

## BANK PRIVATIZATION IN VIETNAM: EXAMINING CHANGES TO MANAGEMENT IN VIETNAM'S NEW BANKING LAW, DECREE NO. 59/2009/ND-CP

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*Abstract:* Due to its WTO obligations, by 2010 Vietnam must open its banking system to the world. As a result, the nation attempted to drastically modernize its state owned banks through partial privatization. This partial privatization, locally translated as equitization, proposed serious challenges to the existing legal infrastructure facilitating banks. To cope with these new challenges, in September 2009, Vietnam's new banking law, Decree 59/2009/ND-CP, was passed. An important change in the new banking law is its stricter regulation on the qualifications of managers. It is suspected that such regulation signals the nation's resistance to surrender control over its banks and commit to reforms. The new banking law also further relies on the problematic Penal Code and the Criminal Procedure Code. Faulty Penal and Criminal Procedure Codes can lead to fraudulent lawsuits and managers losing their positions. In spite of its problems, the new banking law is workable and a step in the right direction. By relying on existing management laws, as opposed to those introduced by the new banking law, and upgrading the Penal and Criminal Procedure Codes, many of the potential problems created by the new banking law can be resolved.

### I. INTRODUCTION

In May of 2002, Kim Brix Andersen, a Danish national, left his job as a vice-president at the largest bank in Singapore to help manage the foreign funds of a quarry project in Vietnam.<sup>1</sup> The quarry project was established by two British nationals, Peter Laking and Sean McCormack.<sup>2</sup> In mid-2002, two Irish investors suspected Laking and McCormack of selling their shares in the project without their knowledge. The two Irishmen lodged a civil claim against Laking and McCormack in the High Court of London and a complaint against them with the Vietnamese public security ministry in Vietnam.<sup>3</sup> Although the case was dropped in the British High Courts for lack of evidence, the Vietnamese government continued to investigate the

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<sup>1</sup> *Denmark Summons Vietnamese Ambassador Over Banker's Case*, BBC MONITORING EUROPE, Jan. 24, 2005, available at LEXIS, The BBC Monitoring Europe File [hereinafter *Denmark Summons Vietnamese Ambassador*].

<sup>2</sup> Fair Trials International, Peter Laking-Vietnam: Update as of June 2007, [http://www.fairtrials.net/index.php/cases/spotlight/peter\\_laking/](http://www.fairtrials.net/index.php/cases/spotlight/peter_laking/) (last visited Feb. 24, 2009) [hereinafter Fair Trials International].

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

case for three months.<sup>4</sup> Laking and McCormack fled Vietnam in May 2003 after supposedly experiencing harassment from employees of the Irish investors and the Vietnamese government.<sup>5</sup> When Laking returned in May 2004, he was arrested in Ho Chi Minh City.<sup>6</sup> He joined Andersen and Tom Hong, an American investor associated with the company, in prison. Andersen was alleged to have helped the two embezzle \$6.5 million USD since the time he was put in charge of foreign funds.<sup>7</sup> Vietnamese newspapers alleged that the project for which they worked was a multi-million dollar scam, set up as a false company used to swindle money from foreign investors.<sup>8</sup> Andersen, after intervention by the Danish ambassador, was released in January 2005 due to lack of evidence against him, after 15 months of being incarcerated.<sup>9</sup> Laking has been out on bail since July 31, 2007.<sup>10</sup> According to Fair Trials International, Laking is still awaiting trial while prosecutors attempt to build a case.<sup>11</sup>

As Vietnam attempts to enter the world market, it must strike a balance between welcoming foreign investment and management, while still maintaining control over the internal workings of the banks.<sup>12</sup> As seen in the Andersen case,<sup>13</sup> investment opportunities are luring high-ranking managers to the country. The case also shows that in attempts to control these managers, the Vietnamese government is willing to go to extreme lengths to investigate a case against them, even if this means depriving an individual of his or her position in a company and/or procedural rights. This situation becomes more complicated as more industries begin to welcome foreign investment. Due to obligations under the World Trade Organization,

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<sup>4</sup> *Id.*

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

<sup>6</sup> Rosemary Hannan, *Haughey's Lawyer 'Was the Victim of Vietnam Scam,'* SUNDAY TIMES (London), July 16, 2005, available at LEXIS, Sunday Times (London) File.

<sup>7</sup> *UK, US Citizens to Stand Trial for Decades-Long Mining Scams,* THAN NIEN NEWS, Mar. 21, 2006, <http://www.thanhniennews.com/overseas/?catid=12&newsid=13708> (last visited Jan. 25, 2010).

<sup>8</sup> *Prosecution Proposed for Three Foreigners,* THE SAIGON TIMES DAILY, July 2, 2004, available at 2004 WLNR 11975828.

<sup>9</sup> *Denmark Summons Vietnamese Ambassador,* *supra* note 1.

<sup>10</sup> Ben Bland, *Briton in Kafka-esque Ordeal,* DAILY TELEGRAPH (Britain), Feb. 13, 2009, <http://www.telegraph.co.uk/finance/economics/2813138/Briton-in-Kafka-esque-Vietnam-ordeal.html> (last visited Jan. 25, 2010).

<sup>11</sup> Fair Trials International, *supra* note 2.

<sup>12</sup> See Andrew Lam, *New Year, Old Unresolved Passion: Vietnam and its Diaspora,* NEW AMERICA MEDIA, Feb. 7, 2008, [http://news.newamericamedia.org/news/view\\_article.html](http://news.newamericamedia.org/news/view_article.html) (last visited Jan. 25, 2010). In the article, the author uses the term "double-edged sword" to refer to the influx of investment and ideas from Vietnamese Overseas, or "Viet Kieu." The term also applies well to all Vietnamese sectors experiencing an influx of foreign ideas.

<sup>13</sup> Throughout this comment, this situation will be referred to as a "case," even though the lawsuit was dismissed at the trial court level in the UK and, because the lack of evidence, the case is still being prepared for trial in Vietnam.

Vietnam must "equitize" its banks in order to prepare the nation for the influx of foreign capital.<sup>14</sup> Equitization, or the process of selling off shares in state-owned enterprises, proposes to modernize Vietnamese state-owned banks.<sup>15</sup> Equitization also proposes the introduction of a cadre of forward thinking and entrepreneurial managers.<sup>16</sup> In addressing this issue, and the general inadequacy of the old banking law to deal with the newly equitized banks, in September 2009, the State Bank of Vietnam released Decree 59/2009/ND-CP, ("New Banking Law").<sup>17</sup> This comment argues that the New Banking Law takes a heavy-handed approach in controlling the influx of new managers by creating stricter regulations for management and more opportunity for the government to remove managers arbitrarily.

Vietnam's New Banking Law increases the government's authority to intervene and remove managers from their positions because it heightens qualification requirements for managers, creates more situations in which managers can be removed on the basis of past activities, and enhances reliance on the problematic Penal Code and Criminal Procedure Code. This comment will demonstrate how the New Banking Law contains stricter regulation on the qualifications of managers compared to the other two laws regulating Vietnamese banks: Law No. 60/2005/QH11 ("Enterprise Law")<sup>18</sup> and Law No. 02/1997/QH10 ("Law on Credit Institutions").<sup>19</sup> Moreover, as can be seen in the Andersen case, even if the stricter qualifications and extended prohibitions against managers are remedied, problems with the Penal Code and Criminal Procedure create significant problems with due process, making it easy for the state to remove managers from their position. This comment argues, therefore, that instead of relying on management regulations introduced by the New Banking Law, management regulations already found in existing banking regulations, such as those in the Enterprise Law, should be used, while loopholes in the Penal and Criminal Procedure Codes should be critically examined.

