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Abstract

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CORPORATE GOVERNANCE OF LISTED COMPANIES IN VIETNAM

TOAN LE MINH* AND GORDON WALKER**

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Introduction

Corporate governance refers to the structures and processes for the direction and control of companies. It defines the role of the management, board of directors, controlling shareholders, minority shareholders and other stakeholders. Effective corporate governance enhances the performance of companies, increases access to outside capital and contributes to sustainable economic development.¹

For emerging market countries, the enhancement of corporate governance can serve a number of important public policy objectives. Good corporate governance reduces emerging market vulnerability to financial crises, reinforces property rights, reduces transaction costs and the cost of capital, and leads to capital market development. In contrast, weak corporate governance reduces investor confidence and discourages outside investment. Also, as pension funds continue to invest more in equity markets, good corporate governance is crucial for preserving retirement savings.² Over recent years, the importance of corporate governance has been highlighted by

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¹ See further, World Bank Representative in Vietnam (WBVN), 'Corporate Governance Country Assessment: Vietnam' (2006) 1-5; Organisation for Economic Co-operation and Development (OECD), 'The OECD Principles of Corporate Governance' (2004) 9-14; Organisation for Economic Co-operation and Development (OECD), 'White Paper on Corporate Governance in Asia' (2003) 5-10.

² Ibid.

academic research which links good corporate governance practices to significant increases in a firm's EVA (economic value added), as well as higher productivity and a lower risk of systemic financial failures.³

The framework for corporate governance in Vietnam, especially for listed companies, is in the early stages of development. A high degree of informality still exists in the corporate sector. The unofficial securities market is significantly larger than the formal market and there remains a large presence of state ownership in enterprises. Institutions responsible for the regulation, enforcement and development of the capital market have limited capacity and resources. Among other key issues: *investor protection is inadequate, related-party transactions are pervasive, compliance with accounting standards is insufficient and disclosures of quality information are limited.*

This study examines the corporate governance of listed companies. This study proceeds in three parts. Part I provides a background to the corporate governance. Part II outlines the current legal framework relating to the corporate governance of listed companies. Part III assesses the corporate governance of listed companies in the light of the implementation principles identified by OECD in relation to investor protection, related-party transactions, accounting standards and disclosure of information. Some case studies of the corporate governance of listed companies are provided. The study concludes that listed companies need to improve their corporate governance to ensure market transparency, investor protection and effective management in order to ensure better development of the securities market.

Legal Background to Corporate Governance

1. The development of a legal framework for corporate governance in Vietnam

Under the *Doi Moi* policy, a multi-sectored market economy (*nen kinh te thi truong nhieu thanh phan*) and business freedom rights (*quyen tu do kinh doanh*) were two objectives in the *Constitution 1992*.⁴ A variety of laws were promulgated after 1986 such as the *Law on Foreign Direct Investment in Vietnam 1987* (*Luat Dau tu nuoc ngoai tai Vietnam*), the *Company Law 1990* (*Luat cong ty*), the *Private Enterprise Law 1990* (*Luat*

³ See further generally, Thomas Clarke (ed), *Theories of Corporate Governance: the Philosophical Foundation of Corporate Governance* (2004); Jeffrey N Gordon and Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (2004); Jean Jacques du Plessis, James McConvill and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2005); John Farrar, *Corporate Governance: Theories, Principles, and Practice* (2 ed, 2005); John Farrar (ed), *Comparative Corporate Governance* (2003); John Farrar, *Corporate Governance in Australia and New Zealand* (2001); Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Perspective* (2002).

⁴ See Articles 15, 16, 21, 25, 27, and 58 of the *Constitution 1992*.

doanh nghiệp tư nhân), the *Law on Encouragement of Domestic Investment 1994* (*Luật Khuyến khích Đầu tư trong nước*), the *State-Owned Enterprises Law 1996* (*Luật doanh nghiệp Nhà nước*) and the *Law on Cooperatives 1996* (*Luật Hợp tác xã*). These provided domestic and foreign investors with the right to operate a business under various forms such as limited liability companies, shareholding companies, proprietors, private enterprises, partnerships, cooperatives, and joint-venture companies.⁵

