnam. Perhaps this mechanism was too new to Vietnam and legal drafters thought that the current court system would be unable to accommodate this complex type of lawsuit.

Examples of foreign legal ideas which were received by legal drafters at first and rejected during the process of debate and argument include the following: liberal views on the role of consumer protection associations as a source of placing pressure upon state authorities in charge of consumer protection;⁸⁹ the idea of stipulating specific provisions on simplified civil procedure in the CPL; and the idea of providing specific administrative sanctions (state sanctions) in the CPL. The idea of stipulating specific provisions on simplified civil procedure in the CPL was persistently proposed by legal drafters, but it was challenged by MoJ and the NA due to a well-established practice that specific legal rules on civil procedure should be stipulated only in the *Code of Civil Procedure*. It was thought that the CPL should not break this unwritten taboo.⁹⁰ The idea of stipulating specific administrative sanctions in the CPL that would be applied to offending traders was also persistently proposed by legal drafters, but was challenged by MoJ. The NA finally determined to reject this idea on the basis that administrative sanctions should be stipulated in the future *Law on Dealing with Administrative Offenses*

⁸⁸ See section 6.3.4.

⁸⁹ Instead, legal drafters continued to commit to the traditional model of state management in which consumer protection associations were regarded as a group targeted for management. See sections 6.5.1 and 7.1.2. This decision seems to reflect the fact that legal drafters of the CPL were sensitive to requirements of the current political environment in Vietnam which is not fully friendly to the flourishing of “independent” non-governmental organizations. This finding seems to further confirm Neilson’s observation some years ago about the pattern of legal transplants in Vietnam that “Vietnam, perhaps more so than most developing or transitional economies, is extremely sensitive to the suggestion that its market reform legislation should copy, or closely follow, Western economic law models.” See Neilson, *supra* note 19 at 311.

⁹⁰ See section 6.4.

and specified by a government decree. It was decided that the CPL should not break this unwritten taboo either.⁹¹

The above-mentioned examples seem to suggest that the foreign legal ideas that were rejected were those that exposed ideological sensitivities or those deemed by legal drafters to be difficult for the current legal system to sufficiently digest. However, some foreign legal ideas were rejected due to technical problems associated with well-established practices shared among law-making elites, such as (1) the unwritten rule that the laws other than the *Ordinance on Dealing with Administrative Offenses* (or the future *Law on Dealing with Administrative Offenses*) should generally not contain provisions on specific sanctions; and (2) a similar unwritten rule that laws other than the *Code of Civil Procedure* should not contain any specific provisions on civil procedure.⁹²

In addition to the above-mentioned examples in which transplanting foreign legal ideas is not socially easy, the experience of drafting the CPL also shows that the importation of foreign legal ideas into this law was path-dependent in the sense that new legal transplants are significantly shaped by previous legal transplants.⁹³

An example showing that previous legal transplants can inhibit new legal transplants was the introduction into the CPL of a provision that certain lawsuits filed by individual consumers could be resolved through simplified civil procedure.⁹⁴ Despite the fact that legal drafters, especially those from VCAD, were quite persistently pushing a more comprehensive system with concrete steps and procedures so that this new mechanism would be able to be implemented when the CPL takes effect (i.e. on 1 July 2011), their efforts were challenged by MoJ, the Supreme People's Court and were finally killed by the NA. As discussed above, this failure of legal drafters can be explained by the fact that the current law-making practice in Vietnam does not allow any laws other than the *Code of Civil Procedure* to contain specific provisions on civil procedure.

⁹¹ See section 6.5.2.

⁹² However, another explanation might be the prevailing rule of recognizing a ministry's law-making monopoly over a given subject area, like MoJ here.

⁹³ This finding seems to be consistent with Gillespie's finding from his case study on the process of drafting the [Unified] *Law on Enterprises* of 2005 in Vietnam. See John Gillespie, "Developing a Decentred Analysis of Legal Transfers" in Nicholson & Biddulph, *supra* note 40, 25 at 55.

⁹⁴ See section 6.4.

This practice has been observed by Vietnamese law-makers, although it is only an implicit and informal norm. Perhaps this norm is the product of reception of legal thinking from the former Soviet Union and/or from civil law countries, in which the difference between substantive law and procedural law usually has clear-cut boundaries which cannot be crossed.⁹⁵

All of the foregoing seems to prove that legal transplantation in the CPL is not socially easy as suggested by Watson.⁹⁶ Instead, this case study seems to confirm Kahn-Freund's idea that some types of legal rules may be more easily transplanted than others.⁹⁷

Legal transplants and the relationship between law and society: Legal transplantation or diffusion of foreign law, as occurred in the process of drafting and adopting the CPL, is realized in certain social, economic, and political contexts. The transplantation of consumer protection law in Vietnam did not take place until about two and a half decades after the market mechanism was introduced. The emergence of consumer problems was one of the direct motivations for legal drafters and law-makers in Vietnam to accept legal transplantation (i.e. to learn from relevant foreign experiences in solving domestic problems).⁹⁸ Without the introduction of the market economy and without the emergence of consumer problems, there would be no need (or socially felt need) for introducing a CPL and no need for legal transplantation. In other words, the occurrence of legal transplants does not reasonably lead to the conclusion that there is no connection between law and society. Actually, legal transplants, as in the case of the CPL of Vietnam, are carried out according to the needs of society. Legal transplants, in this case, are evidence that society and the evolution of law are closely connected, rather than the reverse.

Reasons for legal transplantation: As described in Chapter 2, scholars participating in discussions about the legal transplantation phenomenon have speculated

⁹⁵ Bui Nguyen Khanh, "A Number of Comments and Suggestions for the Draft Law on Consumer Protection" ("Mot so y kien dong gop cho du thao Luat bao ve quyen loi nguoi tieu dung") (2010) 5 J. of State & L. (Vietnam) 78 at 83. It is worth noting that Khanh was a member of the EG of the CPL.

⁹⁶ Watson, *supra* note 80 at 95. However, it is worth noting that Watson never explicitly explains what he really means by the term "socially easy".

⁹⁷ O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod. L. Rev. 1 at 6.

⁹⁸ See sections 5.3.2 and 5.3.3.

that, throughout legal history, there have been many reasons for the adoption of legal transplants.⁹⁹ A close look at the experience of drafting and adopting the CPL in Vietnam provides further insight into this issue. At first glance, the reason for using legal transplants during this experience was the perceived failure of the existing legal system to respond to new problems, particularly consumer problems.¹⁰⁰ In addition, the way legal drafters selected a sample of foreign consumer laws through which to study and learn from foreign experiences seems to reflect an inertia in legal drafting practice in Vietnam; that is, rather than attempting to find wholly local solutions, legal drafters looked first to Western developed jurisdictions for inspiration. However, the case study of the drafting of the CPL shows that they did not only look to Western developed jurisdictions to learn the necessary models, but also looked to China, Japan, South Korea, Taiwan, Singapore, Malaysia, Thailand and India to see whether they could learn something from consumer laws in these Asian jurisdictions.¹⁰¹ They seemed to be convinced that the ideal model for consumer protection in Vietnam could be constructed by selecting elements of consumer laws from foreign countries (both legal rules and legal institutions) and modifying them to meet the local conditions of Vietnam.

However, a favourable environment for the tendency to consult foreign laws in producing the CPL was probably also created by the following: minimal investment from the Government (in terms of political will, funding and time) into law-making activities; poor development of legal expertise in the area of consumer protection, as well as a lack of infrastructure in the social sciences; and, finally, direct financial contributions from foreign donors.

Nevertheless, it is noteworthy that, although many provisions in the CPL can be seen as being very similar to provisions in consumer laws of EU member states, the CPL is not wholly modelled after specific consumer protection laws in any of these countries. As already stated, some provisions regarding enforcement mechanisms, as well as the rights of consumers to set up associations and the rights of consumer protection associations to challenge decisions of the state authorities, are designed in the traditional

⁹⁹ See section 2.2.5.

¹⁰⁰ See section 5.3.2 and 5.3.2.

¹⁰¹ However, consumer laws in these Asian countries might also have transplant roots.

Vietnamese way in which ideological and political constraints are quite visible. Contrary to the claims of Ugo Mattei, these examples suggest that, often, what drives legal drafters to copy or not to copy foreign models has nothing to do with the so-called “economic superiority” of those models.¹⁰² It seems that, when ideological or political factors are present, the economic efficiency argument is usually muted.

7.3 TESTING THE SEIDMANS’ THEORY

There is no clear evidence showing that legal drafters of the CPL were aware of the Seidmans’ problem-solving institutionalist legislative theory. Instead, they were expected to follow the steps and requirements of the LoL in formulating the CPL. According to article 26 of the LoL of 1996 (as revised in 2002), before or during the process of drafting a law, legal drafters (the DC with the assistance of the EG) must carry out many important activities such as reviewing and evaluating the existing relevant LNDs and their actual implementation related to the draft law, and surveying and evaluating the actual social situations expected to be governed by the draft law. The intention of these provisions is to make legal drafters better able to identify and recognize the problems to be addressed by the proposed law.

In addition, according to article 33 of the LoL of 2008, the drafting ministry must conduct an assessment of potential impacts of the draft law. The Report on Impact Assessment (RIA) must clearly state the problems to be solved and the solutions to each problem, along with an enumeration and comparison of the costs and benefits of each solution. Accordingly, legal drafters of the CPL are also expected to follow a problem-solving methodology somewhat similar to the Seidmans’ approach.¹⁰³ The fact that VCAD conducted a survey of problematic business practices harmful to consumers,¹⁰⁴ and VCAD also prepared an RIA of the draft CPL,¹⁰⁵ confirms that the CPL was

¹⁰² Ugo Mattei, *Comparative Law and Economics* (Ann Arbor, MI: University of Michigan Press, 1998) at 124-126.

¹⁰³ Unfortunately, I did not find any evidence showing that the Seidmans’ law-making principles were consulted or employed in drafting the LoL.

¹⁰⁴ See section 5.3.3.

¹⁰⁵ See section 5.3.4.

purposefully drafted to be used to solve certain consumer protection problems. Therefore, stating that the drafting process of the CPL in Vietnam is a problem-solving process is basically accurate.¹⁰⁶

Despite this statement, I do not mean that the drafting of the CPL strictly follows the problem-solving methodology proposed by the Seidmans. On the contrary, this process of producing the CPL in Vietnam deviates noticeably from the Seidmans' theory as follows:

First, policy analysis: The Seidmans' legislative theory (similar to the wisdom offered by policy analysts) emphasizes the importance of defining and analyzing problems before designing suitable policy options. In this theory, taking each step in the proper order – problem definition first and solution design following – is a requisite for success. Legal drafters of the CPL actually carried out small-scale social surveys to identify consumer problems (e.g. the existence of problematic business practices such as selling counterfeited goods, creating misleading advertisements, mislabelling products, dishonouring warranty promises). However, as shown in Chapter 5, the survey report was not completed until December 2008, two months after the initial draft was completed on 23 September 2008.¹⁰⁷ The survey report also failed to identify and acknowledge the existence of many significant problematic business practices such as the employment of standard contracts, the practice of direct sales and distance sales, etc. More problematic is the fact that the survey failed to provide a deep and comprehensive analysis of the causes of the identified consumer problems. In other words, while the Seidmans' legislative theory emphasizes the depth of problem analysis, the legal drafters of the CPL failed to focus on this important aspect. Perhaps this is one of the reasons why the drafting of the CPL was not simply a process of identifying and solving problems but was also a process of denying and delaying the process of problem-solving.¹⁰⁸

The underlying reasons for this shortcoming are perhaps partly the shortage of time and resources available to the drafting ministry and legal drafters during the early days of drafting the CPL. Another reason is probably that legal drafters were influenced

¹⁰⁶ However, whether it is an informed and effective problem-solving process is a matter of debate.