<sup>14</sup> Working Party on the Accession of Viet Nam, *Schedule CLX- Vietnam: Part II – Schedule of Specific Commitments in Services*, 40, WT/ACC/VCM/48/Add.2 (Oct. 27, 2006), available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/wt/acc/vnm48a2.doc>.

<sup>15</sup> See TUYET TREES, U.S. DEPT. OF COMMERCE, VIETNAM: BANKING AND FINANCIAL SECTOR 1 (2008), <http://www.buyusa.gov/arkansas/vietbank09.pdf> (last visited Jan. 25, 2010).

<sup>16</sup> Such a move is not unprecedented. China introduced new and foreign managers into its state owned enterprises in order to modernize them. See Andrew Sargeant & Stephen Frankel, *Managing People in China: Perceptions of Expatriate Managers*, 33 J.WORLD BUS. 17, 19 (1998).

<sup>17</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP (Viet.).

<sup>18</sup> Law on Enterprises, 2005, No. 60/2005/QH11 (Viet.).

<sup>19</sup> Law on Credit Institutions, 1997, No. 02/1997/QH10 (Viet.) (amended 2004).

Section II of this comment provides a background to the proposed changes and will introduce the New Banking Law, the Enterprise Law, and the Law on Credit Institutions. Section III analyzes potential problems inherent in the New Banking Law including conflicts with existing laws and its reliance on a problematic Penal Code and Criminal Procedure Code. Finally, section IV provides potential solutions to the problems found in the New Banking Law.

## II. PROFESSIONALIZING MANAGEMENT THROUGH EQUITIZATION IS NECESSARY BUT MUST NOT CONFLICT WITH THE VIETNAMESE BANKING LAW INFRASTRUCTURE

This section provides a background to the proposed changes, and will introduce the New Banking Law, the Enterprise Law and the Law on Credit Institutions. It will start off with a discussion on the significance of management to professionalizing Vietnamese banks and then will discuss the New Banking Law and how it conflicts with the Enterprise Law and the Law on Credit Institutions, the two laws that help provide the legal infrastructure to banking in Vietnam.

### A. *Addressing Management Issues Through Equitization Will Professionalize Vietnamese Banks*

In a regulated economy dominated by state owned enterprises, such as Vietnam, managers typically have weaker incentives to maximize efficiency and profits.<sup>20</sup> This is because “incentives for efficient management are weak if managers are appointed on the basis of political decisions rather than professional capacity, and if salaries and job security are not related to economic performance.”<sup>21</sup> On the other hand, due to preferential treatment from the state with regards to land, export quotas, and tax treatment, privileges of this kind have created substantial rents for the State Owned Enterprises (“SOE”), leading to an entrenched cadre of managers and employees.<sup>22</sup> These managers and employees have in certain cases complicated governmental attempts to evaluate the performance and assets of companies.<sup>23</sup> In addition, global market forces, the U.S. Government, and

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<sup>20</sup> Frederik Sjöholm, *State Owned Enterprises and Equitization in Vietnam* 6, (Stockholm School of Economics, Working Paper No. 228, 2006), <http://swopec.hhs.se/eijswp/papers/eijswp0228.pdf> (last visited Feb. 5, 2010).

<sup>21</sup> *Id.*

<sup>22</sup> Vu Quoc Ngu, *SOE Equitization in Vietnam: Experiences, Achievements, and Challenges*, in S.E. ASIAN AFFAIRS, 327, 330 (2003).

<sup>23</sup> *Id.* at 330-32.

international agencies are placing pressure on individual firms and the Vietnamese Government to increase transparency and to open up many protected industries and enterprises.<sup>24</sup>

With these factors in mind, the Vietnamese government continues on its campaign to privatize its SOEs to modernize and professionalize their business practices.<sup>25</sup> Approaching the process cautiously, some authors have argued that Vietnam adopted a gradualist approach to privatizing, or "equitizing" its SOEs.<sup>26</sup> Equitization is the dissolution, restructuring, and privatization process of many formerly state-owned monopolies.<sup>27</sup> It liberalizes both internal and external trade regimes, and encourages private (both domestic and foreign) investment in the economy.<sup>28</sup>

Equitization in Vietnam was first initiated in 1992.<sup>29</sup> Small and medium enterprises were part of the first wave of equitized firms.<sup>30</sup> From 1992 to 1998, just seventeen SOEs completed equitization formalities.<sup>31</sup> "Equitization picked up momentum in 1999 and 2000 so that by September 2001 some 700 state enterprises had reportedly completed equitization proceedings."<sup>32</sup> It is reported that from 2003 to 2004, this number had risen to 1,292.<sup>33</sup> Furthermore, while initially small and medium sized enterprises were equitized, now larger SOEs, such as Vietnam's state-owned banks, are also making the change.

Today, external obligations are forcing Vietnam to open up its banking system to the world. In 2001, the country signed a Bilateral Free Trade Agreement with the United States requiring that by 2010, U.S. banks be allowed to enter the country on equal footing with local banks.<sup>34</sup> In 1995, Vietnam promised to join the ASEAN Free Trade Area and reform its local

<sup>24</sup> See Martin Painter, *The Politics of Economic Restructuring in Vietnam: The Case of State-owned Enterprise 'Reform.'* 25 CONTEMP. S.E. ASIA 1, 32-33 (2003).

<sup>25</sup> See Sjöholm, *supra* note 20, at 15.

<sup>26</sup> See Painter, *supra* note 24, at 24; Sjöholm, *supra* note 20, at 2.

<sup>27</sup> Vu Thanh Tu Anh, Policy Brief No. 33: Vietnam – The Long Road to Equitization, 3-4 (The William Davidson Institute: Univ. of Michigan, 2005).

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

<sup>29</sup> Martin Gainsborough, *Slow, Quick, Quick: Assessing Equitization and Enterprise Performance Prospects in Vietnam*, 19 J. COMMUNIST STUD. & TRANS. POL. 49, 50 (2003).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Truong Dong Loc, Nguyen Huu Dang & Nguyen Van Ngan, *Equitization and Firm Performance: The Case of Vietnam* 18 (E. ASIAN DEV. NETWORK, Working Paper No. 32, 2007), <http://www.eadn.org/truongdongloc.pdf> (last visited Feb. 5, 2010).

<sup>34</sup> Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, U.S.-Vietnam, Jul. 13, 2000, Hein's No. KAV 5968, available at <http://www.usvtc.org/trade/bta/US-VN-BTA.pdf>.

banking sector to correspond to international standards by 2012.<sup>35</sup> As part of the entrance requirements into the World Trade Organization (“WTO”), Vietnam shored up its reforms in the banking sector to prepare its industries for entry into a globally competitive market.<sup>36</sup> Therefore, in addition to the need to modernize its banks for national development, these global obligations imposed by the WTO place further pressure on the Vietnamese government to modernize and retrofit its banks.

In September 2009, the New Banking Law took effect.<sup>37</sup> The New Banking Law plays a very important role in upgrading and professionalizing the banking sector in Vietnam. According to the State Bank of Vietnam, the New Banking Law is meant to govern the organization, administration, management, and operation of banks.<sup>38</sup> It will also help the Vietnamese commercial banking sector improve its organizational structure and operations to meet the needs for development and international integration.<sup>39</sup>

*B. The New Banking Law Must Not Conflict with the Enterprises Law and the Law on Credit Institutions*

Apart from the New Banking Law, Vietnamese banks operate in conjunction with two other important laws. These laws are the Enterprise Law<sup>40</sup> and the Law on Credit Institutions.<sup>41</sup> The New Banking Law must therefore achieve its valuable task of preparing the nation for global competitiveness while not interfering with these important existing laws.