In 1999, the *Enterprises Law 1999* (*Luật doanh nghiệp*) was enacted to replace the *Company Law 1990* and the *Private Enterprise Law 1990*. Relying on the previous company statutes and increasingly borrowing corporate legal rules from Western jurisdictions, especially Anglo-American law, the *Enterprises Law 1999* provided for the formation of various types of business associations. Besides the two company types provided for by the *Company Law 1990* (the LLC and the SC), the *Enterprises Law 1999* provided for two additional business association forms: (i) one-organization owned LLCs (*công ty trách nhiệm hữu hạn một thành viên là tổ chức*) and (ii) partnerships (*công ty hợp danh*). In contrast to the *Company Law 1990*, the compulsory governance structure of a multiple shareholder LLC was required to have: (i) a members' council (MC- *Hội đồng thành viên*) consisting of all company shareholders; (ii) a chairperson of the MC (*Chủ tịch Hội đồng thành viên*); (iii) the managing director (*Giam đốc* or *Tổng giam đốc*) (MD); and a board of supervisors (*Ban kiểm soát*) (where there are more than 11 shareholders).⁶ This Law provided that a SC must have (i) a shareholders' meeting (*Dại hội đồng cổ đông*) which comprised all shareholders who have voting rights; (ii) a board of management (*Hội đồng quản trị*) led by a chairperson; (iii) a CEO (*Giam đốc* or *Tổng giam đốc*); and (iv) a board of supervisors

⁵ The *Company Law 1990* provided for two popular entities: limited liability companies (LLC) and shareholding companies (SC). The governance structure of a SC consisted of a shareholders' meeting (*dại hội đồng cổ đông*), a board of management (*hội đồng quản trị*), and two supervisors (*kiểm soát viên*). The management board of a SC selected the managing director (*giam đốc* or *tổng giam đốc*) of the company. According to this Law, an LLC with more than 11 shareholders must have an internal governance structure like a SC. For other LLCs, governance structures were much simpler, requiring only a managing director with neither a shareholders' meeting nor a management board. Although the *Company Law 1990* had shortcomings (for example, an irrational focus on administration, a lack of business freedom, and 'poor' corporate governance rules), it was significant as it saw the re-emergence of company law and business freedom in Vietnam after a long period of its absence. See further, Articles 37, 38, and 40 of the *Company Law 1990*; Central Institute for Economic Management (CIEM), 'Danh gia Luật Công Ty, Luật Doanh Nghiệp Tư Nhân, và Nghị định 66/HĐBT (Transl. Assessment review of the Company Law, Private Enterprise Law, and Decree 66/HĐBT)' (Central Institute for Economic Management (CIEM), 1998) 16-28.

⁶ See Article 34, the *Enterprises Law 1999*.

(*Ban kiem soat*) (where there are more than 11 shareholders).⁷ In this governance structure, the shareholders' meeting is the supreme decision-making body of the company and elects the board of management and the board of supervisors. There were, however, certain problems with the corporate governance regime provided by this Law, such as inflexible corporate governance structures, unclear functions of the management board and the managing directors and 'poor' investor protections mechanisms.⁸ Accordingly, the *Enterprises Law 1999* was replaced by *Enterprises Law 2005* after just six years. The *Enterprises Law 2005* is the most important corporate legislation in Vietnam and it forms the foundation for the Vietnamese corporate governance system.⁹

According to the *Enterprises Law 2005*, a company can take one of the following forms:

- Single member limited liability company (*Cong ty trach nhiem huu han mot thanh vien*-SLLC);
- Multiple member limited liability company with two or more members (*Cong ty trach nhiem huu han hai thanh vien tro len*-MLLC);
- Shareholding company (*Cong ty co phan*-SC); and
- Partnership (*Cong ty hop danh*).

In general, an LLC under the *Enterprises Law 2005* is similar to a proprietary company under the *Corporations Act 2001* (Cth) of Australia and the GmbH of Germany. It is also similar to a close corporation in US company law and a private company in the law of the UK.¹⁰ Under the *Enterprises Law 2005*, a MLLC is a business organisation

⁷ Ibid, Articles 69-85.

⁸ See further, Central Institute for Economic Management (CIEM), GTZ and UNDP Vietnam, 'Thoi diem cho su thay doi: Danh gia Luat doanh nghiep va Kien nghi sua doi (Trans. High Time for another Breakthrough: Review of the Enterprise Law and Recommendations for Change)' (2004) 1-25; Vien Quan ly Kinh Te Trung Uong (CIEM) and To hop tac ky thuat Duc (GTZ), 'The Six -year Report on the Implementation of the Enterprises Law: Highlight Issues and Experienced Lessons (6 nam thi hanh Luat doanh nghiep: Nhung van de noi bat va bai hoc kinh nghiem)' (2006) 10-15.