¹⁰⁷ See section 5.3.3.

¹⁰⁸ See section 7.1.1.

by the simplistic view that a desirable law is a law dealing with only two things: (1) identifying problematic social practices that are regarded as the target of the law (in the case of the CPL, these practices were unfair commercial practices and employment of unfair contractual terms); and (2) simply expressly denouncing or sanctioning these problematic social practices.

In other words, for legal drafters and law-makers in Vietnam, the success of a law can be realized if we accurately identify problematic social practices and adequately design proper sanctions to remedy them. According to the Seidmans' legislative theory, good legislative practice requires legal drafters to ensure in advance the feasibility of legal provisions incorporated into a draft law.¹⁰⁹ Nevertheless, the CPL drafters did not fully follow this step. No estimate of the state budget and human resources to be allocated was carried out by legal drafters or the drafting ministry in order to examine the CPL's feasibility.¹¹⁰ Therefore, it was quite difficult to predict the level of resources the government of Vietnam would actually pledge to effectively enforce the newly-adopted CPL.¹¹¹ Given this, it is not surprising that the adopted law seems to focus on the outcomes of problematic practices rather than on the roots of these practices.

Second, the participation of relevant parties in problem definition: The Seidmans' legislative theory requires that persons knowing about the problems to be solved should actively participate in the process of identifying, recognizing, defining and analyzing those problems. In compliance with this requirement, public consultation should be carried out even before the drafting process starts (or right at the beginning of drafting). This is because members of the public (including consumers and the business community) are the persons who know best about the existence of consumer problems. In addition, the problems relating to the failure of the current legal framework of consumer protection can be clearly and adequately identified only when the relevant authorities or organizations involved in the implementation of these provisions are effectively

¹⁰⁹ Ann Seidman & Robert B. Seidman, "Between Policy and Implementation: Legislative Drafting for Development" in Constantin Stefanou & Helen Xanthaki, eds., *Drafting Legislation: A Modern Approach* (Farnham, UK: Ashgate, 2008) 287 at 287.

¹¹⁰ See section 7.1.2.

¹¹¹ This is despite the fact that articles 32, 36, and 43 of the LoL have addressed this issue by stating that the DC, MoJ, and the NA Verifying Committee must ensure these requirements are met during the process of drafting a law.

consulted. Unluckily, in terms of the CPL, such consultation was carried out only when the draft was already quite complete (i.e. Draft 2).¹¹² This move was consistent with the requirements and the steps of the LoL of 2008; however, this likely explains why the CPL failed to address some consumer problems (e.g. consumer problems associated with direct sales contracts, distance sales contracts, clarity of written warranties) and some problems associated with enforcement.

In addition, public consultations should have been held to reflect the fact that the CPL could have different impacts upon different groups of consumers in different geographical areas (e.g. urban and rural consumers). Unfortunately, such public consultation was not conducted. As a result, most provisions in the CPL, especially provisions resulting from legal transplants based on the findings of core common legal provisions on consumer protection in foreign countries, were designed using the “one size fits all” method. They were usually designed without adequate sensitivity to the needs of different groups of consumers in Vietnam. Actually, most provisions in the CPL can be seen as being more favourable to urban consumers than to rural consumers.¹¹³ The reason is that urban consumers usually have greater capacity to access newspapers, the internet, consumer protection organizations, consumer protection authorities, and even the court system. The attempts by NA members to strengthen provisions on unregistered vendors in the CPL can be seen as an effort to counter this approach. However, this effort was far from being successful in ensuring a fairer allocation of CPL benefits among rural and urban consumers.

However, the actual experience of drafting and adopting the CPL in Vietnam also shows that the application of the Seidmans’ legislative theory to this experience (if any) could also create the following conundrums:

Firstly, according to the Seidmans, the rational law-making process must be a four-phase process in which identification of problems (or “problem definition” in the

¹¹² See section 5.3.4.

¹¹³ It can also be argued that devolution of the consumer protection mandate from MoIT to provincial People’s Committees, district People’s Committees and commune People’s Committees can be seen as a move to make consumer protection law closer to rural consumers as stipulated in articles 7, 25, 26, and 49 of the CPL. However, it is not clear whether local authorities have sufficient resources and expertise to implement these provisions. MoIT did not provide any research reports showing the preparedness of these local authorities in assuming new mandates or that they had anticipated the kinds of problems that might arise from these provisions.

language of public policy analysis) will be the starting point for the whole process; examining the causes of problems and designing optimal solutions should then follow.¹¹⁴ For each specific problem, this process is fairly rational. It is ideal that all problems be identified at the beginning of the drafting process. However, the actual experience of drafting the CPL shows it is very likely that some problems will not be identified at the very beginning of the drafting process. Instead, some of them will actually be identified as the drafting process unfolds. This is especially common in the current law-making process in Vietnam, in which many parties and agencies play the roles of problem identifiers and solution designers. For example, the need for protection of consumers' personal information was identified only during the period of public consultation (i.e. between creating Draft 2 and Draft 3).¹¹⁵ The need for more detailed provisions on unregistered vendors was identified mainly during the period of public consultation and during the first debates of the NA.¹¹⁶

Therefore, in many cases, the law-making process should not be rigidly divided into discrete problem-solving periods. Instead, there should be continuous problem-solving periods. Accordingly, drafting should be thought of as a constant learning process by legal drafters themselves. The identification of problems should not necessarily be complete before entering into their analysis. Given the current practice of law-making in Vietnam (in accordance with the current LoL of 2008), it is very likely that the identification of problems and the comprehensive analysis of their causes will be completed at the same time draft laws are finalized. Accordingly, the design of solutions should be presumed to be mainly completed only as the final draft is approved. The law-making process is, therefore, an open process of social dialogue between legal drafters and the outside world, including interest groups, and even society as a whole. This remark seems consistent with the practice of law-making or policy making in developed countries, as observed by policy analysts Jann and Wegrich:

[...] under real-world conditions, policies are, e.g., more frequently not the subject of comprehensive evaluations that lead to either termination or reformulation of a

¹¹⁴ Ann Seidman & Robert B. Seidman, "Drafting Legislation for Development: Lessons from a Chinese Project" (1996) 44 Am. J. Comp. L. 1 at 22-25 [A & R Seidman, "Legislation for Development"].

¹¹⁵ See section 5.3.5.

¹¹⁶ See sections 5.3.5 and 5.4.1.

policy. Policy processes rarely feature clear-cut beginnings and endings. At the same time, policies have always been constantly reviewed, controlled, modified, and sometimes even terminated; policies are perpetually reformulated, implemented, evaluated, and adapted. But these processes do not evolve in a pattern of clear-cut sequences; instead, the stages are constantly meshed and entangled in an ongoing process.¹¹⁷

Secondly, for the Seidmans, there are objective criteria that legal drafters can easily agree about for determining what kinds of social problems can be solved by a law. In other words, under the umbrella of the public interest, legal drafters should be able to easily identify targeted problems. However, it has long been widely held by social scientists that “there is no universal, constant, or absolute of what constitutes a social problem.”¹¹⁸ The reason for this is that every social problem consists of both objective and subjective elements. A problem’s objective element “refers to the existence of a social condition”,¹¹⁹ and we can be aware of it through our own life experience or through other information channels. In contrast, its subjective element “refers to the belief that a particular social condition is harmful to society, or to a segment of society, and that it should and can be changed.”¹²⁰ In reality, the experience of drafting the CPL illustrates that the same social situation may be regarded by some legal drafters as a problem, while others simply deny its seriousness.¹²¹

The disagreements among legal drafters of the CPL over the necessity of provisions on door-to-door sales contracts and distance sales contracts are good examples. In the view of Vinastas, door-to-door sales and distance sales practices are problematic, while VCCI regards them as problem-free.¹²² In addition, some may regard a particular provision as a solution while others may view it as a problem. The differences between groups of CPL drafters regarding the provision on the consumer

¹¹⁷ Werner Jann & Kai Wegrich, “Theories of the Policy Cycle” in Frank Fischer, Gerald J. Miller & Mara S. Sidney, *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (New York: CRC Press, 2007) 43 at 44.

¹¹⁸ Linda A. Mooney, David Knox & Caroline Schacht, *Understanding Social Problems*, 4th ed. (Belmont, CA: Thomson/Wadsworth, 2005) at 3.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Nevertheless, it seems that there is widely shared agreement among legal drafters about the vulnerability of the consumer.

¹²² See section 6.3.4.

right to set up consumer associations and the provision on the rights of consumer protection organizations to challenge the behaviours of the administrative authorities support this statement.¹²³ However, it is noteworthy that this is also the case in developed countries, where “the legislative process is buffeted by interest-group pressures.”¹²⁴

Thirdly, the requirement that legal drafters should be equipped with “social science research skills”, as suggested by the Seidmans’ legislative theory, seems to be very hard to follow in Vietnam, although this requirement is certainly ideal. In addition, it is still not clear with what kinds of social science skills and legal expertise drafters should be equipped, especially in the world of increasing professional specialization. Furthermore, the decision to appoint a person to be a legal drafter is an “administrative” decision rather than simply a “scientific” decision. The politics of law-making in Vietnam may not produce legal drafters as required by the Seidmans’ legislative theory. Perhaps a more reasonable solution would be to set up a mechanism that would help legal drafters and other experts to cooperate in identifying and analyzing the social problems that a particular law is intended to address.¹²⁵

Fourthly, budgets and resources for following the process proposed by the Seidmans’ theory are also problems in Vietnam. We all know that “obtaining reliable and expert information [...] is costly”.¹²⁶ Vietnam, as a developing country, cannot usually afford such resources, especially when the political will of the current regime to reform the law is not always sufficiently strong. Given this, it is not surprising that the drafting ministry will usually seek foreign donor funding during the process of drafting a law.¹²⁷

¹²³ See section 5.4.2.

¹²⁴ Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 393.

¹²⁵ However, it is worth noting that the skill set required of the interdisciplinary policy group will depend on the subject field and the capacity and financial resources of the drafting ministry to put together a suitable group.

¹²⁶ Ramsay, *supra* note 64 at 462.

¹²⁷ See section 5.3.3.

7.4 RECONCILING WATSON AND THE SEIDMANS?

In contrasting Watson's legal transplantation theory and the Seidmans' legislative theory, Otto, Stoter and Arnscheidt state that these two theories do not clash with each other. Instead, they

[...] actually deal with the lawmaking process from different perspectives, asking different questions [...] their theories complement rather than conflict with one another. Watson is interested ex-post in the technical-legal processes and the preference for certain legal systems over others, whereas the Seidmans are concerned with the actual behaviour of lawmakers and with the social effects of law.¹²⁸

I think there is some truth in this comment, but I do not totally agree with it. A close comparison of Watson's theory and the Seidmans' theory shows that they are complementary in many respects, but that there are also some ways in which they can hardly be reconciled. In the following section, I will explore both possibilities by looking at these two theories from the same perspective: their relevance to legislative drafting.