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<sup>35</sup> ASEAN Free Trade Area (AFTA) is a trade bloc agreement by the Association of Southeast Asian Nations supporting local manufacturing in all ASEAN countries. Association of Southeast Asian Nations, Protocol for the Accession of the Socialist Republic of Vietnam to the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Dec. 15, 1995, available at <http://www.aseansec.org/12372.htm>.

<sup>36</sup> See TREES, *supra* note 15.

<sup>37</sup> See *Newsletter No. 03*, VCFO, (VIETNAM CHIEF FINANCIAL OFFICERS CLUB, HANOI, VIET.), Aug. 5, 2009, [http://www.cfo.vn/cfolib/uploads/VCFO%20News/VCFO\\_Newsletter\\_August09.pdf](http://www.cfo.vn/cfolib/uploads/VCFO%20News/VCFO_Newsletter_August09.pdf) (last visited Jan. 28, 2010).

<sup>38</sup> State Bank of Vietnam, Tin Tuc Su Kien: Toa Dam lay y kien Du thao Nghi dinh to chuc, quan tri va hoat done cua NHTM. [Discussion Opinions: Draft Decree Organization, Management, and Operation of Commercial Banks] (Feb. 10, 2007), <http://www.sbv.gov.vn/vn/home/tinHDNH.jsp?tin=2409> (last visited Jan. 19, 2009).

<sup>39</sup> Viet Stock Financial Information, Monthly Information on Banking Activities: July (Aug. 13, 2009), <http://vietstock.com.vn/Tianyonen/Index.aspx?ArticleID=76179&ChannelID=37> (last visited Aug. 12, 2009).

<sup>40</sup> Law on Enterprises, 2005, No. 60/2005/QH11 (Viet.).

<sup>41</sup> Law on Credit Institutions, 1997, No. 02/1997/QH10 (Viet.) (amended 2004).

### 1. *The Enterprise Law Protects Businesses from Governmental Intervention*

The Enterprise Law of 2005 sets forth provisions on the establishment, organizational management, and operation of limited liability companies, share-holding companies, partnerships, and sole-proprietorships belonging to all economic components.<sup>42</sup> Passed in 2005, and effective as of July 1, 2006, the law "is intended to apply equally to domestic and foreign invested enterprises."<sup>43</sup>

The Enterprise Law applies to Vietnamese banks since according to the law, an enterprise is an "economic organization that has its own name, assets, stable office and is duly constituted for the purpose of conducting business."<sup>44</sup> The Enterprise Law also enables the state to supervise, inspect, and handle violations of national law by enterprises.<sup>45</sup> Although the New Banking Law creates additional requirements to which banks must abide, these requirements must not conflict with the Enterprise Law, which protects enterprises from governmental intervention.<sup>46</sup>

### 2. *The Law on Credit Institutions Creates a Level Playing Field and Prevents Preferential Treatment*

The Law on Credit Institutions governs "the organization and operation of credit institutions and banking activities conducted by other organizations."<sup>47</sup> The law, which was passed by the National Assembly on June 15, 2004, aims to make capital markets run effectively, satisfy the demand for capital from businesses, and keep up with economic changes in the global economy.<sup>48</sup> When it was drafted, the Law on Credit Institutions was meant to "create a level playing field for all credit institutions and prevent preferential treatment."<sup>49</sup>

Currently, it is rumored that the state bank is drafting new legislation to replace the Law on Credit Institutions and create a more efficient

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<sup>42</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 1 (Viet.).

<sup>43</sup> Memorandum from Freshfields Bruckhaus Deringer, LLP on Vietnam's New Investment Law (Mar. 2006), <http://www.freshfields.com/publications/pdfs/2006/14675.pdf> (last visited Jan. 25, 2010).

<sup>44</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 4(1) (Viet.).

<sup>45</sup> *Id.* art. 161(1-5).

<sup>46</sup> *Id.*

<sup>47</sup> Law on Credit Institutions, 1997, No. 02/1997/QH10 (Viet.) (amended 2004). "Other institutions" refers to non-state actors.

<sup>48</sup> Vietnamese Law Consultants, Amendments to Law on Credit Institutions (Oct. 2005), <http://vietnamese-law-consultancy.com/english/content/browse.php> (last visited Jan. 25, 2010).

<sup>49</sup> *Mergers of Viet Nam's Credit Institutions Regulated*, ASIA NEWS NETWORK, May 26, 2009, <http://www.asianewsnet.net/news.php?id=5922&sec=2> (last visited Jan. 25, 2010).

regulatory framework.<sup>50</sup> Yet talks of this new Law on Credit Institutions have not led to specific dates as to when the law will emerge. This poses a problem since the existing Law on Credit Institutions contains clauses that conflict with the New Banking Law.

### 3. *The New Banking Law Facilitates Vietnam's Development Needs by Professionalizing the Nation's Banks*

Drafted by the State Bank of Vietnam, the New Banking Law is designed to supersede Decree No. 49/2000/ND-CP,<sup>51</sup> the former banking law.<sup>52</sup> The New Banking Law is intended to apply to all commercial banks, including SOEs, joint stock banks, joint venture banks, and banks with one hundred percent foreign capital.<sup>53</sup> It also, for the first time ever, provides for the use of the term "bank," stating that only organizations granted licenses under the Law on Credit Institutions or permitted by the State Bank of Vietnam, can be referred to as banks.<sup>54</sup> Defining the term "bank" is the first critical step in streamlining control over the banking sector by the New Banking Law, the Law on Credit Institutions, and the Enterprise Law.

The New Banking Law must also serve several, very important functions. First, it should enable all Vietnamese state-owned banks to equitize by 2010, the deadline by which Vietnam must equitize due to its agreement with the WTO.<sup>55</sup> Second, it must provide the guidelines private investors must abide by when buying into state-owned banks. Last, these changes should bring the industry up to international standards. All three of these changes are necessary to support Vietnam's development in the years

<sup>50</sup> *Spreading Out the Credit*, VFR (Vietnam Financial Review, Hanoi, Viet.), May 23, 2008), at 1, <http://www.nri.co.jp/english/opinion/vfr/06SpreadingOut.pdf> (last visited Jan. 25, 2010).

<sup>51</sup> Organization and Operation of Commercial Banks, 2000, 49/2000/ND-CP (Viet.), amended by New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP (Viet.).

<sup>52</sup> ASIA-PACIFIC ECON. COOPERATION (APEC), ELECTRONIC INDIVIDUAL ACTION PLAN, UPDATE FOR VIET NAM FOR 2009 (2009), [http://www.apec-iap.org/document/VN\\_2009\\_IAP.htm](http://www.apec-iap.org/document/VN_2009_IAP.htm) (last visited Mar. 28, 2010).

<sup>53</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 1 (Viet.).

<sup>54</sup> *State Bank to Detail Rules on Commercial Banks*, 13 VIET. L. AND LEGAL FORUM 156, 24 (2007).