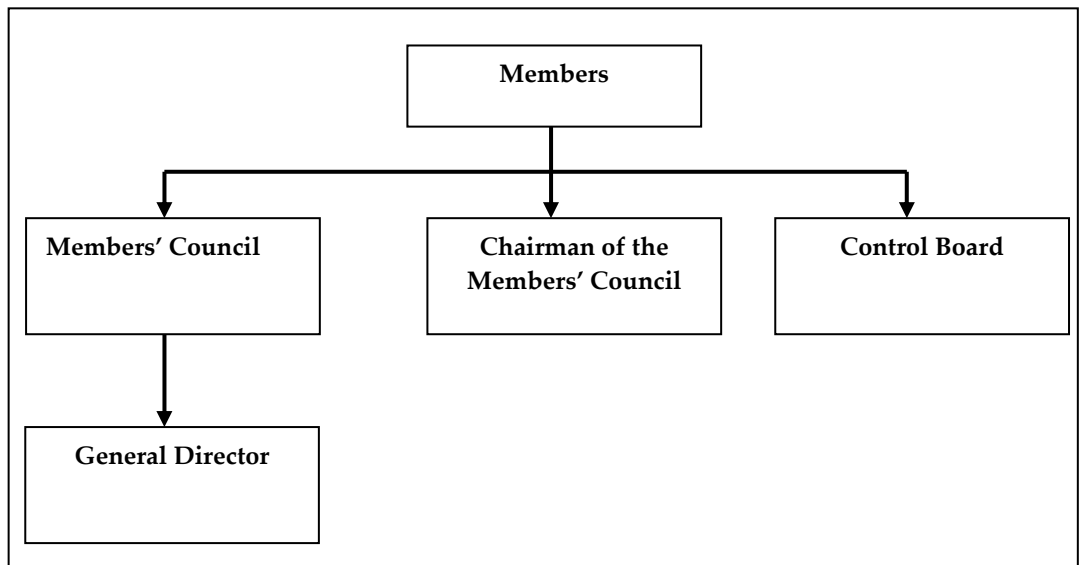
⁹ The *Enterprises Law 2005* passed on 29 November 2005. This Law came in force on 1 July 2006. Although the *Enterprises Law 2005* is largely based on the *Enterprises Law 1999*, it also contains other legal principles borrowed from Anglo-American law.

¹⁰ For example, a proprietary company under Australian company law is a company that must (i) have no more than 50 non-employee shareholders; (ii) not engage any activities that would require disclosure to investors (such as issuing shares or debentures under Chapter 6D of the *Corporations Act*), and, (iii) have the abbreviation 'Pty' in its name. See ss 113(1), 113(3), 148(2), 149(1)c of the *Corporations Act 2001* (Cth).

that (i) is a separate legal entity; (ii) has no more than 50 members whose liability is limited to the amount they undertake to contribute to the company's share capital, and, (iii) has no right to issue shares to the public.¹¹

Regarding its management structure, an MLLC must have (i) a Members' Council (MC) consisting of all members; (ii) a Chairman of the MC appointed by the Members' Council, and (iii) a Director or General Director appointed by the MC, and, (iv) a Control Board (only compulsory where they are more than 11 members). The management structure of a MLLC can be depicted as follows (see Figure 1).¹²

Figure 1: Management structure of a MLLC



In Vietnam, a SC is similar to a public company in the company law of Australia and the UK, a shareholding company in Chinese company law and an AG in German company law. Accordingly, a SC is a business organization that (i) is a separate legal entity; (ii) the share capital is divided into equal parts as shares; (iii) must have at least three shareholders whose liability is limited to the amount contributed to the company's share capital; and (iv) has a right to issue securities to the public.¹³ In

¹¹ See Article 38, the *Enterprises Law 2005*. Where a SLLC is owned by one institution or one natural person, liability is limited to the amount they undertake to contribute to the company's share capital. A SLLC may not also issue shares. *Ibid*, Article 63.