Looking at the recipient country's hope to produce desirable legal rules and legal institutions, Watson and the Seidmans seem to converge in the sense that they both promise to offer ways to attain this goal. Actually, not only is the Seidmans' theory a legislative theory, but Watson's legal transplantation theory can also be seen as a legislative theory. Looked at another way, not only is Watson's theory a legal transplantation theory, but the Seidmans' theory can also be seen as a version of a legal transplantation theory. This statement is supported by the following analysis:

Firstly, Watson's legal transplantation theory can be seen as a legislative theory for the very simple reason that legal transplantation can be seen as a form of legislative activity. According to Watson's theory, borrowing foreign legal solutions can be a desirable way to produce the laws necessary for a country to carry out law reform. Through legal transplantation, law changes and grows. In other words, according to this theory, law-making activities are primarily the activities of creating new legal rules by

¹²⁸ J.M. Otto, W.S.R. Stoter & J. Arnscheidt, "Using Legislative Theory to Improve Law and Development Projects" in J. Arnscheidt, B. van Rooij & J.M. Otto, eds., *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects* (Leiden: Leiden University Press, 2008) 53 at 68.

borrowing legal rules or legal solutions from foreign legal systems. It is noteworthy that Watson never clearly explains the concept of “borrowing” as simply meaning the wholesale copying of foreign legal rules or foreign institutions without modification. Some scholars share with Watson the idea that “legal borrowing” and “legal localization” are intertwined concepts.¹²⁹ In other words, the modification of “borrowed” foreign legal ideas or legal rules is an inevitable step towards making “borrowed” foreign legal rules fit the conditions of the recipient country.¹³⁰ As a result, good legal drafters are persons armed with good comparative law skills. Proper investment in law reform projects includes investment in studying successful foreign legal systems and investment in localizing or modifying them.

If legislative activities can be seen as problem-solving processes, Watson’s legal transplantation theory can also be seen as a problem-solving legislative theory. Actually, Watson never excludes the possibility that legal drafters are problem solvers. Furthermore, his theory tends to assume this role for legal drafters. However, the way Watson’s legal transplantation theory suggests that legal drafters (or even law-makers) should solve problems is quite distinctive. For instance, this theory says nothing about the method that legal drafters should use to identify and recognize the perceived problems to be solved. It seems that Watson assumes that the problems to be solved have been successfully identified and acknowledged. This is one of the key differences between Watson’s theory and the Seidmans’ theory. However, this is also an area in which the Seidmans’ theory could offer great wisdom by reminding legal drafters and law-makers of the extreme importance of problem analysis and policy analysis in designing a good law. This is based on common sense: wrong diagnosis will produce wrong prescription and, thus, legal problems will never be fully solved. In this respect, Watson’s theory and the Seidmans’ theory are clearly different in their focus, but these differences are complementary rather than conflicting.

Ignoring the matter of problem analysis and policy analysis, Watson’s theory tends to focus primarily on offering solutions to already perceived problems. It seems that

¹²⁹ Harding, *supra* note 79 at 45.

¹³⁰ K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1998) at 17.

the underlying assumption of this theory is that “similar problems” could be and perhaps should be addressed by “similar solutions”. In offering or suggesting suitable solutions, Watson’s theory tends to suggest legal drafters follow a “shortcut method” (to save time and great labour by avoiding reinventing the wheel) by borrowing legal solutions available in foreign countries which solve similar problems. As suggested by Watson’s theory, once legal drafters recognize the existence of similar problems that donor countries already face, they will have reasonable grounds to believe that, if donor countries already have a law successfully addressing those problems, they can simply borrow that law or that set of legal rules, with certain modifications, in order to solve the perceived problems.

The Seidmans completely clash with Watson on this point. Simply put, the Seidmans think that this approach is futile and dangerous.¹³¹ For the Seidmans, desirable legal solutions only come naturally from the process of identifying and analyzing “unique” problems the country carrying out law reform is facing.¹³² In this process, there is no room for any kind of legal transplantation to be executed.¹³³ Good investment in a law reform project constitutes investment in surveying the social situation to identify problems and their causes. Good investment in a law reform project also means investment in designing solutions to fix the causes of the perceived problems. Spending time and resources copying foreign laws is dangerous and futile.¹³⁴

In sum, from a legal drafting perspective, the Seidmans’ legislative theory is substantially different from Watson’s theory in its emphasis. The Seidmans’ legislative theory places its main emphasis on problem definition, which seeks out suitable solutions based on the unique conditions of the recipient country. Watson’s theory places its main emphasis on offering solutions following the principle that similar problems can be solved in similar ways. Watson’s theory simply assumes that legal drafters already know the problems they need to address. As for selecting or designing suitable solutions to the perceived problem, the Seidmans emphasize inventing or designing solutions that, based

¹³¹ A & R Seidman, “Legislation for Development”, *supra* note 114 at 34-35.

¹³² A.W. Seidman & R.B. Seidman, “Lawmaking, Development and the Rule of Law” in Amscheidt, van Rooij & Otto, *supra* note 128, 91 at 104 [A & R Seidman, “Lawmaking”].

¹³³ A & R Seidman, “Legislation for Development”, *supra* note 114 at 34-35.

¹³⁴ *Ibid.*

on reason informed by experience, can fix the “unique” perceived problem.¹³⁵ The Seidmans seem to be trying to remind legal drafters that the perceived problem is always unique; it is not the same as past problems, or problems in other jurisdictions. At the same time, Watson suggests that legal drafters should select one solution from the bank of available legal solutions provided by comparative law study, and then modify it to fix and fit the perceived problem. In other words, Watson’s theory tends to assume that the perceived problem probably exists in other jurisdictions, or was a problem in the past.

Due to the marginalized treatment of problem analysis in Watson’s theory, legal drafters influenced by his theory – without paying due attention to the importance of problem analysis and policy analysis – might hastily import foreign legal solutions in which problems are wrongly prescribed and treated. This is especially important for legal drafters and law-makers in developing countries, where problematic democratic processes exist together with low development of social and legal scholarship.

Secondly, the Seidmans’ legislative theory can also be seen as a legal transplantation theory. However, this statement seems to be contrary to what the Seidmans claim in their theory. In fact, on proposing an adequate legislative theory for developing and transitional countries, the Seidmans try to escape from the influence of legal transplantation theories by developing their own “law of non-transferability of law”.¹³⁶ The Seidmans’ theory tries to urge local legal drafters or local law-makers to fully employ their own thinking and local knowledge banks to craft suitable legal solutions to the problems they are facing. In other words, the Seidmans tend to prefer local solutions or home-made solutions to imported foreign solutions to local problems. However, I will show that the Seidmans’ theory has two problems that make it less consistent than it seems to be.

The first problem is that the Seidmans have to admit the usefulness of comparative law. The Seidmans explain that “to say that Country A cannot copy the law

¹³⁵ A & R Seidman, “Lawmaking”, *supra* note 132 at 104.

¹³⁶ A & R Seidman, “Legislation for Development”, *supra* note 114 at 34-35.

or institutions of Country B does not say that its policy-makers cannot learn from B's experience."¹³⁷ In their view,

[...] using the problem-solving methodology [...] they can learn: (i) the kinds of difficulties that have arisen in Country B, and hence may exist or arise in the future in Country A; (ii) the explanations for the problematic behaviour that Country B's experience warranted, and which therefore might serve as useful hypotheses to explain the behaviour in Country A; and (iii) information about the solutions that Country B tried, and how well they worked, to provide ideas about possible proposals for solutions in Country A, and to help assess their potential social costs and benefits. Cross-cultural experience may provide an invaluable mine of information; but policy-oriented researchers must venture down those dark and difficult shafts with care.¹³⁸

If we are convinced by common sense that the concept of learning always has an aspect of copying or emulating, it seems that the Seidmans fail to be consistent in their claims about non-transferability. In addition, if experiences of different countries are totally different, how can policy makers from different countries understand each other and beneficially learn from each other, as the Seidmans claim? The above quote shows that the Seidmans acknowledge the fact that different countries may face similar problems. And, if they face similar problems, why should they not share similar solutions? As a result, the Seidmans are not successful in dismantling the foundational idea of legal transplantation theories, including Watson's theory, that similar problems can be treated with similar solutions.

The second problem is that the Seidmans' theory actually urges legal drafters and law-makers in developing countries to copy law-making practices in developed foreign countries. Actually, as the Seidmans themselves clearly note, the practice of law-making in developing countries usually deviates substantially from the steps and requirements of their own theory. The Seidmans note that,

[...] almost everywhere, practising drafters lacked a theory or methodology directing them to examine the specific constraints and resources that structure the environment within which a new law's addressees must determine how to behave in the face of the new law.¹³⁹

¹³⁷ Ann Seidman & Robert Seidman, *State and Law in the Development Process: Problem-solving and Institutional Change in the Third World* (London: St. Martin's Press, 1994) at 51.

¹³⁸ *Ibid.*

¹³⁹ A & R Seidman, "Lawmaking", *supra* note 132 at 104.

In other words, the practice of law-making in developing countries usually fails to follow problem-solving methodology. The Seidmans' legislative theory is not in the bank of local knowledge in developing countries. In the Seidmans' view, to escape the current law-making problems in these countries, legal drafters have no choice but to follow (i.e. import) the Seidmans' legislative theory. As we know, problem-solving methodology is quite common in policy analysis and law-making processes in developed countries. The widespread use of the RIA (Regulatory Impact Assessment or Regulatory Impact Analysis) is a clear example.¹⁴⁰ The Seidmans' legislative theory, therefore, implies that legal drafters and law-makers in developing countries must import the new technology or practice of law-making activities. This importation inevitably leads to a substantial reform of rules governing the law-making process in developing countries in which problem-solving methodology is legalized and followed. From this perspective, the Seidmans' legislative theory does not delegitimize legal transplants but actually provides legitimacy for certain legal transplants, even though they are not transplants of specific substantive legal rules but transplants of the rules governing the production of substantive legal rules (i.e. transplants of law-making technology).

7.5 BRIEF CONCLUSIONS

The actual experience of drafting and adopting the CPL shows that the law-making process can be seen as both a problem-solving process and a legal transplantation process. Actually following a problem-solving approach can create the possibility of legal transplantation. However, as political processes, the patterns of problem-solving and legal transplantation depend on many factors, including: the availability of local expertise, foreign legal information and foreign legal expertise; government investment; and assistance from foreign donors. Pervasive legal transplants actually occurred during

¹⁴⁰ See OECD, "Regulatory Impact Analysis" (RIA), online: OECD <http://www.oecd.org/document/39/0,3746,en_2649_34141_35258801_1_1_1_1,00.html>. Accordingly, RIA is "a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives [...] At its core it is an important element of an evidence-based approach to policy making." Also, according to this website, since 2008, there have been more than 30 OECD countries adopting RIAs in their law-making processes.

the process of drafting and adopting the CPL. However, certain foreign legal ideas and legal rules were intentionally blocked due to ideological barriers, and well-established conventions in law-making practice in Vietnam. The actual experience of drafting and adopting the CPL also shows many deviations from the requirements in the Seidmans' legislative theory.

Based on the experience of drafting and adopting the CPL, both Watson's theory and the Seidmans' theory can be seen as having dual aspects. Both can be viewed as problem-solving legislative theories. Both can also be viewed as legal transplantation theories. However, the emphasis of these theories differs sharply. Watson's theory emphasizes the possibility of legal transplantation, while the Seidmans' theory emphasizes country-specific legal innovation. These theories also seem to be based upon different assumptions. Watson's theory seems to be based on the assumption of commonality between countries, while the Seidmans' theory seems to heavily emphasize the apparent differences among countries. However, both theories pose a very philosophical question: do similar problems in different countries actually exist and can they be solved in similar ways? Unfortunately, this philosophical question does not have a definitive answer. Given this, Watson's theory and the Seidmans' theory can never be totally reconciled, although they are complementary in some respects. I am of the opinion that these two theories seem to be at the extremes of the spectrum of specificity and commonality. Therefore, over-emphasizing one theory is, perhaps, as erroneous as ignoring it.

CONCLUSION

The narrative of this dissertation has come full circle. It started with a debate about the nature of law-making (actually law reform) offered by comparative law scholars, a debate concerning the possibility and usefulness of legal transplantation. This debate reveals that legal scholars, especially comparative law scholars, are quite divided on the nature of law-making, i.e. about whether it is simply or mainly a project of legal transplantation or a project of local or indigenous innovation. This debate touches on the deep methodological aspects of law reform in developing and transitional countries like Vietnam.