<sup>55</sup> Xinhua, *Vietnam to Finish Bank Equitization by 2010*, PEOPLE'S DAILY ONLINE, Dec. 5, 2005, [http://english.people.com.cn/200512/05/eng20051205\\_225706.html](http://english.people.com.cn/200512/05/eng20051205_225706.html) (last visited Jan. 25, 2010). By 2010, Vietnam is required to receive foreign banks on equal footing with local banks. This places pressure on the nation to equitize its state-owned banks. Therefore, although Vietnam is not obligated to equitize all its state-owned banks by 2010, there is strong pressure to do so by then. See Working Party on the Accession of Viet Nam, *Schedule CLX- Vietnam: Part II - Schedule of Specific Commitments in Services*, 40, WT/ACC/VCM/48/Add.2 (Oct. 27, 2006), <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/wt/acc/vnm48a2.doc> (last visited Jan. 28, 2010).



to come. It is speculated that in the next 10 years, Vietnam is going to need \$140 billion USD to retrofit its crumbling infrastructure in order to keep up with its growth.<sup>56</sup> Vietnamese banks must play a central role in raising and disseminating these funds. In order to do this, the New Banking Law must effectively modernize Vietnamese banks to efficiently and effectively serve this function while further enticing foreign investment.

An important element to modernizing Vietnam's banks is providing bank managers with the opportunity to adapt to the dynamic conditions of the market. Chapter III of the New Banking Law entitled "General Management Principles" lays the guidelines for who can serve in a Vietnamese bank.<sup>57</sup> Although the responsibilities of the different managerial positions remain the same, the requirements of who can serve in such positions have changed.<sup>58</sup> According to the State Bank, the previous banking law "has demonstrated a number of weaknesses during its time, not least of which is the lack of detail regarding the qualifications, duties and responsibilities of general directors or members of bank boards and audit committees."<sup>59</sup> The New Banking Law therefore attempts to address these issues. In the process, however, several new problems emerge.

### III. THE NEW BANKING LAW ALLOWS THE GOVERNMENT MORE CONTROL IN REMOVING MANAGERS FROM OFFICE BY INTRODUCING STRICTER MANAGEMENT REQUIREMENTS AND BY ENHANCING RELIANCE ON THE PROBLEMATIC CRIMINAL LEGAL INFRASTRUCTURE

First, the New Banking Law provides the government more control in removing managers from their positions by introducing stricter regulations on the qualifications of managers and more prohibitions against managers than the Law on Credit Institutions and the Enterprise Law. Second, the New Law's enhanced reliance on loopholes within the Penal Code and Criminal Procedure Code makes it easy for the government to arbitrarily remove managers from office. This section explores these two problems with the New Banking Law.

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<sup>56</sup> Vietnam Ministry of Foreign Affairs, Vietnam Infrastructure Funds Debuts, <http://www.mofa.gov.vn/mofa/en/nr040807104143/nr040807105039/ns070815101124> (last visited Dec. 29, 2009).

<sup>57</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, ch. III (Viet.).

<sup>58</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, ch. III, sec. 2 (Viet.).

<sup>59</sup> *Do Commercial Banks Really Need Temporary Regulation?*, VILAF HONG DUC LAW FIRM, Jan. 31, 2008, <http://vilaf.com.vn/index.asp?progid=50005&docID=898D361B-6E68-6152-0D0F-A31354D75722> (last visited June 12, 2009).

A. *The New Banking Law Provides the Government with More Control Over Management than the Law on Credit Institutions and the Enterprise Law*

This section compares the New Banking Law with the Law on Credit Institutions and Enterprise Law to examine how the New Banking Law has expanded restrictions for managers, while simultaneously heightening requirements to serve as a manager.

1. *The New Banking Law is Stricter than the Law on Credit Institutions When it Comes to Criminal Investigations, Previous Bankruptcies, and Suspensions*

The Law on Credit Institutions was drafted with the intent to create a level playing field and prevent preferential treatment. The New Banking Law, on the other hand, vests significantly more control of a company in the hands of the state. While the Law on Credit Institutions prohibits a manager under criminal investigation from serving in a bank, the New Banking Law expands this requirement to a greater number of positions.<sup>60</sup> The New Banking Law also prohibits those who have served on boards of bankrupt companies and those who have been suspended from previous positions by the State Bank, from serving as managers.<sup>61</sup> Thus, under the New Banking Law, criminal investigations and bankruptcy are all situations that can severely affect one's ability to manage a bank. These situations, as will be demonstrated, are within the power of the state to create, leading to a potentially dangerous position for bank managers.

a. *According to the New Banking Law, Criminal Investigations, Even When Based on Fraudulent Claims, Can Lead to a Manager's Removal*

Although both the New Banking Law and the Law on Credit Institutions prohibit those under "criminal prosecution" from serving in a bank, the New Banking Law extends such a prohibition to more positions.<sup>62</sup> According to Article 40 of the Law on Credit Institutions, the members of the managing board, the control board, and executive officers cannot serve if

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<sup>60</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art 19, pts. 1, 2 (Viet.).

<sup>61</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19(2)(b) (Viet.).

<sup>62</sup> *Id.* art. 19, pt. 2.

they are under investigation for penal liability.<sup>63</sup> The Law on Credit Institutions does not make clear whether those under investigation are suspended until exonerated. This can lead to problems if fraudulent criminal claims are lodged against individuals.

For example, in the Andersen case, Laking endured criminal investigations for over four years.<sup>64</sup> Laking was released on bail in January 2005 and was under house arrest until his trial, which as of June 2007, was not set.<sup>65</sup> During his time in prison and under house arrest, Laking was forced to suspend all business activities.<sup>66</sup> Lack of evidence, plus the fact that a parallel case was dismissed in British courts, should have provided evidence that a fraudulent claim was filed.<sup>67</sup> Regardless, Vietnamese courts still deprived Laking of the ability to serve as a manager, and even the most basic rights of leaving his home or seeking employment elsewhere.<sup>68</sup>

The New Banking Law extends this problematic aspect of the Law on Credit Institutions to apply to more managers. The New Banking Law extends the same requirements to the Chief Accountant, Director of the Operation Center, Manager of a Branch, and Director of a subsidiary company of the bank.<sup>69</sup> As seen in the Andersen case, "criminal prosecution" included years of criminal investigation and probation. According to the Vietnamese Penal Code, during a probationary period the sentenced persons must not leave their governmentally designated residence and are deprived of a number of civic rights.<sup>70</sup> They are banned from practicing certain occupations or doing certain jobs. Probationary periods can range from one year to five years from the date an imprisonment penalty is completely served.<sup>71</sup> Needless to say, criminal investigations and probationary periods can be a severe burden for managers. Not only can they lead to one's removal from office, as was seen in the Andersen case, if questionable charges are brought, one can be kept on probation until a case is established. In Laking's case, four years after charges were brought, he is still on probation waiting for the prosecutors to present their case.

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<sup>63</sup> Law on Credit Institutions, 1997, No. 02/1997/QH10 art. 40, pt. 1 (Viet.) (amended 2004).

<sup>64</sup> Fair Trials International, *supra* note 2.

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

<sup>66</sup> *Id.*

<sup>67</sup> Hannan, *supra* note 6..

<sup>68</sup> Vietnam Penal Code, 1999, art. 38 (Viet.), available at <http://www.worldlii.org/vn/legis/pc66/>.

<sup>69</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art 19, pt. 1 (Viet.).

<sup>70</sup> Vietnam Penal Code, 1999, art. 38 (Viet.).