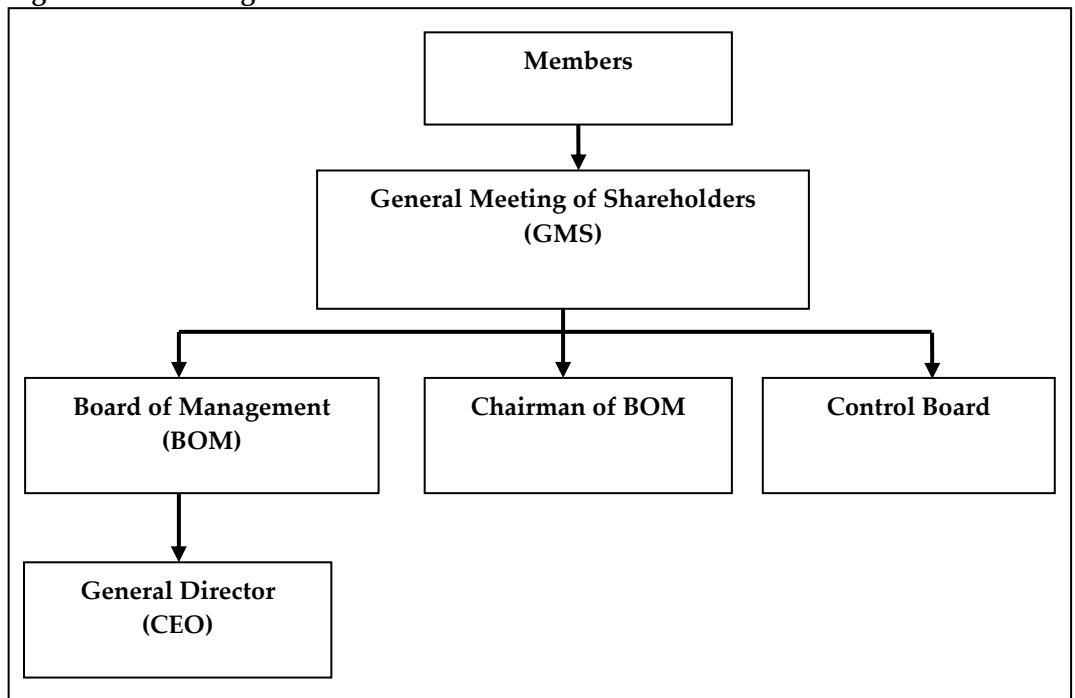
¹² *Ibid*, Article 46.

¹³ *Ibid*, Article 77.

addition, a SC's shares may be listed on the securities market if it meets certain requirements provided for by the *Securities Law 2006* and its subordinate legislation.

The management structure of a SC must have: (i) a GMS (GMS) consisting of all shareholders who have the right to vote; (ii) a Board of Management (BOM) consisting of between 3 to 11 persons appointed by the GMS; (iii) a Chairman of the BOM appointed either by the GMS or BOM; (iv) a Director of General Director (CEO) appointed by the BOM; and (v) a Control Board of a SC has 11 or more individual shareholders or a corporate shareholding more than 50 per cent share (see Figure 2).¹⁴

Figure 2: The management structure of a SC



Although the framework for corporate governance in Vietnam – especially as regards listed companies, is in the early stages of development, the *Enterprise Law 2005* and its regulations provide the fundamental regulatory framework for corporate governance of listed companies.

¹⁴ Ibid, Article 95.

2. What constitutes the regulatory framework for corporate governance in Vietnam?

2.1. *The Enterprises Law 2005: the most fundamental of corporate governance regulation*

The main sources of corporate governance in Vietnam are legislation and the company Charter (*Dieu le Cong ty*). However, the main problems of corporate governance in Vietnam arise from reliance on subordinate legislation, the inefficiency of the company constitution and lack of judicial transparency.

Corporate governance rules come from statutes enacted by the Parliament and subordinate legislation as promulgated by governmental bodies under the *Law on Promulgation of Legislation 1996* (as amended). Among the pieces of legislation that provide rules for governing companies, the *Enterprises Law 2005* is the most fundamental corporate governance regulation for Vietnamese companies.