The actual experience of drafting and adopting the CPL shows that law-making activities can be both legal transplantation and problem-solving processes, whether these processes are explicitly stated or implicitly assumed.

The actual experience of drafting and adopting the CPL also shows that the Vietnamese CPL owes a huge debt to foreign legal ideas about consumer protection. Most of the key policy ideas in the CPL have foreign origins. However, provisions regarding enforcement mechanisms and legal sanctions are basically the products of recycling the traditional model of state management in Vietnam. In other words, from a legal transplantation perspective, the drafting and adoption of the CPL is actually a process of interaction in which foreign and new legal ideas find a way to fill the gaps in the existing legal system. However, the true agent of this process is the human being, the human mind and, more concretely, the legal drafters, the participating communities and their accompanying conditions.

Not all foreign legal ideas can be easily transplanted. Some foreign legal ideas may travel easily, but some may face huge challenges in terms of local politics and traditional law-making processes. The meaning of foreign legal concepts and legal rules travels across borders but it experiences transformation due to the fact that its true meaning in the recipient legal systems is also shaped by local conditions.

The actual experience of drafting and adopting the CPL in Vietnam shows that legal drafters face huge difficulties in realizing the requirements of either effective legal transplantation or fruitful local innovation. Legal drafters have certain freedoms in

considering, selecting and borrowing foreign legal ideas in order to construct their own legal solutions. Nevertheless, their choices are always influenced or even shaped by many constraints, both official and informal, which are embedded in the culture of law-making activities in Vietnam. In other words, legal drafters are never completely free to select the foreign legal ideas that they perceive as suitable in designing a new law. Among the many constraints legal drafters should be aware of are ideological constraints, the implicit norm supporting the hegemony of the Government over the NA's legislative activities, and the implicit norm supporting a sustained commitment to the traditional model of state management.

Other constraints which should be noted are some implicit conventions established as legacies of previous legal transplants, i.e. the idea that laws other than the *Civil Code*, the *Criminal Code*, and the *Ordinance on Dealing with Administrative Offenses* should not stipulate specific offenses and sanctions, and the idea that laws other than the *Code of Civil Procedure* should not have specific provisions on civil procedure. All of these constraints help to further clarify the Vietnamese version of the legal transplantation principle (or theory) as currently practiced in Vietnam. This version shows that legal drafters in Vietnam are not xenophobic,¹ but their choices of legal transplants are constrained by local conditions. Actually, they are expected to be sensitive to state ideology, and to not go beyond its constraints. They are also expected not to go beyond the implicit constraints I mentioned above.

In this context, I have reached many conclusions that I did not initially expect at the time I began to conduct this research. I discovered the importance of commonly-held conventions existing in the environment of drafting, debating, formulating and adopting laws in Vietnam. These conventions do not have an explicit legal foundation in any Vietnamese normative legal documents. However, these conventions, together with the explicit provisions of the LoL and its guidance documents, actually shape the mentality of legal drafters and the relevant agents in the process of producing statutes. My research also provides a reminder to anyone studying and examining the meaning of each legal rule or the meaning of a law: behind each word, each legal rule and each chapter is a

¹ It is worth noting that xenophobia is *per se* inconsistent with the ideals of the CPV. This is because the CPV is based on Marxism and Leninism which are obviously not home-grown ideologies in Vietnam.

complex and interesting story. It is a story about how conflicting interests have been represented and advanced during the process of legal drafting, debate and adoption. Almost every word and every legal provision is a contested one. Each choice of legal solution has social implications. The wording of each law can never convey the whole story behind it.

The actual process of drafting and adopting the CPL also shows that this process contains numerous deviations from the Seidmans' legislative theory. Insufficient attention to problem definition is a clear example. In fact, these deviations have negatively affected the quality of the CPL. However, these deviations have their own rationales, such as the Government's lack of political and financial investment in legislative activities, constraints on time and other resources, poor development of domestic legal scholarship,² and a low level of social science infrastructure in Vietnam.

These deviations are also associated with the fact that foreign donors in Vietnam tend to support the practice of legal transplants rather than the practice of local innovation. In this context, to fully follow the Seidmans' legislative theory, a substantial reform in the constitutional rules, as well as in the rules governing law-making activities, is still needed. Unfortunately, the LoL of 2008 is far from being able to meet this need. Perhaps a more faithful compliance with all requirements in the LoL will require greater Government investment in law-making activities. It may require the drafting ministry to comprehensively conduct policy analysis before starting the drafting process.

Furthermore, it may also require a critical change in the implicit norm regarding the NA's relatively weak role in legislative activities. The need for these changes closely reflects the need for more democracy, transparency and accountability in Vietnamese law-making processes.

The experience of drafting and adopting the CPL has also inspired me to contrast and reconcile Watson's theory with the Seidmans' theory. I conclude that these theories are complementary in some respects, but cannot be completely reconciled, as they are based upon conflicting assumptions about the degree to which historical experiences can replicate themselves from country to country. I also conclude that exclusive reliance on

² Hoang Ngoc Giao, *et al. Research Report on Assessment of the Process of Formulating Laws and Ordinances: Problems and Solutions (Bao cao nghien cuu danh gia quy trinh xay dung Luat, Phap lenh: Thuc trang va giai phap)* (Hanoi: Labour and Society Press, 2008) at 93.

either of these two theories will not provide what legal drafters and law-makers in developing countries require in order to create good laws. In my view, a good legislative theory for legal drafters and law-makers in developing countries like Vietnam is a theory that can make law-making processes more informed and rational. Perhaps such a theory could be the result of combining reasonable elements from both Watson's theory and the Seidmans' theory. Such a "reconciled" theory would appreciate the importance of problem analysis and policy analysis, while acknowledging the possibility of learning from foreign experiences in an informed manner.

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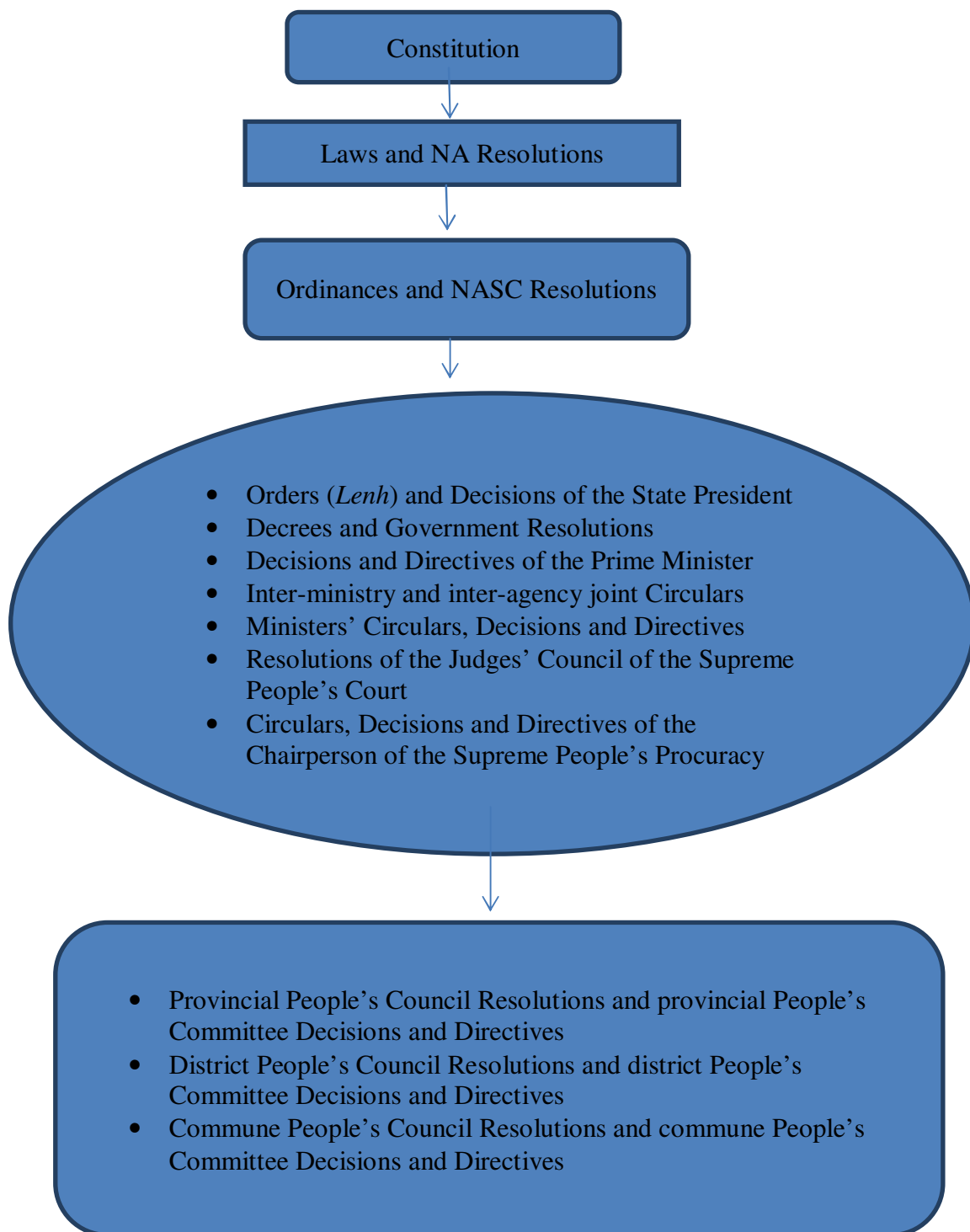
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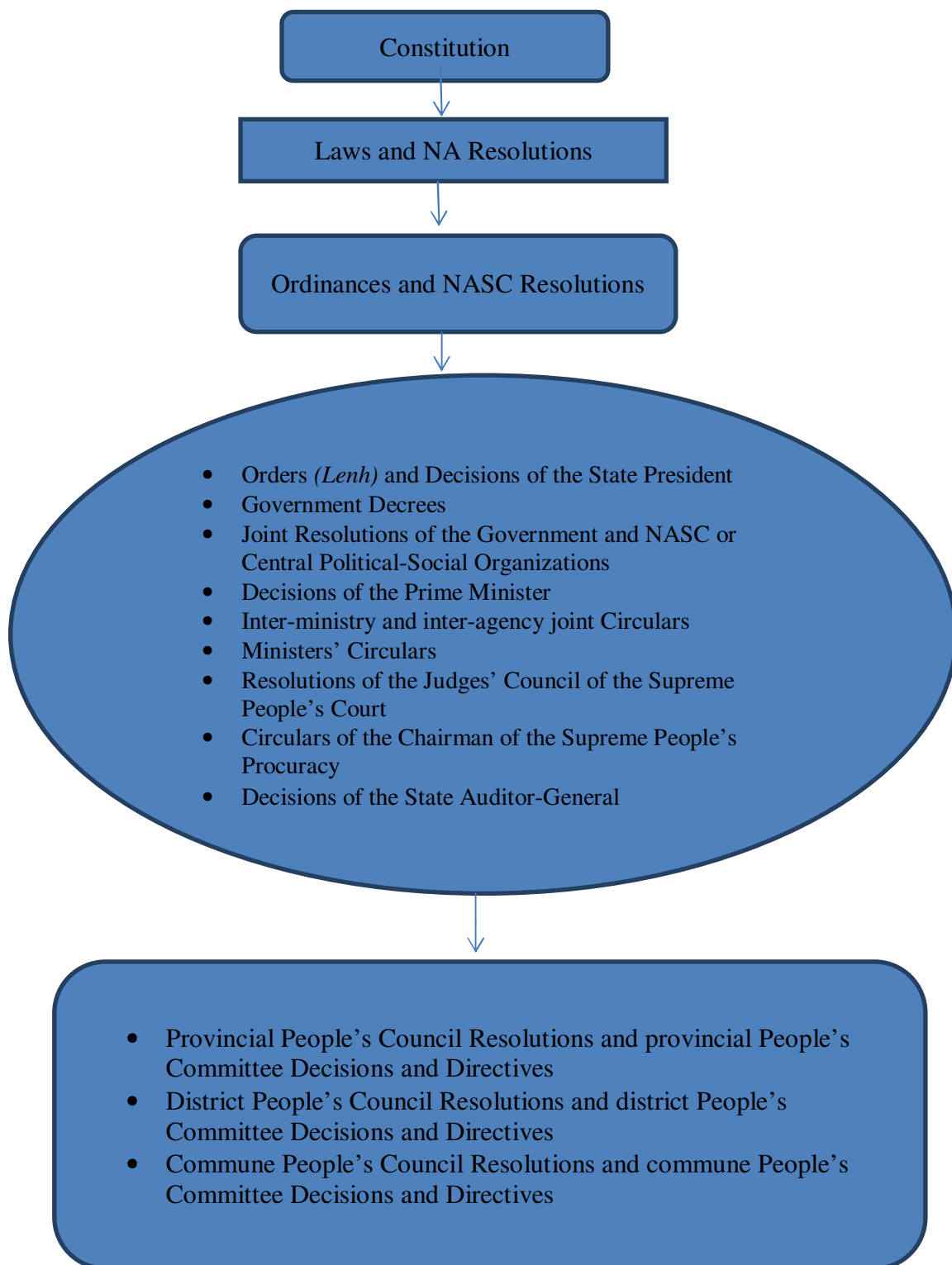
Appendix 1