<sup>71</sup> *Id.*

- b. *The New Banking Law Expands Restrictive Prohibitions on Those Who Have Served in Bankrupt Companies to Even More Positions than the Law on Credit Institutions*

The New Banking Law expands similar restrictive provisions found in the Law on Credit Institutions regarding those who served in bankrupt companies. The Law on Credit Institutions prohibits former members of the managing board and former general directors of bankrupt companies to serve as members of the managing board, the control board, and as executive officers in the future.<sup>72</sup> The New Banking Law expands this restriction to partners in the company, council members, control commissioners, and members of the management of cooperatives and their chair.<sup>73</sup> The New Banking Law also specifically mentions head and members of the managing board, while the Law on Credit Institutions does not.<sup>74</sup>

The New Banking Law makes no distinction between those who are to blame for the bankruptcy and those who merely served on a board for a company that went bankrupt. Furthermore, in business, bankruptcies are inevitable and are sometimes used in desperate situations as a deliberate strategy to reorganize.<sup>75</sup> The New Banking Law therefore prohibits managers who were unfortunate to serve on a board for a business that either went bankrupt, regardless of the manager's own culpability, or went bankrupt as a result from an established business plan meant to reorganize the organization.

- c. *Under the New Banking Law, the Government Has Far More Control Over the Suspension and Subsequent Removal of Managers from Office than the Law on Credit Institutions*

The New Banking Law creates new restrictive provisions that are not found in the Law on Credit Institutions. The New Banking Law prohibits those who have been temporarily suspended from their positions by the State Bank from serving as chairman of the board of directors, members of the board of directors, chief of the control committee, members of the control

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<sup>72</sup> Law on Credit Institutions, 1997, No. 02/1997/QH10 (Viet.) (amended 2004).

<sup>73</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19(2)(b) (Viet.).

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

<sup>75</sup> Wilburn N. Moulton et al., *Bankruptcy as a Deliberate Strategy: Considerations and Deliberate Evidence*, 14 STRATEGIC MGMT. J. 125, 125-26 (1993).

committee, or the general manager.<sup>76</sup> Temporary suspension is guided by Article 25 of the New Banking Law, which grants expansive control to the state regarding such suspensions. Article 25 allows the State Bank to permanently or temporarily suspend the chairman and members of board of directors, chief and members of control, and director general in banks that are under "special control" of the government if they violate laws found in Article 20 of the New Banking Law.<sup>77</sup> "Special control" according to the New Banking Law is when a company is in danger of losing its ability to maintain solvency and pay its customers, and is therefore, placed under the control of the State Bank.<sup>78</sup>

Given the fact that creating "special control" over a company is completely up to the State Bank, this can lead to problems. Since "special control" is when a company is in any danger of losing its ability to maintain solvency and pay off its customers, a company's financial stability is important. However, assessing a company's financial stability has been a problem, especially when it comes to whether the company is capable of paying off its loans from the government.<sup>79</sup> According to some reports, the State Bank has non-performing loans under control and 4.7% of such loans are outstanding.<sup>80</sup> However, the true level of non-performing and under-performing loans in Vietnam's financial system is difficult to gauge due to the enduring lack of transparency and poor public disclosure.<sup>81</sup> Therefore, the State Bank has wide discretion to administer "special control" over some businesses, while leaving others alone.

## 2. *The New Banking Law is Stricter than the Enterprise Law When it comes to Criminal Investigations, Bankruptcy, and Required Qualifications*

The Enterprise Law was created with the intent to protect businesses from government intervention.<sup>82</sup> It does this by removing burdensome government regulations that restrict Vietnamese business operations.<sup>83</sup> The

<sup>76</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19(2)(d) (Viet.).

<sup>77</sup> *Id.* art. 25(1)(2)(3)(4).

<sup>78</sup> *Id.* ch. 5.

<sup>79</sup> Hoang Tien Loi, *An Update on Non-Performing Loans Resolution and Banking Reform in Viet Nam*, in ASIAN INSOLVENCY SYSTEMS: CLOSING THE IMPLEMENTATION GAP 139 (2007).

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

<sup>81</sup> Karl D John, *Vietnam's Banks: A Wild New World*, ASIA TIMES ONLINE, Apr. 19, 2006, [http://www.atimes.com/atimes/Southeast\\_Asia/HD19Ae03.html](http://www.atimes.com/atimes/Southeast_Asia/HD19Ae03.html) (last visited Jan. 26, 2010).

<sup>82</sup> *See* Law on Enterprises, 2005, No. 60/2005/QH11, arts. 1, 5 (Viet.).

<sup>83</sup> *Id.*

New Banking Law departs from this approach and offers different requirements for those who have engaged in criminal activities and for those who have served in bankrupt companies.<sup>84</sup> The Enterprise Law also provides for less rigid education and experience requirements for those serving in banks compared to the New Banking Law.<sup>85</sup> The New Banking Law therefore reintroduces burdensome government regulations that the Enterprise Law attempted to remove.

*a. The New Banking Law's Significantly Stricter Provisions Concerning Criminal Investigations Create Confusion as to Which Law Should Apply*

While the Law on Credit Institutions and the New Banking Law prohibit those who are under penal investigation from serving in certain managerial positions, the Enterprise Law does not. Article 13(2)(e) of the Enterprise Law only restricts persons who are serving an imprisoned punishment or prohibited by the court from managing an enterprise.<sup>86</sup> Thus the Enterprise Law is less restrictive than both laws when it comes to criminal investigations. Only those who are convicted of a crime and physically incarcerated cannot serve. Furthermore, according to the Enterprise Law, theoretically, one may be incarcerated and still manage an enterprise if allowed to do so by the court.<sup>87</sup> This is less strict than the Law on Credit Institutions' prohibition against those who are under criminal investigation and the New Banking Law's extension of this prohibition to more managerial positions.<sup>88</sup>

The significantly stricter provisions of the New Banking Law create confusion as to which laws should apply. Borderline institutions that only lend or transfer funds may inadvertently be included in the category with more restrictive provisions. Furthermore, those who have operated under the more relaxed provisions of the Enterprise Law may be in jeopardy now that the stricter provisions of the New Banking Law may apply. Although criminal investigations are serious and should cause suspicion regarding a manager's ability to run a business, when the Criminal Code is ambiguous

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<sup>84</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19, pts. 1, 2 (Viet.).

<sup>85</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 110 (Viet.).

<sup>86</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 13(2)(e) (Viet.).

<sup>87</sup> *Id.* art. 13(e).

<sup>88</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19, pt. 2 (Viet.).

and the Vietnamese government, as seen in the Andersen case, can intervene in private enterprise, such a strict provision is problematic.

b. *The New Banking Law Complicates Matters When it Creates Its Own Guidelines on Bankruptcy as Opposed to Relying on the Law on Bankruptcy*

The Enterprise Law's restriction on those who have served in enterprises that have gone bankrupt from serving in similar positions in SOEs is guided by the Law on Bankruptcy,<sup>89</sup> as opposed to the New Banking Law which creates such a condition on its own.<sup>90</sup> However, while the Law on Bankruptcy prohibits individuals who have served in managerial positions in bankrupt companies from serving in similar positions in non-state owned enterprises for a period of one to three years, the New Banking Law takes this prohibition further for some positions and neglects it for others. According to the Law on Bankruptcy, this prohibition applies to the owners of private enterprises, partnership members, general directors, chairmen and members of managing boards, members' councils, and managers and members of the managerial boards of the cooperatives that are declared bankrupt.<sup>91</sup> The Law on Bankruptcy adds that these individuals shall not be allowed to set up enterprises or cooperatives, and must not work as managers of enterprises or cooperatives for one to three years from the date the enterprises or cooperatives are declared bankrupt.<sup>92</sup>

The New Banking Law adopts this provision, but further stipulates that if an individual has served in the aforementioned position, then he or she may not serve as a chairman of the board of directors, chief of the controllers committee, member of the controllers committee, or general manager of the bank indefinitely.<sup>93</sup> Branch directors, the director of transactions, and the director of the company's banks are not subject to the New Banking Law's prohibition against those who have served in similar positions in bankrupt companies.<sup>94</sup> Thus, it is unclear if they are subject to

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<sup>89</sup> Bankruptcy Law, 2004, No. 21/2004/QH11 (Viet.). This law prescribes bankruptcy procedures for enterprises and cooperatives and serves as legal basis for the restoration or abolition of enterprises that suffer chronic losses and insolvency. The Law took effect on October 15, 2004.