Besides the *Enterprises Law 2005*, other statutes also provide a few additional rules governing companies, especially for particular business areas such as banking, auditing, insurance and securities. In this way, corporate governance rules can be found in the *Law on Credit Organization 1997* (as amended) (*Luat cac to chuc tin dung*), and the *Law in Insurance Business 2000* (*Luat kinh doanh bao hiem*), the *Law on Accounting 2003* (*Luat Ke Toan*), and the *Securities Law 2006*. For example, although the *Securities Law 2006* provides that Vietnam's listed companies must be governed in accordance with the *Enterprises Law 2005*, it also prescribes additional rules for listing stocks, transparency and the disclosure of information by public companies (*Cong ty dai chung*).¹⁵

The company Charter is built on legal rules provided for by the *Enterprises Law 2005* and as decided at the shareholders' meeting. It must consist of rules in relation to the internal governance structure; the power, functions and tasks of each corporate governance body, and, other important matters of the company. Under the *Enterprises Law 2005*, a company has more power and discretion to decide its internal corporate governance matters through a constitution.¹⁶ More particularly, many

¹⁵ See Articles 25, 28 the *Securities Law 2006*. A public company means a shareholding company which belongs to one of the following three categories: (a) a company which has made a public offer of shares; (b) a company which has shares listed on the Stock Exchange or a Securities Trading Centre; (c) a company which has shares owned by at least one hundred (100) investors excluding professional securities investors and which has a paid-up charter capital of ten (10) billion Vietnamese dong or more.

¹⁶ Such as rights and obligations of shareholders; management and organizational structure; procedures for passing resolutions of the company; rules for resolution of internal disputes; bases and method of calculating remuneration, wages and bonuses of managers and

articles of the *Enterprises Law 2005* enable a company to self-regulate via its constitution in a manner similar to the replaceable rules in *Australia's Corporation Act 2001 (Cth)*.¹⁷ Any corporate governance issues that are not provided for by company legislation can be decided by shareholders in the company constitution.¹⁸ In this way, for example, a company Charter can set down voting requirements to enhance minority investor protection and supervise related party transactions. Besides the mandatory rules prescribed by the *Enterprises Law 2005*, a company constitution can also distribute more power to specific governance bodies of a company such as the shareholders' meeting and the board of management. However, in practice, Vietnamese investors do not appear to pay much attention to a company's Charter.

In practice, most Vietnamese companies have a Charter with the same requirements, quorum and ratios as prescribed by the *Enterprises Law 2005*.¹⁹ There are two possible reasons. Firstly, majority shareholders of a company may not favour provisions in the Charter that provide rules for stronger minority shareholder protection. This appears to be consistent with Backman's findings that sharing power through a constitution appears to be avoided in Asian companies.²⁰ Secondly, most private companies are family-controlled and tend to rely on personal relationships consistent with the notion that 'internal management is a matter for personal relationships

members of the inspection committee or of inspectors. See Article 22, the *Enterprises Law 2005*.

¹⁷ Under the *Enterprises Law 2005*, many corporate governance matters of a company can be decided by shareholders under the company's Charter. See, e.g., Articles 41, 51, 52, 64, 65, 70, 71, 74, 79, 102, 104 of the Law. For replaceable rules in Australian company law, see ss 140, 141 the *Corporation Act 2001 (Cth)*.

¹⁸ For example, the *Enterprises Law 2005* provides that a resolution on amendment of the constitution must be approved by at least 75 per cent of total votes of participating shareholders. This requirement can be prescribed by the constitution at a higher level such as at 80 per cent or more.

¹⁹ For listed companies, the Charter must used is the *Model Charter 2007*. See further, Decision 15/2007/QĐ-BTC of the Finance Minister dated 19 March 2007 on the Model Charter of listed companies (*Model Charter 2007*). Some provisions of the *Model Charter 2007* met with protests from lawyers such as art 40.1 vs art 96.1 of the *Enterprise Law 2005*; art 19.10 vs 79.1 of the *Enterprise Law 2005*, art 16.1 vs 104.3. (a, b) of the *Enterprise Law 2005*. See further, Bao Duy, 'Rắc rối Điều lệ mẫu cho công ty niêm yết (A Complicated Model Charter for Listed Companies)', *Dau Tu Chung Khoan* (Hanoi), 16 April 2007, available at <http://www.vir.com.vn/CLIENT/DautuChungkhoan/content.asp?CatID=30&DocID=12813>; <http://www.tinnhanhchungkhoan.vn/tintuc.php?nid=363>; <http://www.tincp.com/view.php?t=716527>; all last visited 10 July 2008.

²⁰ See Michael Backman, *Asian Eclipse: Exposing the Dark Side of Business in Asia* (1999) 21.

guided by morality and sentiment and the state law should not intrude'.²¹ In 2004, research by the CIEM, the GTZ and UNDP Vietnam found that very few Vietnamese shareholders used their statutory rights to make a quorum and shareholders were more inclined to use the company charter than the *Enterprise Law*.²² The benefits provided by the legislative provisions and the 'enabling' statutory rules of the *Enterprises Law 2005* are not used in practice.