HIERARCHY OF LEGAL NORMATIVE DOCUMENTS AS STIPULATED IN THE LAW ON LAWS OF 1996 (ARTICLE 1)



Appendix 2

HIERARCHY OF LEGAL NORMATIVE DOCUMENTS AS STIPULATED IN THE LAW ON LAWS OF 2008 (ARTICLE 1)



Appendix 3

LIST OF MEMBERS OF THE CPL DRAFTING COMMITTEE

1. Mr. Vu Huy Hoang – Minister of Industry and Trade – Chairperson of the Drafting Committee (DC)
2. Mr. Le Danh Vinh – Vice-Minister of Industry and Trade – Standing Vice-Chairperson of the DC
3. Mr. Bach Van Mung – Director of VCAD, MoIT – Vice-Chairperson of the DC
4. Mr. Truong Quang Hoai Nam – Director of the Department of Legal Affairs, MoIT; Vice-Chairperson of the DC
5. Mr. Dang Hoang Hai – Vice-Director of VCAD, MoIT
6. Mr. Pham Anh Tuan – Director of the Legislative Committee, the Government Office
7. Mr. Nguyen Thanh Tinh – Vice-Director of the Department of Civil and Economic Laws, MoJ
8. Mr. Pham Dinh Thi Thi – Vice-Director of the Department of Tax Policy, the Ministry of Finance
9. Mr. Tran Quoc Tuan – Vice-Director of the Department of Standards and Measurements and Quality of Goods, the Ministry of Science and Technology
10. Mr. Vo Thanh Lam – Vice-Director of the Department of Legal Affairs, the Ministry of Information and Communication
11. Mr. Nguyen Danh Nga – Vice-Director of the Department of Planning and Finance, the Ministry of Culture, Sports and Tourism
12. Mr. Tran Huu Huynh – Director of the Legal Bureau, VCCI
13. Mr. Nguyen Huy Quang – Vice-Director of the Department of Legal Affairs, the Ministry of Public Health
14. Mr. Dinh Van Son – Vice-Rector of the University of Commerce (Hanoi)
15. Mr. Dao Tri Uc – Vice-Chairperson of the Lawyers Association of Vietnam
16. Mr. Nguyen Nhu Phat – Director of the Institute of State and Law

17. Mr. Ho Tat Thang – Vice-Chairperson of Vinastas

Appendix 4

LIST OF MEMBERS OF THE CPL EDITING GROUP

1. Mr. Bach Van Mung – Director of VCAD – Chairperson of the EG
2. Mr. Nguyen Sinh Nhat Tan – Vice-Director of the Department of Legal Affairs, MoIT – Vice-Chairperson of the EG
3. Ms. Vu Thi Bach Nga – Head of the Consumer Protection Bureau, VCAD – Vice-Chairperson of the EG
4. Mr. Trinh Anh Tuan – Head of the International Cooperation Division, VCAD
5. Mr. Nguyen Hung Dung – Director of the Market Control Agency, MoIT
6. Ms. Nguyen Cam Trang – Legal expert, VCAD
7. Mr. Nguyen Van Thanh – Legal expert, VCAD
8. Mr. Phan Cong Thanh – Legal Expert, VCAD
9. Mr. Doan Tu Tich Phuoc – Legal Expert, VCAD
10. Mr. Pham Dinh Thuong – Legal Expert, Department of Legal Affairs, MoIT
11. Ms. Hoang Thi Thuy Hang – Department of Civil and Economic Laws, MoJ
12. Mr. Nguyen Van Khoi – Agency of Standards, Measurement, and Quality of Goods, the Ministry of Science and Technology
13. Mr. Nguyen Van Manh – Legislative Committee, the Government Office
14. Mr. Tran Van Hai – Legal Bureau, VCCI
15. Ms. Trinh Thi Thu Hue – The Ministry of Public Health
16. Mr. Nguyen Van Cuong – Institute of Legal Sciences, MoJ
17. Mr. Bui Nguyen Khanh – Institute of State and Law
18. Mr. Ho Tat Thang – Vice-Chairperson of Vinastas

Appendix 5

LIST OF MEMBERS OF THE MINISTRY OF JUSTICE'S EVALUATION COUNCIL WHO ASSESSED THE DRAFT CPL

1. Mr. Dinh Trung Tung - Vice-Minister of Justice, Chairperson of the Evaluation Council
2. Mr. Duong Dang Hue - Director of the Department of Civil and Economic Legislation, MoJ
3. Mr. Le Hong Hanh - Director of the Institute of Legal Sciences, MoJ
4. Mr. Hoa Huu Long - Vice-Director of the Department of International Law, MoJ
5. Mr. Dang Thanh Son - Vice-Director of the Department of Criminal and Administrative Legislation, MoJ
6. Ms. Hoang Thi Thuy Hang - Department of Civil and Economic Legislation, MoJ
7. Mr. Phung Trung Tap - Head of the Team of Civil Law Lecturers, Hanoi University of Law
8. Mr. Tran Van Vinh - Vice-Director of the General Department of Standards, Measurement, and Quality of Goods, Ministry of Science and Technology
9. Ms. Nguyen Thi Mai - Vice-Director of Department of Laws, Office of the Government
10. Mr. Do Gia Phan - Vice-Chairman and General Secretary of Vinastas
11. Ms. Khuat Thi Thu Hien - The Institute of Judicial Studies, The Supreme People's Court

Appendix 6

TIMELINE OF EACH DRAFT OF THE CPL

Order	Draft Number	Date of completion	Number of Articles
1	Initial Draft (completed by the EG)	23 September 2008	81
2	Draft 1 (completed by the DC)	Early 2009	74
3	Draft 2 (used for public consultation)	June 2009	71
4	Draft 3 (sent to MoJ for evaluation)	10 February 2010	68
5	Draft 4 (sent to the cabinet for deliberation)	March 2010	67
6	Draft 5 (submitted to the NA)	8 April 2010	66
7	Draft 6 (sent to delegations of the NA)	August 2010	57
8	Draft 7 (submitted to the NA for final debate)	12 October 2010	51
9	Final draft (adopted law)	17 November 2010	51

Appendix 7

DETAILED TIMELINE OF DRAFTING AND ADOPTING THE CPL

Number	Event	Time
1	MoIT set up the DC and its EG	March 2008
2	VCAD held the start-up workshop	11 June 2008
3	Completion of the initial draft	23 September 2008
4	Study tour in a number of foreign jurisdictions (France and China)	November 2008 (France) July 2009 (China)
5	Completion of Draft 1	Early 2009
6	Completion of Draft 2 (used for public consultation)	June 2009
7	Public consultation about the draft CPL (including soliciting opinions from governmental ministries and provincial People's Committees or provincial Departments of Industry and Trade)	June-December 2009
8	EU-Vietnam MUTRAP Report	July 2009
9	Completion of Draft 3 (sent to MoJ)	10 February 2010
10	MoJ held an evaluation meeting to examine Draft 3	5 March 2010
11	MoJ's valuation report was sent to MoIT	17 March 2010
12	Completion of Draft 4 (sent to the Government)	Late March 2010
13	The Government held a meeting to deliberate and approve Draft 4	1 April 2010
14	Completion of Draft 5 (sent to NASC)	8 April 2010
15	The standing body of CSTE held a session to conduct an initial verification of Draft 5	14 April 2010
16	NASC held a meeting to give their opinions on Draft 5	17 April 2010

17	Workshop at Maison du Droit in Hanoi (France's experience was sought to improve the draft CPL)	20-21 April 2010
18	The meeting of the whole CSTE to conduct a full verification of Draft 5	28 April 2010
19	CSTE's verification report was sent to the NA	13 May 2010
20	Official introduction of Draft 5 before the NA	May 2010
21	The NA discussed Draft 5 at its group meetings	June 2010
22	The NA discussed Draft 5 at its plenary meeting (first debate)	18 June 2010
23	NASC discussed and contributed their opinions to improve the draft CPL	20 August 2010
24	Completion of Draft 6	Late August 2010
25	Draft 6 was sent to provincial delegations of NA deputies for comments	Late August 2010
26	The Conference on Consumer Protection from Asian and European perspectives (jointly held by the Maison du Droit and MoIT)	27 September 2010
27	Completion of Draft 7	12 October 2010
28	Final debate on Draft 7 by the NA	29 October 2010 (afternoon)
29	Voting on adoption of the CPL	17 November 2010 (afternoon)
30	Promulgation of the CPL	30 November 2010

Appendix 8

LIST OF 28 LAWS ADOPTED BY THE NATIONAL ASSEMBLY FOR THE FIRST FOUR DECADES OF THE NEW REGIME PRIOR TO THE DOI MOI ERA

Order	Name of Law	Date of Promulgation
1	<i>Law on Land Reform</i>	19 December 1953
2	<i>Law on Newspaper and Press Activities</i>	14 December 1956
3	<i>Law on Security of People's Freedom of the Physical Body and Inviolable Rights of Residential Houses, Personal Property and Correspondence</i>	20 May 1957
4	<i>Law on Freedom of Association</i>	20 May 1957
5	<i>Law on the Right to Set Up Associations</i>	20 May 1957
6	<i>Law on the Workers' Union</i>	5 November 1957
7	<i>Law on Local Government</i>	31 May 1958
8	<i>Law on Army Officers</i>	31 May 1958
9	<i>Law on Marriage and Family</i>	13 January 1960
10	<i>Law on Election of National Assembly Deputies</i>	13 January 1960
11	<i>Law on Military Service</i>	28 April 1960
12	<i>Law on Organization of the People's Courts</i>	26 July 1960
13	<i>Law on Organization of the People's Procuracy</i>	26 July 1960
14	<i>Law on Organization of the National Assembly</i>	26 July 1960
15	<i>Law on Organization of the Governmental Council</i>	26 July 1960
16	<i>Law on Organization of People's Councils and Administrative Committees</i>	10 November 1962
17	<i>Law on Amendments to the Law on Military Service</i>	10 November 1962
18	<i>Law on Amendments to the Law on Military Service</i>	25 April 1965
19	<i>Law on Election of National Assembly Deputies</i>	20 December 1980
20	<i>Law on Organization of the National Assembly and the</i>	11 July 1981

	<i>State Council</i>	
21	<i>Law on Organization of the People's Courts</i>	13 July 1981
22	<i>Law on Organization of the People's Procuracy</i>	13 July 1981
23	<i>Law on Organization of the Council of Ministers</i>	14 July 1981
24	<i>Law on Army Officers</i>	10 January 1982
25	<i>Law on Military Service</i>	10 January 1982
26	<i>Law on Organization of People's Councils and People's Committees</i>	9 July 1983
27	<i>Law on Election of Deputies to the People's Councils</i>	2 January 1984
28	<i>Criminal Code</i>	9 July 1985

Appendix 9

LISTS OF QUESTIONS USED IN MY FIELDWORK IN HANOI, VIETNAM, IN AUGUST AND SEPTEMBER 2010

1. Interview questions for members of the Editing Group and the Drafting Committee from MoIT

Question 1. Why is Vietnam drafting the CPL and what are the key reasons driving the adoption of this law in Vietnam at this time?