<sup>90</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 13(2)(g) (Viet.).

<sup>91</sup> Bankruptcy Law, 2004, No. 21/2004/QH11, art. 94(2) (Viet.).

<sup>92</sup> *Id.*

<sup>93</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19(2)(d) (Viet.).

<sup>94</sup> *Id.* art. 19(2)(b).

the bankruptcy provision in the New Banking Law or if they are subject to the rules found in the Law on Bankruptcy.

While the Enterprise Law defers to the Law on Bankruptcy, the New Banking Law takes some provisions of the Law on Bankruptcy and interprets them more strictly for some positions and completely ignores them for others. Therefore, while the Enterprise Law defers to the Law on Bankruptcy to create consistency, the New Banking Law complicates matters by taking the issue into its own hands. Reliance on the Law on Bankruptcy for some issues and the New Banking Law's expanded provisions for others makes compliance more difficult.

*c. Required Qualifications in the New Banking Law Are More Stringent than the Enterprise Law and Provide the State with More Opportunity to Remove Managers from Office*

The New Banking Law introduces new baseline requirements, which differ from the Enterprise Law's simple and uniform requirements. In the Enterprise law, required qualifications for different managerial positions are simple and uniform. The Enterprise Law discusses the qualification requirements for different managerial positions according to the type of business and position. For instance, Articles 57(1)(a) and 116 require that a director or general director in a limited liability company (LLC) with more than one member and in a shareholding company: 1) have the capacity for civil acts;<sup>95</sup> 2) not be prohibited from managing an enterprise as stipulated in the Enterprise Law;<sup>96</sup> and 3) own ten percent or more of the charter capital or have expertise and experience in relation to business management or major business activities of the company.<sup>97</sup> Section two adds that in companies where state-owned capital accounts for more than fifty percent of the charter capital, related family members cannot serve as directors.<sup>98</sup> Members of the board of management and board of supervisors share similar requirements to those of the director or general director.<sup>99</sup> Pursuant to Article 110, members of the board of management must abide by standards

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<sup>95</sup> For a definition of a shareholding company see Law on Enterprises, 2005, No. 60/2005/QH11, ch. IV, art. 77(1) (Viet.).

<sup>96</sup> *Id.* arts. 57(1)(a), 116.

<sup>97</sup> *Id.* art. 57(1)(b). The article also allows the enterprise to stipulate its own provisions here. The draft also uses the term, "expertise experience." The author will interpret this to mean "expertise and experience" since in other sections of the document the qualifications are discussed this way.

<sup>98</sup> *Id.* These family members include wives, husbands, fathers, foster fathers, mothers, foster mothers, children, adopted children, or siblings.

<sup>99</sup> *Id.* art. 110.



found in Article 57, except the percentage of the ownership and prohibited positions to which a member can be related is different.<sup>100</sup> The rest of the positions mentioned in the Enterprise Law do not have as structured a set of requirements as found for these positions. The baseline requirements in the law allow banks to be more flexible in their requirements, encouraging more investment and dynamic forms of enterprises.

The New Banking Law, on the other hand, has more explicit clauses and new requirements. The New Banking Law, for instance, requires that the Governor of the State Bank must approve the election or appointment of chairman and members of the board of directors, chief and members of the controllers committee, and general manager of the bank (except for the case where the appointment is made by the Prime Minister).<sup>101</sup> Furthermore, banks must submit the names and resumes of appointed deputy general managers, chief accountants, directors of operation centers, manager of a branch, and director of a subsidiary company to the State Bank.<sup>102</sup>

These requirements, although useful in creating a transparent management apparatus, subject management appointees to the approval and scrutiny by the state. In addition, whereas the Law on Enterprises mandates that managers have expertise and experience,<sup>103</sup> the New Banking Law discusses what this means in greater detail, creating arbitrary baselines such as having a university degree in economics to be a general director, or having no less than three years serving in a managerial position in a bank or other company to serve on the board of directors.<sup>104</sup> The New Banking Law thus exposes managers to greater scrutiny by the state at both the entry level and the decision making level. Although this can lead to higher standards in management, it arguably reduces the autonomy of the manager and arbitrarily creates obstacles.

*B. Problems with the Penal Code and Criminal Procedure Code Make it Easy for the Government to Arbitrarily Remove a Manager from Office*

Reliance of the New Banking Law, the Enterprise Law, and the Law on Credit Institutions on the Vietnamese Penal Code, particularly with

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<sup>100</sup> Law on Enterprises, 2005, No. 60/2005/QH11, arts. 110, 122, 57(a) (Viet.).

<sup>101</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 26, pt. 1 (Viet.).

<sup>102</sup> *Id.* art. 26, pt. 2.

<sup>103</sup> See Law on Enterprises, 2005, No. 60/2005/QH11, art. 57 (Viet.).

<sup>104</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 21(1)(c) (Viet.).

regard to certain provisions such as those regarding "criminal prosecutions," highlights the much broader issue of weak procedural infrastructures. When the New Banking Law relies on the ambiguous and problematic nature of the Penal Code, it is argued that managers are further at risk from losing their positions because of the potential for frivolous investigations and filing of lawsuits. To establish this argument, this section analyzes problems in the Penal Code and the Criminal Procedure Code and ends with a discussion of the Andersen case, which demonstrates how such problems have played out in the past.

*1. Ambiguous Clauses in the Penal Code Can Lead to a Manager Being Removed from Office Under the New Banking Law*

The expanded significance of criminal investigations and convictions in the New Banking Law requires the existence of a clear and effective Penal Code. Article 19 of the New Banking Law mandates that those who are under criminal investigation, those who have been convicted for crimes against national security or violating private property rights, or those who have been convicted of serious crimes cannot serve as a member of the board of directors, members of the control commission, the general director, or the deputy general of the bank.<sup>105</sup> In addition to being broad, the New Banking Law poorly defines these potential grounds for removal. The New Banking Law also relies on the criminal system's ability to investigate carefully, since an investigation alone may lead to the loss of one's position in a company.<sup>106</sup>

Launching a criminal investigation on the basis of a legal claim in Vietnam is easy because the Penal Code is written broadly and ambiguously. According to Article 8 of the Penal Code, a crime is an act dangerous to society.<sup>107</sup> Such acts can be committed intentionally or unintentionally by a person having a capacity for penal liability.<sup>108</sup> Penal liability can be found when an actor infringes upon the independence, sovereignty, unity, and territorial integrity of the nation.<sup>109</sup> Furthermore, penal liability is also present when an actor infringes upon the political regime, the economic

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<sup>105</sup> New Law on the Organization and Operation of Commercial Banks, 2009, 59/2009/ND-CP, art. 19(b)-(d) (Viet.).

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

<sup>107</sup> Vietnam Penal Code, 1999, art. 8(1) (Viet.).

<sup>108</sup> *Id.* Article 12 stipulates that persons 16 or older shall have to bear penal liability for all crimes they commit. Furthermore, Article 13 states that persons who commit acts dangerous to society while suffering from mental disease or disease which deprives them of their capacity to be aware of or to control their acts, shall not bear penal liability.