It should be noted that in common law countries like the US, the UK and Australia, judges have an important role in interpreting statutory principles and providing additional rules for corporate governance. Unlike many other jurisdictions, however, judge-made law is not a source of law and corporate governance regulation in Vietnam. Further, the lack of full judicial transparency does not assist corporate governance in Vietnam.

2.2. Listing rules by securities regulators, accounting and auditing standards

In Vietnam, the *Securities Law 2006* provides that the SE and STCs can issue listing rules once they obtain the approval of the SSC. However, despite the rapid expansion of the securities market, the Vietnamese stock regulators have not promulgated listing rules until very recently. It is suggested that Vietnam's stock should adopt appropriate regulations from their counterparts in advanced and other transitional economies to provide listing rules for the corporate governance of listed companies.

Auditing and accounting standards also have a role in the corporate governance regulatory framework. However, it is argued that (i) professional associations of accountants and auditors in Vietnam have a relatively trivial role in promoting effective accounting and auditing regimes; and (ii) Vietnam's accounting and auditing standards promulgated by the Ministry of Finance (MOF) need to be improved.

First, unlike some other economies, where auditing and accounting standards are often prescribed by professional associations of accountants and auditors, Vietnamese auditing and accounting standards are promulgated by the MOF. In contrast, the Vietnam Association of Accountants (*Hoi Ke toan Vietnam - VAA*) and the Vietnam Association of Certified Public Accountants (*Hoi kiem toan vien hanh nghe Vietnam - ACPA*) have a trivial role in administering accounting and auditing

²¹ See John Stanley Gillespie, *Transplanting Commercial Law Reform: developing a 'rule of law' in Vietnam* (2006) 272.

²² See Central Institute for Economic Management (CIEM), GTZ and UNDP Vietnam, 'Thoi diem cho su thay doi: Danh gia Luat doanh nghiep va Kien nghi sua doi (Trans. High Time for another Breakthrough: Review of the Enterprise Law and Recommendations for Change)' (2004) 37.

standards and are relatively dependent on the MOF, which administers these matters.²³ However, in the next few years, the MOF aims to transfer some functions of administering auditing and accounting practice from the MOF to these associations.²⁴

Second, Vietnam does not have auditing and accounting standards as they appear in advanced economies. The existing 26 accounting standards and 38 auditing standards promulgated by the MOF - are incomplete. Further, some of the contemporary accounting and auditing standards of Vietnam do not meet international standards and do not promote 'good' corporate governance of companies.²⁵

2.3. *Corporate governance standards*

In many economies, codes of corporate governance and best practice have been promoted by various agencies including stock regulators or professional agencies. Nevertheless, among codes of corporate governance on a worldwide perspective, the *OECD Principles of Corporate Governance* is most significant, and 'undoubtedly had key impact on the development of corporate governance globally'.²⁶ As will be seen, it will be important for Vietnam to adopt the OECD principles if it is to develop its economic infrastructure.

a. The OECD Principles of Corporate Governance

The latest revised version of *OECD Principles of Corporate Governance* was released in 2004 in response to a number of concerns about corporate governance in advanced economies. The Principles have been supported by major international institutions like the World Bank, the Global Governance Forum, and the International Corporate Governance Network. They have also been widely adopted by both OECD and non-OECD jurisdictions such as Greece, Czech, Poland and China. Corporate governance has been adopted as one of twelve core best-practice standards by the international financial community. The World Bank is the assessor for the application of the *OECD Principles of Corporate Governance* and its assessments are part of the International

²³ For ethics standards in auditing and accounting practice, see generally, Decision No. 87/2005/QD-BTC of the MOF. For issuing regulations on the selection of auditing enterprises for accreditation to audit issuing organizations, listed organizations and securities business organizations, see Decision 89/2007/QD-BTC dated 24 October 2007.

²⁴ See further, Decision No. 47/2005/QD-BTC dated 14 July 2005 of the MOF.

²⁵ See Decision 38/2000/QD-BTC dated 14 March 2000 of the MOF and Decree 105/2004/ND-CP dated 30 March 2004 of the Government.

²⁶ See Mallin, n 31 above, 26.