Question 2. Did the Drafting Committee conduct a comprehensive social survey or an equivalent form to exactly clarify the problems that Vietnamese consumers are facing and the problems that this CPL will target? How did you do so?

Question 3. How do you identify the unique political, economic and social conditions of Vietnam which may influence the formulation and enforcement of consumer policy in Vietnam?

Question 4. What are the key objectives of the law?

Question 5. What are the most visible challenges in drafting this law? How do you overcome them? Do issues such as time constraints, lack of resources and expertise matter during the drafting process of this law? How so?

Question 6. Does Vietnam consult foreign experiences in drafting this law? If any, which countries do you think have had the most influential experiences in the drafting process?

Question 7. Do you think that international experiences are relevant or useful for drafting the CPL? If so, how useful are they?

Question 8. Have you imagined or prepared any plans for the implementation of this law once it is adopted? If any, what are the key contents of such plans?

Question 9. Can you think of any key challenges that the implementation of this law may face? If any, what are they and why so?

Question 10. Once adopted, do you think the CPL will benefit consumers in urban areas and in rural areas in the same way? Why?

Question 11. Once adopted, do you think the CPL will affect domestic businesses and foreign-invested businesses in the same way? Why?

2. Interview questions for members of the Editing Group and the Drafting Committee from Vinastas

Question 1. Why is Vietnam drafting the CPL and what are the key reasons driving the adoption of this law in Vietnam at this time?

Question 2. Do you think that the legitimate interests of consumers have been fully represented in the process of drafting the CPL? If not, why not?

Question 3. What kind of input does your association provide to the Drafting Committee? Do you think this input is meaningfully used by the Drafting Committee?

Question 4. What do you expect from this new law in changing the way the market is operating?

Question 5. Have you imagined or prepared any plans for the implementation of this law once it is adopted? If any, what are the key contents of such plans?

Question 6. Can you think of any key challenges that the implementation of this law may face? If any, what are they?

Question 7. Once adopted, do you think the CPL will benefit consumers in urban areas and in rural areas in the same way?

3. Interview questions for members of the Editing Group and the Drafting Committee from VCCI

Question 1. Are you satisfied with the current draft of the CPL? Why or why not?

Question 2. Do you think the legitimate interests of the business community have been fully represented or reasonably balanced in the current draft of CPL? If not, why not?

Question 3. What kind of input does VCCI provide to the Drafting Committee? Do you think this input is meaningfully used by the Drafting Committee?

Question 4. Do you think that there will be any challenges for the business community when this law is adopted and implemented? If any, what will they be?

Question 5. Have you imagined or prepared any plans for the implementation of this law once it is adopted? If any, what are the key contents of such plans?

Question 6. Can you think of any key challenges that the implementation of this law might face? If any, what might they be?

Question 7. Once adopted, do you think the CPL will affect domestic businesses and foreign-invested businesses in the same way? Why?

4. Interview questions for a number of scholars participating in the Editing Group and the Drafting Committee

Question 1. Do you have any comments about the process of drafting this law? Do you think a social survey on the local need for this law has been comprehensively conducted?

Question 2. Do you think foreign experiences are important in drafting this CPL?

Question 3. Are there any visible legal solutions or legal models borrowed from foreign countries in this new law?

Question 4. If any, what were the key guidelines or principles for borrowing foreign models of consumer protection in the process of drafting this law?

Question 5. How are foreign models modified to meet the local conditions of Vietnam?

Question 6. Do you think the Drafting Committee have paid due attention in learning from foreign experiences?

Question 7. Are you satisfied with the quality of this law? Why or why not?

Question 8. If the Drafting Committee has more time and resources, what should this Committee do to make the law better?

Appendix 10

LAW ON PROTECTION OF CONSUMERS' RIGHTS AND INTERESTS OF 2010¹

THE NATIONAL ASSEMBLY

No. 59/2010/QH12

SOCIALIST REPUBLIC OF VIET NAM

Independence – Freedom – Happiness

Hanoi, 17 November 2010

LAW ON PROTECTION OF CONSUMERS' RIGHTS AND INTERESTS

Pursuant to 1992 Constitution of the Socialist Republic of Vietnam, which was amended and supplemented under Resolution No. 51/2001/QH10;

The National Assembly promulgates the Law on Protection of Consumers' Rights and Interests.

CHAPTER 1

GENERAL PROVISIONS

Article 1. Scope of regulation

This Law provides for rights and obligations of consumers; responsibilities of organizations and individuals conducting business in goods and/or services with consumers; responsibilities of social organizations participating in protection of consumers' rights and interests; resolution of disputes between consumers and organizations, individuals conducting business in goods and/or services; responsibilities of State management of protection of consumers' rights and interests.

Article 2. Subjects of application

This Law is applicable to consumers, traders; State bodies, organizations, and individuals relevant to activities involving protection of consumers' rights and interests in the territory of Vietnam.

¹ [Translation by author].

Article 3. Interpretation of terms

In this Law, the terms below are construed as follows:

1. “Consumer” means a person purchasing and/or using goods and/or services for the purpose of consumption or living activities of individuals, families, or organizations.
2. “Organization and/or individual conducting business in goods and/or services”² means an organization and/or individual conducting one, several or all of the stages of the business process, from production to sale of products or provision of services in the market for profit, including:
 - a) Merchants as stipulated in the Commercial Law;
 - b) Unregistered individuals conducting frequent and independent commercial activities.
3. “Defective goods” are goods failing to ensure the safety of consumers, or likely causing harm to the life, health, and/or property of consumers, even when such goods are produced in accordance with current standards or technical regulations and even if their defects are not identified at the time they are supplied to consumers, including:
 - a) Goods mass produced having defects arising from technical design;
 - b) Individual goods having defects arising from the process of manufacture, processing, transportation, or storage;
 - c) Goods with the potential to cause harm [to consumers] during use, yet lacking sufficient instructions or warnings to consumers.
4. “Harassing consumers” means the behaviour of contacting consumers directly or indirectly to introduce goods and/or services, or traders, or proposing to enter into contracts against consumers’ will, creating obstacles or affecting consumers’ work and/or normal living activities.

² In this translation, the phrase “organizations, individuals conducting business in goods and/or services” will hereinafter be replaced by the term “traders”.

5. “Standard contract” means a contract drafted by the trader to transact with consumers.
6. “General transaction conditions” are provisions or rules about the sale of goods or supply of services which are published by the trader and are intended by the trader to apply to consumers.
7. “Mediation” is the method of resolving disputes between consumers and traders through a third party.

Article 4. Principles of protection of consumers’ rights and interests

1. Protection of consumers’ rights and interests is the joint responsibility of the State and the whole society.
2. Consumers’ rights and interests are to be respected and protected in accordance with legal provisions.
3. Protection of consumers’ rights and interests shall be timely and fairly exercised in a transparent and lawful manner.
4. Protection of consumers’ rights and interests shall not infringe upon the interests of the State, the legitimate rights and interests of traders and other organizations or individuals.

Article 5. State policy on protection of consumers’ rights and interests

1. Creating favourable conditions for organizations and/or individuals to actively participate in protection of consumers’ rights and interests.
2. Encouraging organizations and/or individuals to apply and/or develop modern technologies to produce and/or supply safe, quality goods and/or services.
3. Deploying frequent and uniform measures of managing and supervising traders’ legal compliance.
4. Mobilizing all resources to invest in infrastructure, developing human resources for bodies and organizations to implement protection of consumers’ rights and

interests; frequently providing advice, assistance, propaganda, dissemination of knowledge and guidance to consumers.

5. Enhancing international integration and cooperation, sharing information and management experiences regarding protection of consumers' rights and interests.

Article 6. Protection of consumers' information

1. Consumers are entitled to have their information safely and confidentially kept when they participate in transactions with traders except when that information is requested by the State authorities.
2. In cases of gathering, using, or transferring consumers' information, traders shall:
 - a) clearly and publicly inform consumers in advance about the purpose of the activities of gathering and using consumers' information;
 - b) use consumers' information in conformity with the previously stated purpose and with the consent of consumers;
 - c) ensure the security, integrity and accuracy of consumers' information already gathered, used and transferred;
 - d) make available measures so that consumers can adjust or update their information if they find inaccuracies in the information;
 - e) only transfer consumers' information to the third parties with the consent of consumers, except as otherwise stated by legal provisions.

Article 7. Protection of consumers' rights and interests in transactions with unregistered individuals conducting frequent and independent commercial activities

1. Based on the provisions in this Law and the relevant legal provisions, the Government shall stipulate detailed guidance on protection of consumers' rights and interests in their transactions with unregistered individuals conducting frequent and independent commercial activities.
2. Based on provisions of this Law, provisions of the Government and local specific conditions, Commune-level People's Committees, management boards of local markets, and management boards of trade centres must implement concrete

measures to secure quality, quantity, and safety, including food safety, for consumers purchasing and/or using goods and/or services from unregistered individuals conducting frequent and independent commercial activities.

Article 8. Consumers' rights

1. To be secure in the rights to life, health, property, and in other legitimate rights and interests, in entering into transactions, and in using goods and/or services supplied by traders.
2. To be provided with accurate and sufficient information on traders, contents of transactions and origins of goods; to be provided with invoices and documents relating to transactions and other necessary information on goods and/or services purchased.
3. To select goods and/or services and to select traders in accordance with their needs and actual conditions; to decide whether to participate in transactions and to agree to terms in entering into transactions with traders.
4. To contribute their opinions to traders on price, quality of goods and/or services, manner of service, method of transaction, and other matters relating to transactions between consumers and traders.
5. To participate in constructing and implementing policies and/or legal provisions on protection of consumers' rights and interests.
6. To request [traders] to compensate for harm or loss in circumstances involving the sale of goods and/or services failing to meet standards or technical regulations, quality, quantity, functions, use, price, or other features that traders have announced, posted, advertised or to which they have committed.
7. To make complaints, denunciations or initiate lawsuits or ask social organizations to initiate lawsuits to protect their rights and interests in accordance with provisions of this Law and other relevant legal provisions.
8. To be provided advice, assistance, or guidance on consumption knowledge relating to goods and/or services.

Article 9. Consumers' obligations

1. To examine goods before reception; to select (for consumption) goods and/or services with clear origins and which do not cause harm to the environment, or are not contrary to social morality or good traditions and customs, or do not cause harm to their own or others' life and health; to accurately and sufficiently implement use instructions for goods and/or services.
2. To inform the State authorities, relevant organizations and/or individuals upon discovering goods and/or services in the market failing to secure safety, causing harm or being likely to cause harm to consumers' life, health, and/or property, and upon discovering traders' behaviours violating consumers' rights and interests.