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

regime, culture, defense, security, social order and safety, or the legitimate rights and interests of organizations.<sup>110</sup> Infringing upon the life, health, honor, dignity, freedom, property, as well as other legitimate rights and interests of citizens may also lead to penal liability.<sup>111</sup> Finally, the code adds that infringing upon other socialist legislation may also be considered a penal violation.<sup>112</sup> These broad crime definitions enable any act to be deemed worthy of investigation. Furthermore, because many of these crimes can be committed either intentionally or unintentionally, the subject of the investigation may be completely unaware of his or her liability until the lawsuit is initiated.

2. *Due Process Violations Allowed by a Weak Criminal Procedure Code Can Facilitate the Initiation of a Frivolous Lawsuit*

The Criminal Procedure Code also facilitates the initiation of frivolous lawsuits. According to Article 164, the party initiating the lawsuit must provide names and addresses of parties, the litigator, date of filing, name of court, and documents and evidence to prove that the lawsuit is well grounded, in addition to the signature and fingerprints of the litigator.<sup>113</sup> While stating a claim is facilitated by the ambiguity found in the Penal Code, certain loopholes in the Criminal Procedure Code can also lead to the filing of a lawsuit despite a weak legal claim.

Although Article 165 mandates that litigators accompany their lawsuit petitions with documents and or evidence to prove their claims are well grounded, what is deemed admissible is also problematic.<sup>114</sup> Documents strictly under the control of the government are sufficient for admission and serve as the basis for a legal claim.<sup>115</sup> Nicholson argues this is problematic because judicial independence in Vietnam is severely limited and courts are intrinsically connected to the Communist Party.<sup>116</sup> Therefore, it is easy for the government to file claims against a manager to have her removed from her position based on evidence within the exclusive domain of the state.

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

<sup>111</sup> *Id.*

<sup>112</sup> Vietnam Penal Code, 1999, art. 8(1) (Viet.).

<sup>113</sup> *Id.* art. 64(2)(a)-(k).

<sup>114</sup> *Id.* art. 165.

<sup>115</sup> Vietnam Penal Code, 1999, art. 64(2)(a)-(k) (Viet.).

<sup>116</sup> Penelope Nicholson, *The Vietnamese Judiciary: Politics of Appointment and Promotion*. 14 PAC. RIM. L. & POL'Y 1, 15 (2005).

3. *Government Control Over Management Through Faulty Criminal Procedure and Penal Codes Can Be Seen in the Andersen Case*

The case of Andersen, as mentioned in the introduction, demonstrates how Vietnam's poorly drafted criminal procedure laws can lead to one's removal from a management position. In this case, ambiguity within the Criminal Procedure and Penal Codes created significant problems with due process, making it very difficult for the foreign manager to assert a defense and very easy for the state to remove him from his managerial position in a multinational corporation. Although not based on the New Banking Law, this case demonstrates how existing laws in the Law on Credit Institutions and Enterprise Law have led to frivolous lawsuits and managers being removed from office. More cases such as Andersen's will probably follow, given the New Banking Law's expanded reliance on the Penal and Criminal Procedure Codes.

Andersen's case demonstrates how easy it is for the state or a disgruntled investor to file a lawsuit despite a lack of evidence. To date, it is questionable whether or not the two Irishmen lodged a valid complaint against Laking and McCormack.<sup>117</sup> Although British courts had dropped the case for lack of evidence, Vietnamese courts continued to investigate for months, leading to an eventual incarceration of Andersen, Hong, Laking, and McCormack.<sup>118</sup> As of June 2007, Laking, one of the founding members and principal defendants, is still awaiting trial while prosecutors continue to search for evidence to support their charges.<sup>119</sup> On the other hand, Andersen's case was not expedited until the Danish Foreign Minister raised the issue of Andersen's dire jail conditions and delayed trial date during an October 2004 meeting with the Vietnamese Foreign Minister.<sup>120</sup> Meanwhile, in the United Kingdom on November 5, 2008, the two Irishmen finally settled long-running property disputes, which include the assets for which Laking, McCormack, Andersen, and Hong were incarcerated.<sup>121</sup> Thus, while British courts dismiss cases for lack of evidence and British newspapers acknowledge the suspicious actions of wealthy businessmen taking on their

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<sup>117</sup> Fair Trials International, *supra* note 2.

<sup>118</sup> *Id.*

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

<sup>120</sup> Leif Carlsen, *A Danish Nightmare in Vietnam*, SCANDASIA.COM, Feb. 16, 2005, [http://www.scandasia.com/viewNews.php?news\\_id=1372&coun\\_code=vn](http://www.scandasia.com/viewNews.php?news_id=1372&coun_code=vn) (last visited Jan. 4, 2009).

<sup>121</sup> Mary Carolan, *Long-running Dispute Over Property Company Settled*, THE IRISH TIMES, Nov. 5, 2008, available at LEXIS, Irish Times File.

competitors in court,<sup>122</sup> Vietnamese courts continue to investigate and detain defendants.<sup>123</sup>

This case also demonstrates how difficult it is for parties to assert a defense. While incarcerated, when Andersen was able to receive visitors, the visitors were only allowed twenty minutes and were forced to speak in English in order for the guards to understand the content of their communication.<sup>124</sup> The case was not to be discussed and everything said was translated into Vietnamese while heavily armed policemen watched the visits intently.<sup>125</sup> After sixteen months of waiting, Andersen had the opportunity to plead his case in front of a judge and in the presence of his lawyers, the Danish ambassador, and members of the Danish press.<sup>126</sup> During trial however, Andersen's interpreters spoke broken and incompetent English, prompting protests from both the Danish ambassador and his British colleague.<sup>127</sup> As for Laking, he did not have any access to a lawyer for a period of four months.<sup>128</sup> He was not allowed to communicate with his lawyer in private, nor was his right for privileged correspondence with his lawyer upheld, while claimants were allowed to intimidate him on four occasions during his imprisonment.<sup>129</sup> During trial, the interpreters were supplied by the legal representatives of the claimants and were deeply biased.<sup>130</sup>

#### IV. PROBLEMS IN THE NEW BANKING LAW CAN BE RESOLVED BY RELYING ON CERTAIN EXISTING LAWS WHILE UPGRADING OTHERS

This section argues that despite its problems, the New Banking Law is a step in the right direction. Although evidence has shown that the government is willing to intervene in management, all is not lost. Problems found in the banking law can be resolved by focusing on existing laws such as the Enterprise Law and the Bankruptcy Law. Furthermore, by critically reviewing loopholes in the Penal and Criminal Procedure Codes, management rights, and civil rights in general, can improve.

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

<sup>123</sup> See Fair Trials International, *supra* note 2.

<sup>124</sup> Carlsen, *supra* note 120.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Fair Trials International, *supra* note 2.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

A. *The New Banking Law Should Rely on Updated Laws Such as the Law on Enterprises*

To remedy problems with the new banking law, the Vietnamese government can rely on the management requirements in the Law on Enterprises. Managers under this law are only required to act in the best interest of the company,<sup>131</sup> providing much leeway for managers to experiment and expand their businesses. They are also not bogged down by the formal requirements of the New Banking Law that require a baseline of education in order to serve as a manager.<sup>132</sup>

Results of the broad management requirements under the Enterprise Law are astonishing. Under the Enterprise Law, private enterprise in Vietnam has flourished. The law was enacted in 1999, and from 2000 to 2005, more than 180,000 enterprises were established, and dozens of existing enterprises expanded their activities.<sup>133</sup> These enterprises created one million new jobs each year and dramatically diversified the nation's industrial and agricultural capacity, boosted exports, and enhanced products offered by the services industry.<sup>134</sup>

B. *The New Banking Law Should Rely on the Bankruptcy Law as Opposed to Creating its Own Provisions on Bankruptcy*

While the Enterprise Law and the Law on Credit Institutions both defer to the Law on Bankruptcy to create consistency,<sup>135</sup> the New Banking Law on the other hand complicates matters by creating its own provisions on the issue.<sup>136</sup> The New Banking Law takes some provisions of the Law on Bankruptcy and interprets them more strictly for some positions and completely ignores them for others.<sup>137</sup> Although the Bankruptcy Law has

<sup>131</sup> Law on Enterprises, 2005, No. 60/2005/QH11, art. 42 (Viet.).