Monetary Fund (IMF) program on Reports on the Observance of Standards and Codes (ROSC).²⁷

The Principles are intended to assist the OECD and non-OECD countries 'to evaluate and improve the legal, institutional and regulatory framework for corporate governance', and 'to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role' in the corporate governance process. The Principles cover broad areas of corporate governance (see Figure 5.8):

- (i) ensuring the basis for an effective corporate governance framework;
- (ii) the rights of shareholders and key ownership functions;
- (iii) the equitable treatment of shareholders;
- (iv) the role of stakeholders in corporate governance;
- (v) disclosure and transparency; and
- (vi) the responsibilities of the board.²⁸

Although the OECD Principles focus on corporate governance matters of publicly traded companies on the basis of the separation of ownership and control, to some extent they are also useful for the improvement of corporate governance in non-traded companies, including privately held and state-owned enterprises. More importantly, a key reason why the Principles have been widely accepted is that they are based on common elements of corporate governance, embracing different corporate governance models found in the OECD and non-OECD economies.

b. The Code of Corporate Governance in Vietnam.

Codes of corporate governance are important sources for corporate governance in many economies ranging from advanced economies to transitional economies. Until March 2007, Vietnam lacked this source of corporate governance regulation.²⁹ On 13

²⁷ The goal of the ROSC initiative is to identify weaknesses that may contribute to a country's economic and financial vulnerability. Each corporate governance ROSC assessment reviews the legal and regulatory framework, as well as practices and compliance of listed firms, and assesses the framework relative to an internationally accepted benchmark. As of June 2005, 40 assessments had been completed in 40 countries around the world. See the World Bank website available at www.worldbank.org.

²⁸ See Organisation for Economic Co-operation and Development (OECD), 'The OECD Principles of Corporate Governance' (2004) 11.

²⁹ Before March 2007, none of the governmental agencies such as the SSC, stock regulatory or business organizations like Vietnam Chamber of Commerce and Industry (VCCI) had

March 2007, the MOF issued the *Code of Corporate Governance for Listed Companies* (hereinafter Code). This Code was developed under the *Enterprises Law 2005* and the *Securities Law 2006*. It intended to implement 'the best international practice on corporate management suitable to the conditions of Vietnam to ensure a stable development of stock market and a transparent economy in Vietnam'.³⁰ This Code is, in fact, a piece of subordinate legislation (with mandatory rules) and is therefore different from a voluntary code of corporate governance in advanced economies such as the *OECD Principles of Corporate Governance*, the *German Corporate Governance Code*, and the *Chinese Code of Corporate Governance for Listed Companies*.

Under the Code, the term 'corporate governance' refers to the systemic principles which ensure a listed company is managed in a way that respects the rights of shareholders and related persons. More specifically, rules of corporate governance shall:

- Ensure an effective managerial structure;
- Ensure the rights of shareholders;
- Ensure fair and impartial treatment as between shareholders;
- Ensure roles of persons with related interests;
- Ensure transparency during the company's activities;
- Ensure that the board of management and the board of controllers lead and manage the company effectively.³¹

The main principles of corporate governance applicable to a listed company under the Code include: (i) Rights of shareholders; (ii) General meeting of shareholders; (iii)

introduced a code of corporate governance or code of conduct to promote good corporate governance. Additionally, Vietnam has no working committee on corporate governance. It is noteworthy that Mekong Capital - a private institution - introduced the *Recommendations on Corporate Governance Practices 2003*, the *Introduction to Internal Controls 2004*, and the *Guidelines for Conducting a Meeting of the Board of Directors or a Meeting of Shareholders 2005*. These guidelines were largely transplants from corporate governance standards in advanced economies, but their quality was far from those in Western jurisdictions. However, most Vietnamese companies ignored the recommendations by Mekong Capital. See further the Mekong Capital website at <http://www.mekongcapital.com/downloads.htm>, last visited 10 July 2007.

³⁰ See Decision 12/2007/QĐ-BTC dated 13 March 2007 of the MOF on Code of Corporate Governance for Listed Companies on Stock Exchange/Securities Trading Centers (*Quy che Quan tri Cong ty ap dung cho cac Cong ty Niem yet tren So giao dich chung khoan/ Trung tam giao dich chung khoan*).

³¹ *Ibid*, Article 1.1.a.

Board of Management; (iv) Control Board; (v) Conflicts of interest and related party transactions and (vi) Information disclosure and transparency.