Article 10. Prohibited acts

1. Traders shall not deceive or mislead consumers by means of advertising or by hiding information, or providing inadequate, distorted or inaccurate information about any of the following:
 - a) Goods and/or services supplied by that trader;
 - b) Reputation, business capacity, or capacity to supply goods and/or services of that trader;
 - c) Terms and characteristics of the transaction between the consumer and that trader.
2. Traders shall not harass consumers by means of marketing goods and/or services against the will of consumers on more than one occasion and shall not prevent consumers from carrying on the normal course of their work or lives.
3. Traders shall not coerce consumers by means of the following behaviours:
 - a) employing force or threatening to use force or other means to cause harm to life, health, reputation, dignity or property of consumers;
 - b) taking advantage of difficult circumstances of consumers or taking advantage of natural calamities or epidemics to coerce consumers into transactions.

4. Traders shall not carry out trade promotion activities, or make offers to directly transact with persons having no civil capacity as stipulated by the civil laws.
5. Traders shall not request consumers to pay for unsolicited goods and/or services.
6. Consumers, social organizations participating in consumer protection, and traders shall not take advantage of protection of consumers' rights and interests to infringe upon the interests of the State, or the legitimate rights and interests of other organizations and/or individuals.
7. Traders shall not take advantage of difficult circumstances of consumers and shall not take advantage of natural calamities or epidemics to supply shoddy goods and/or services.
8. Traders shall not conduct business in goods and/or services which are substandard, causing harm to life, health, and property of consumers.

Article 11. Dealing with violations of the legal provisions on protection of consumers' rights and interests

1. Individuals violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to administrative sanctions or criminal prosecution, and shall provide compensation if causing damage, as stipulated by law.
2. Organizations violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to administrative sanctions, and shall provide compensation if causing damage, as stipulated by law.
3. Individuals taking advantage of their position or power, violating laws on protection of consumers' rights and interests, depending on the extent and seriousness of the offense, shall be subject to discipline or criminal prosecution, and shall provide compensation if causing damage, as stipulated by law.
4. The Government shall issue detailed provisions dealing with administrative offenses in the area of protection of consumers' rights and interests.

CHAPTER II

RESPONSIBILITIES OF TRADERS TOWARDS CONSUMERS

Article 12. Responsibilities of traders in provision of information on goods and/or services to consumers

1. To obey legal provisions on labels of goods.
2. To publicly post prices of goods and/or services at business locations and/or services offices.
3. To provide warnings on the possibility that goods and/or services may negatively affect consumers' health, life, and property and to suggest precautionary measures.
4. To provide information on the ability to supply spare parts and components for goods.
5. To provide use instructions, conditions, time limits, locations, and warranty/guarantee procedures in the event that the goods are subject to warranty/guarantee.
6. To accurately and sufficiently notify consumers as to standard contract and general transaction conditions prior to transaction.

Article 13. Responsibilities of third parties in provision of information on goods and/or services to consumers

1. In the event traders provide information to consumers through a third party, this third party shall:
 - a) Provide accurate and sufficient information on goods and/or services in supply;
 - b) Request traders to produce evidence to prove the accuracy and sufficiency of the information on goods and/services;
 - c) Jointly bear liability arising from provision of inaccurate or insufficient information, except if the third party has proved that it exercised all

measures as stipulated by law to examine the accuracy and sufficiency of the information on the goods and/or services;

- d) Obey legal provisions in newspapers and advertisements.
2. In the event traders provide information to consumers through public media, the owners of public media or providers of public media shall:
- a) Implement provisions in Paragraph 1 of this Article;
 - b) Construct and develop technical measures to prevent themselves from being employed for the purpose of harassing consumers;
 - c) Refuse to allow traders to employ the public media if such employment leads to the possibility of harassing consumers;
 - d) At the request of consumers or of the competent State authorities, stop allowing traders to employ the public media for the purpose of harassing consumers.

Article 14. Contracts with consumers

1. Forms of contracts [between traders and consumers] are governed by civil legal provisions.³
2. In the event the contract [between trader and consumer] is written, the language of the contract must be clear and understandable. The contract must be in Vietnamese, except as otherwise agreed by contracting parties or otherwise stipulated by law.
3. In the event the contract is created through electronic means, the traders shall create favourable conditions for the consumer to examine the whole contents of the contract prior to signing the contract.
4. The Government shall provide detailed stipulations on forms of contracts [between traders and consumers].

³ This means that the *Civil Code* of 2005 will be applied to deal with matters relating to forms of contracts between consumers and traders.

Article 15. Interpretation of contracts [between traders and consumers]

In the event of different interpretations of a contract, the organization and/or individual having mandate to resolve the relevant dispute shall interpret the contract in favour of the consumer.

Article 16. Non-binding terms in contracts [between traders and consumers] or in general transaction conditions

1. Terms in contracts between traders and consumers or in general transaction conditions shall be void in the following circumstances:
 - a) The terms exclude the responsibilities of the trader towards consumers as stipulated by law;
 - b) The terms exclude or limit the consumer's right to lodge complaints or initiate lawsuits;
 - c) The terms allow the trader to unilaterally modify other terms of the contract already agreed to by the consumer or to unilaterally modify terms and conditions of sale and provision of services that are not concretely stipulated in the contract;
 - d) The terms allow the trader to unilaterally determine that the consumer has to perform an obligation;
 - e) The terms allow the trader to determine or change the price at the time of delivery of goods or provision of services;
 - f) The terms allow the trader to unilaterally interpret the terms of the contract in the event that there are different interpretations of the contract;
 - g) The terms exclude the liability of the trader in the event that the trader deals in goods and/or services through a third party;
 - h) The terms coerce the consumer to perform his/her obligations even when the trader does not perform his/her obligations;

- i) The terms allow the trader to transfer his/her rights and obligations to a third party without the consent of the consumer.
2. The issue of declaration of and dealing with the voidability of terms in contracts between traders and consumers or in general transaction conditions shall be implemented in accordance with civil legal provisions.

Article 17. Implementation of standard contracts

1. In entering into a standard contract, the trader shall grant the consumer a reasonable period of time to examine the contract;
2. The trader shall store and keep the signed standard contract until the expiry of the validity of the contract. In cases in which the signed standard contract kept by the consumer is lost or worn out, the trader shall provide the consumer a copy of the signed standard contract.

Article 18. Implementation of general transaction conditions

1. The trader employing general transaction conditions shall inform the consumer publicly of [the existence and content of] the general transaction conditions before entering into the transaction with the consumer.
2. The general transaction conditions shall clearly specify the time of application and shall be posted in a place convenient to consumers at the [trader's] business location.

Article 19. Control of standard contracts and/or general transaction conditions

1. Traders supplying goods and/or services categorized as essential goods and/or services designated by the Prime Minister have to register their standard contracts or general transaction conditions with the competent state management body on protection of consumers' rights and interests.⁴

⁴ In this article, the "competent State management body on protection of consumers' rights and interests" means the Ministry of Industry and Trade (actually, the Vietnam Competition Administration Department – VCAD) as stipulated in Article 48 (2) of this law.

2. The competent State management body on protection of consumers' rights and interests, at its discretion or at the request of consumers, may request traders to repeal or modify standard contracts and/or general transaction conditions in cases in which these standard contracts and/or general transaction conditions are found to infringe upon consumers' rights and interests.
3. The Government shall provide detailed stipulations on this Article.

Article 20. Responsibility [of the trader] to provide evidence of transaction

1. Traders shall provide consumers with receipts or invoices relating to transactions as stipulated by law or at the request of consumers.
2. In the event the transaction is made through electronic means, the trader shall provide the consumer the ability to access, download, store, and print receipts, invoices or relevant documents stated in Paragraph 1 of this Article.

Article 21. Responsibility [of the trader] regarding warranty/guarantee of goods, spare parts, and/or components

Goods, spare parts and components are subject to warranty as agreed by relevant parties or as stipulated by law. In the event that goods, spare parts, and components are subject to warranty, the trader has the following responsibilities:

1. To adequately perform the obligation of warranty services regarding the goods, spare parts and components already provided;
2. To provide written acknowledgment of a warranty request from the consumer in which the time for completion of warranty services shall be clearly indicated. The time for performing warranty services shall not be calculated within the warranty time limit applicable to the goods, spare parts or components. In the event that a new good or a new spare part or a new component is exchanged for an old one, the warranty time limit shall restart from the time of replacement;
3. To provide the consumer with an equivalent good, spare part or component for his/her temporary use during the time warranty services are being performed or as otherwise agreed by the consumer;

4. To replace the defective good, spare part, or component with an equivalent one or to take back the defective one and refund the consumer in the event that the time for performing warranty services has expired but warranty services were not completed or the defect was not successfully repaired;
5. To replace the defective good, spare part or component with an equivalent new product or to take back the defective product and refund the consumer in the event that, within the warranty time limit, the product was broken more than three times and the trader failed to repair the defective product;
6. To bear the expense of repair and transportation of the good, spare part or component to and from the place of performing warranty services and the residence of the consumer;
7. To assume ultimate responsibility for warranty services even when it authorizes third parties to perform warranty services.

Article 22. Responsibility of recalling defective goods

Upon discovering defective goods, organizations and/or individuals producing or importing such goods shall:

1. Promptly apply all necessary measures to stop supplying defective goods to the market;
2. Notify the public about the defective goods and the recall in one newspaper for at least five consecutive days or for five consecutive days on the radio or television operating in localities in which the recall is being implemented, providing the following information:
 - a) Description of the goods subject to the recall;
 - b) Reasons for recalling the goods and warnings on the dangers associated with the recalled goods;
 - c) Time, place, and methods of recalling the goods;
 - d) Time and methods for remedying the defects in the recalled goods;

- e) Necessary measures to protect consumers' rights and interests during the process of recalling the goods.
3. Carry out the recall of the defective goods in consistence with publicly announced information and bear costs arising from the process of recalling the goods;
4. Report the results of the recall to the provincial management body on protection of consumers' rights and interests in the locality where the recall is implemented once it is completed; report the result of the recall to the central State management body on protection of consumers' rights and interests in circumstances in which the recall is implemented in at least two provinces.

Article 23. Liability to compensate for damage caused by defective goods

1. Organizations and/or individuals conducting business in goods shall be liable to compensate for damage in the event that the defective goods supplied by them cause damage to consumers' life, health, and property, even if these organizations or individuals are not aware of or are not at fault in generating the defects, except in circumstances stipulated in Article 24 of this Law.
2. Organizations and/or individuals conducting business in goods as stipulated in Paragraph 1 of this Article include:
 - a) Organizations and/or individuals producing goods [producers];
 - b) Organizations and/or individuals importing goods [importers];
 - c) Organizations and/or individuals affixing their trade names to the goods or employing marks or commercial indications which allow [the public] to recognize them to be producers or importers;
 - d) Organizations and/or individuals directly supplying goods to consumers when no organizations or individuals stipulated in subparagraphs (a), (b), and (c) of this Paragraph are identified as assuming liability.
3. Compensation for damage shall be implemented in accordance with provisions of civil laws.

Article 24. Exemption from liability to compensate for damage caused by defective goods

Organizations and/or individuals conducting business in goods as stipulated in Article 23 of this Law are exempted from liability to compensate for damage when they succeed in proving that the defects of the goods were not discoverable via existing science and technology available at the time the said goods were supplied to consumers.

Article 25. Requesting the State management body to protect consumers' rights and interests

1. Upon discovering offenses against consumer protection laws committed by traders generating harm to the interests of the State, the interests of consumers, or the public interest, consumers and/or social organizations have the right to directly or through documents request the district management bodies on protection of consumers' rights and interests to handle these offences.
2. The complainants shall provide information and/or evidence relevant to the offenses of the traders.