<sup>132</sup> This is especially problematic when Vietnam currently experiences low tertiary enrollment rates. See UNESCO INSTITUTE FOR STATISTICS, UIS STATISTICS IN BRIEF: VIETNAM (2007), [http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF\\_Language=eng&BR\\_Country=8680](http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF_Language=eng&BR_Country=8680) (last visited Mar. 28, 2010). Although the Banking Industry may require a higher level of technical training than enterprise management, baseline requirements create arbitrary guidelines, while the Enterprise Law creates general categories that still provide protection by requiring experience.

<sup>133</sup> Pham Chi Lan, Member, Prime Minister's Research Board (Viet.), Workshop 2 at the 11th Meeting of APEC Women Leaders' Network: Policy Environment in Vietnam Promote Enterprise Development (Sept. 19-22, 2006), <http://www.apecwln.org/index.php?s=pham+chi+lan> (last visited Dec. 6, 2009).

<sup>134</sup> *Id.*

<sup>135</sup> See Law on Enterprises, 2005, No. 60/2005/QH11, art. 160 (Viet.); see also Law on Credit Institutions, 1997, No. 02/1997/QH10, art. 98 (Viet.) (amended 2004).

<sup>136</sup> See *supra* Section II(B)(ii).

<sup>137</sup> *Id.*

many problems of its own, more consistency results when all three laws rely on its provisions. One commentator found inconsistency in a similar situation for instance when the Bankruptcy Law did not apply to small-scale enterprises.<sup>138</sup> Because small-scale enterprises relied on the Civil Code, which until recently had not been amended to refer to the Bankruptcy Law, small-scale enterprises were able to escape bankruptcy, while larger enterprises registered under the Law on Enterprises went bankrupt.<sup>139</sup> Second, the Bankruptcy Law provides a clear definition of bankruptcy, the categories of persons having the right to file bankruptcy petitions, and sanctions and additional restrictions for directors, board members, owners of bankrupt businesses, etc.<sup>140</sup> Many of these provisions may either be missing or conflicted out if drawn up independently in the New Banking Law. Thus, in addition to relying on management principles of the Enterprise Law, the New Banking Law should refer to the Bankruptcy Law, as opposed to attempting to create its own provisions on the topic.

*C. By Strengthening the Rights of the Accused, Civil Rights and the Rights of Managers Will Improve*

Lastly, by strengthening the rights of the accused, management rights and civil rights will improve. In order to do this, the Vietnamese government should revise the Penal and Criminal Procedure Codes. Although Vietnam has been a party to the International Covenant on Civil and Political Rights since 1982, peaceful government critics have been charged with "abusing democratic freedoms to infringe upon the interests of the State."<sup>141</sup> Despite implementing wide-reaching economic reforms such as the new banking law, Vietnam is still a monolithic one-party state and its citizens are often denied basic civil liberties.<sup>142</sup> Cases such as Andersen may become more prolific if Vietnam continues to rely on its ambiguous and faulty Penal and Criminal Procedure Code provisions. Amnesty International has urged the Vietnamese government to repeal or amend provisions in the 1999 Penal Code to ensure that ambiguous provisions

<sup>138</sup> John Gillespie, *Insolvency Law in Vietnam*, in *INSOLVENCY LAW IN EAST ASIA* 256 (Roman Tomasic ed., 2006).

<sup>139</sup> *Id.*

<sup>140</sup> Tran Tien Cuong, *Closing a Business: Bankruptcy Procedures Have Been Simplified*, *BUSINESS ISSUES BULLETIN*, Dec. 2005, at 4-5, [http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/BIBVN-14/\\$FILE/BIB-14-VN-EN.pdf](http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/BIBVN-14/$FILE/BIB-14-VN-EN.pdf) (last visited Jan. 19, 2010).

<sup>141</sup> *Viet Nam: Silenced Critics Must be Released*, *AMNESTY INT'L*, Apr. 24, 2007, available at *AMNESTY INT'L INDEX*, ASA 41/004/2007.

<sup>142</sup> Maran Turner, *Vietnam Failing Rights Standard*, *ASIA TIMES ONLINE*, Jul. 22, 2009, [http://www.atimes.com/atimes/Southeast\\_Asia/KG22Ac01.html](http://www.atimes.com/atimes/Southeast_Asia/KG22Ac01.html) (last visited Dec. 6, 2009).

relating to national security are clearly defined or removed, so they cannot be applied in an arbitrary manner.<sup>143</sup> Such amendments can not only affect an individual's civil and political rights, but economic rights as well, since the same provisions used to crack down on dissidents can be used by the government to crack down on unruly managers, as seen in the new banking law.

## V. CONCLUSION

Vietnam is currently privatizing its state-owned banks to meet the growing internal demand for efficient financial and credit services and to fulfill its international obligations. The New Banking Law represents a big step forward in Vietnam's equitization campaigns. The New Banking Law provides guidance on how equitized banks shall be managed. It is also far more sophisticated, as it expands aspects of the previous law that were previously vague.

In its expansion however, the New Banking Law has introduced a whole new set of problems. First, the law conflicts with the existing legal infrastructure regarding banks. In its attempts to bring banking management requirements in line with existing laws, it has gone so far as to expand and increase the requirements, which unnecessarily puts management at risk of losing their positions. Second, although the New Banking Law arguably addresses weaknesses in the previous law, loopholes in the legal infrastructure make it so that the government can intervene and strip an individual of rights normally afforded elsewhere—a troubling sign when management requirements and restrictions are increased. Last, increasing requirements, and evidence of a swift and unforgiving government, are not conducive to inspiring investor confidence, or recruiting international talent to help modernize or professionalize state-owned banks. These facts reveal a government that goes to extreme lengths to protect its interests, not one interested in standing behind the decisions of its banks and their managers.

Vietnam has proven to be aggressive and driven when it comes to economic growth. Equitizing its state-owned bank is a huge step in modernizing its economy. However, the New Banking Law serves as an example of the nation's attempt to release control over its state-owned banks while preserving avenues for intervention when necessary. Such attempts to maintain control can be self-destructive when the heavy hand of government strangles the already limited channels for private investment and

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<sup>143</sup> *Socialist Republic of Viet Nam: Amnesty International Submission to the UN Universal Periodic Review*, AMNESTY INT'L, May 2009, available at AMNESTY INT'L INDEX, ASA 41/007/2008.



development. However, existing legislation such as the Enterprise Law proves that Vietnam is capable of releasing control and allowing more freedom and autonomy to managers. Changes to banking laws make no difference, however, if problematic provisions in the Penal and Criminal Procedure Codes continue to provide the government with expansive authority to intervene in private enterprise. Relaxing management regulations while shoring up civil liberties will greatly enhance government attempts to modernize the country's banking industry.

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