Article 26. Handling a request to protect consumers' rights and interests

1. Upon receiving a consumer request, the district management bodies on protection of consumers' rights and interests shall request relevant parties to explain and/or provide information and evidence or, at these bodies' own discretion, may examine, collect information and/or evidence to handle the case in accordance with the legal provisions.
2. The district management bodies on protection of consumers' rights and interests shall reply in writing to the consumer about the result of handling the request submitted. In circumstances in which the accused traders are found to have committed offenses against consumers' rights and interests, the replying document shall contain the following information:
 - a) the nature of the offense;
 - b) remedies for consequences of the offense;

- c) the time limit for execution of the remedies;
 - d) administrative sanctions applied to offending traders (if any).
3. Remedies for consequences of the offense stated in Paragraph 2(b) of this Article include:
- a) Forcing the traders to recall and destroy the impugned goods or to cease providing the impugned service;
 - b) Suspending or temporarily suspending the operation of the traders;
 - c) Forcing the traders to remove terms which violate consumers' rights and interests in standard contracts or in general transaction conditions.
4. In addition to measures stipulated in Paragraph 3 of this Article, traders repeating their offenses shall be included in the list of traders violating consumers' rights and interests.
5. The Government shall provide detailed stipulations on this Article.

CHAPTER III

RESPONSIBILITIES OF SOCIAL ORGANIZATIONS PARTICIPATING IN PROTECTION OF CONSUMERS' RIGHTS AND INTERESTS

Article 27. Social organizations participating in protection of consumers' rights and interests

- 1. Social organizations established in accordance with legal provisions and operating within their charters are entitled to participate in consumer protection activities.
- 2. Operations to protect consumers' rights and interests conducted by social organizations shall be consistent with provisions of this Law and other relevant legal provisions.

Article 28. Content of participation in protection of consumers' rights and interests conducted by social organizations

1. Social organizations may participate in protection of consumers' rights and interests through the following activities:
 - a) providing guidance, assistance or advice to consumers at their request;
 - b) bringing lawsuits in the public interest or representing consumers wishing to bring lawsuits;
 - c) informing the State management bodies on consumer protection of offenses of traders;
 - d) conducting independent examinations or tests regarding goods and/or services; publicizing the results of examinations and tests already conducted; informing and giving warnings to consumers about goods and/or services; assuming legal liability regarding the information and warnings already disclosed; requesting the competent State bodies to deal with legal violations regarding protection of consumers' rights and interests;
 - e) participating in constructing legal provisions, guidelines, policies, orientations, plans and measures concerning protection of consumers' rights and interests;
 - f) carrying out activities assigned by the state authorities as stipulated in Article 29 of this Law;
 - g) participating in dissemination of and education about legal provisions and knowledge for consumers.
2. The Government shall stipulate conditions for social organizations participating in protection of consumers' rights and interests to exercise their rights to initiate civil lawsuits in the public interest as stipulated in Paragraph 1(b) of this Article.

Article 29. Implementation of tasks assigned by the state authorities

1. In carrying out tasks assigned by the State authorities, social organizations participating in protection of consumers' rights and interests shall be given expenditure assistance and other assistance from the State as stipulated by legal provisions.
2. The Government specifies the tasks that the State authorities may assign to social organizations participating in protection of consumers' rights and interests.

CHAPTER IV**RESOLUTION OF DISPUTES BETWEEN CONSUMERS AND TRADERS****Article 30. Methods of resolution of disputes between consumer(s) and trader(s)**

1. Disputes between consumers and traders may be resolved through:
 - a) Negotiation;
 - b) Mediation;
 - c) Arbitration;
 - d) Court proceedings.
2. The pursuit of negotiation and mediation for the purpose of causing harm to the interests of the State, the interests of consumers, and/or the public interest is prohibited.

Part 1**NEGOTIATION****Article 31. Negotiation**

1. The consumer is entitled to request the trader to negotiate when he/she/it deems that his/her/its legitimate rights and interests have been infringed.
2. The requested trader shall receive and negotiate with the requesting consumer within 7 days from the date of reception of the request.

Article 32. Result of negotiation

The result of a successful negotiation between the requested trader and the requesting consumer shall be documented, except as otherwise agreed by the parties.

Part 2**MEDIATION****Article 33. Mediation**

Traders and consumers are entitled to submit their disputes to a third party (individual or mediation organization) to mediate on their behalf.

Article 34. Principles of mediation

1. Objectivity, integrity, good will, and lack of fraud will be ensured.
2. Organizations, individuals conducting mediation, and involved parties shall ensure the secrecy of information relevant to mediation, except as otherwise agreed by the parties or as otherwise stipulated by legal provisions.

Article 35. Mediation organization

Organizations or individuals satisfying conditions set forth by the Government are entitled to establish mediation organizations to resolve disputes between consumers and traders.

Article 36. Minutes of mediation

1. Minutes of mediation shall contain the following key information:
 - a) Names of organizations, or individuals conducting mediation;
 - b) Names of parties participating in the mediation;
 - c) Content of mediation;
 - d) Time and place of mediation;
 - e) Opinions of parties participating in mediation;

- f) Results of mediation;
 - g) Time limit for executing the results of mediation.
2. The minutes of mediation shall be signed by parties participating in the mediation and certified by signatures of organizations and individuals conducting the mediation.

Article 37. Implementation of results of successful mediation

The parties participating in mediation shall implement the results of successful mediation within the time limit set forth in the minutes of mediation; in the event one party does not voluntarily implement the minutes of mediation, the remaining party is entitled to initiate a lawsuit for resolution as stipulated by law.

Part 3

ARBITRATION

Article 38. Effect of arbitration clause

Traders shall inform consumers of the [existence of] arbitration clauses before entering into contracts with consumers and shall obtain consent from the consumer in this regard. In cases in which arbitration clauses are already set forth in standard contracts or general transaction conditions, once disputes arise, individual consumers are entitled to elect other methods of dispute resolution.

Article 39. Procedures for dispute resolution through arbitration

The procedures for resolving disputes through arbitration shall be carried out in accordance with legal provisions on commercial arbitration.

Article 40. Burden of proof

The burden of proof in resolving disputes through arbitration is implemented in accordance with provisions of Article 42 of this Law.

Part 4**RESOLUTION OF DISPUTES THROUGH THE COURTS****Article 41. Civil lawsuits about protection of consumers' rights and interests**

1. A civil lawsuit about protection of consumers' rights and interests is a lawsuit in which the plaintiff is a consumer or social organization participating in protection of consumers' rights and interests as stipulated in this Law.
2. Civil lawsuits about protection of consumers' rights and interests shall be resolved using simplified civil procedures, provided the following conditions are met:
 - a) The plaintiff is an individual consumer and the defendant is a trader directly supplying goods and/or services to the plaintiff;
 - b) The lawsuit is simple, with clear evidence;
 - c) The value of the transaction is equal to or less than 100 million VND.

Article 42. Burden of proof in civil lawsuits about protection of consumers' rights and interests

1. Consumers shall provide evidence to prove their claims in a civil lawsuit about protection of consumers' rights and interests as stipulated by civil procedure law, except for proof of traders' liability.
2. Traders shall prove absence of liability in causing damage to consumers.
3. The court shall determine liability in civil lawsuits about protection of consumers' rights and interests.

Article 43. Court fees and costs in civil lawsuits about protection of consumers' rights and interests

1. Court fees and costs in a civil lawsuit about protection of consumers' rights and interests shall be calculated and borne in accordance with legal provisions on court fees.

2. Consumers bringing civil lawsuits to protect their rights and legitimate interests are exempted from advancing court fees and costs.

Article 44. Notification regarding civil lawsuits about protection of consumers' rights and interests initiated by social organizations

1. Social organizations participating in a consumer protection lawsuit shall properly notify the public about the lawsuit and shall be responsible for the information provided, ensuring that this information does not affect the normal operation of [defendant] traders.
2. The notification required in Paragraph 1 of this Article shall contain the following information:
 - a) the name and mailing address of the social organization participating in the consumer protection lawsuit [i.e. the plaintiff];
 - b) the identity of the [defendant] traders;
 - c) the subject of the lawsuit;
 - d) the procedure and time limit for consumers to register to participate in the lawsuit.
3. The court shall, within 3 working days from acceptance of the lawsuit, publicly post the information about its filing as stipulated in civil procedure provisions.

Article 45. Notification of the judgment and/or decision of the court resolving a civil lawsuit about protection of consumers' rights and interests initiated by social organizations

The judgments or decisions of the court in civil lawsuits initiated by social organizations shall be publicly posted at the filing office of the court or disclosed in the public media.

Article 46. Damages in civil lawsuits about protection of consumers' rights and interests initiated by social organizations

Damages in civil lawsuits about protection of consumers' rights and interests initiated by social organizations participating in consumer protection for the purpose of

protecting the public interest shall be allocated in accordance with the judgment and decision of the court.

CHAPTER V

RESPONSIBILITIES FOR STATE MANAGEMENT OF PROTECTION OF CONSUMERS' RIGHTS AND INTERESTS

Article 47. Responsibilities for State management of protection of consumers' rights and interests

1. The Government shall carry out uniform State management of protection of consumers' rights and interests.
2. The Ministry of Industry and Trade shall be responsible to the Government for carrying out State management of protection of consumers' rights and interests.
3. Ministries and ministerial-level agencies, within their mandates, shall cooperate with the Ministry of Industry and Trade to carry out State management of protection of consumers' rights and interests.
4. Local People's Committees, within their mandates, shall conduct State management of protection of consumers' rights and interests in their own localities.

Article 48. Responsibilities of the Ministry of Industry and Trade

1. Issuing or preparing and submitting to the competent State organs to issue policies, strategies, plans, programs, projects, and legal normative documents on protection of consumers' rights and interests; and organizing the implementation of said documents;
2. Managing consumer protection activities of social organizations and mediation organizations; managing standard contracts and general transaction conditions as stipulated in Article 19 of this Law;

3. Propagating and disseminating laws on protection of consumers' rights and interests; giving advice or assistance to raise public awareness of consumer protection;
4. Creating information databases for the purpose of protection of consumers' rights and interests; providing training and education for the purpose of protection of consumers' rights and interests;
5. Conducting inspections and check-ups; handling complaints and denunciations; and dealing with offenses against legal provisions on protection of consumers' rights and interests within its mandate.
6. Cooperating with international agencies regarding protection of consumers' rights and interests.

Article 49. Responsibilities of People's Committees

1. Issuing, or preparing and submitting to the competent State organs to issue and implement, legal normative documents on protection of consumers' rights and interests in their localities;
2. Managing consumer protection activities of social organizations and mediation organizations in their localities;
3. Propagating and disseminating legal provisions on protection of consumers' rights and interests; giving advice or assistance to raise public awareness of protection of consumers' rights and interests in their localities;
4. Conducting inspections and check-ups; handling complaints and denunciations; and dealing with offenses against legal provisions on protection of consumers' rights and interests within their mandate.

CHAPTER VI

IMPLEMENTATION PROVISIONS

Article 50. Effect

This Law takes effect on 1 July 2011.

Ordinance No. 13/1999/PL-UBTVQH10 on Protection of Consumers' Rights and Interests ceases to be effective on the effective date of this Law.

Article 51. Implementation detailing and guidance

The Government shall detail and guide the implementation of articles and clauses as assigned in this Law; and shall ensure other necessary provisions of this Law meet State management requirements.

This Law was passed on 17 November 2010, by the Twelfth National Assembly of the Socialist Republic of Vietnam at its Eighth session.

**CHAIRPERSON OF THE NATIONAL
ASSEMBLY**

(Signed)

Nguyen Phu Trong