The current corporate governance of listed companies

The legal framework and institutional foundation for the capital markets in Vietnam are in an early stage of development. As mentioned above, the legal framework for corporate governance consists of in the *Enterprises Law 2005*, the *Securities Law 2006*, the *Code of Corporate Governance of Listed Companies 2007* (Code) and the *Model Charter 2007*. However, Vietnam faces significant challenges in implementing these laws and strengthening the institutions responsible for the regulation, enforcement and development of good corporate governance. This section discusses some aspects of the current framework of corporate governance and its implementation in Vietnamese listed companies.

1. The terms ‘public company’ and ‘listed company’

The *Enterprises Law 2005* offers no definition of a public company and a listed company; these are provided for in *Securities Law 2006*. Under the *Securities Law 2006*, the term ‘public company’ refers to a shareholding company which belongs to one of the following three categories:

- (i) A company which has made a public offer of shares;
- (ii) A company which has shares listed on the Stock Exchange or a Securities Trading Centre;
- (iii) A company which has shares owned by at least one hundred (100) investors excluding professional securities investors, and which has paid-up charter capital of VND ten (10) billion or more.³²

A public company has the rights stipulated in the *Enterprises Law 2005* and in other laws. Public companies also have the following obligations: (i) information disclosure; (ii) complying with corporate governance principles; (iii) operating a

³² See Articles 25-26, *Securities Law 2006*. The shareholding companies defined in this category must lodge public company file required by the SSC within a time-limit of ninety (90) days from the date such shareholding company becomes a public company. A public company file must contain the following documents: (a) Charter of the company; (b) Copy business registration certificate of the company; (c) Summarized information about the business operational scale, managerial organization and shareholding structure; (d) Financial statements for the most recent year. Within a time-limit of seven (7) days from the date of receipt of a valid file, the SSC shall be responsible to announce the name, business contents and other relevant information about the public company on the information network of the SSC.

register and securities depository at a Securities Depository Centre; and (iv) other obligations as stipulated in the *Enterprises Law 2005* and in other laws.³³

The *Securities Law 2006* states that, public companies must comply with the provisions of corporate governance in the *Enterprises Law 2005*.³⁴ Moreover, any organisation or individual which becomes a major shareholder of a public company (owning from 5 per cent or more of the voting shares) must notify to the public company, the SSC and the SE or STC where the shares of such public company are listed within a time-limit of seven (7) days from the date of becoming a major shareholder.³⁵

Under the Code, the term 'listed company' means any shareholding company with its shares listed on the Stock Exchange or a STC.³⁶ A listed company is a public company which is obliged to abide by the *Enterprises Law 2005* and the *Securities Law 2006*. In accordance with the Code, a listed company must have a company charter in the standard *Model Charter 2007* issued by the MOF. In addition to the Charter, a listed company must also pass internal regulations on corporate governance including the matters stipulated in Article 4 of the Code.³⁷

2. Current legislation on corporate governance of listed companies

Under the Code, the main principles of corporate governance applicable to a listed company include the following: (i) internal governance structures of a listed company; (ii) rights of shareholders; (iii) conflict interest and related party transaction; and (iv) information disclosure and transparency. This sub-section discusses current corporate governance of listed companies. It argues that current

³³ Ibid, Article 27.

³⁴ Ibid, Article 28.

³⁵ Ibid, Article 29. A report on ownership by a major shareholder contains the following particulars:

(i) In the case of a major shareholder being an organization, the name, address and business line of the major shareholder; in the case of a major shareholder being an individual, the full name, age, nationality, permanent residence and profession of the major shareholder;

(ii) The number of shares and the percentage of shares which such organization or individual owns, or owns jointly with other organizations and individuals, compared to the total number of currently circulating shares.

³⁶ See Article 2.1.b, the *Code of Corporate Governance of Listed Company*.

³⁷ Such as rule and procedures for (i) convening and voting at the general meeting of shareholders; (ii) nominating, standing for election, electing and dismissing members of the board of management; (iii) holding meetings of the board of management; (iv) selecting, appointing and dismissing senior managers; (v) co-ordination between the board of management, the board of controllers and the board of directors.

corporate governance of Vietnamese listed companies shows a lack of flexibility, accountability and efficiency. It does not meet the requirements of 'good' corporate governance for listed companies on the securities market in Vietnam.

2.1. Internal governance structures of Vietnamese listed companies

2.1.1. Internal governance structure of listed companies

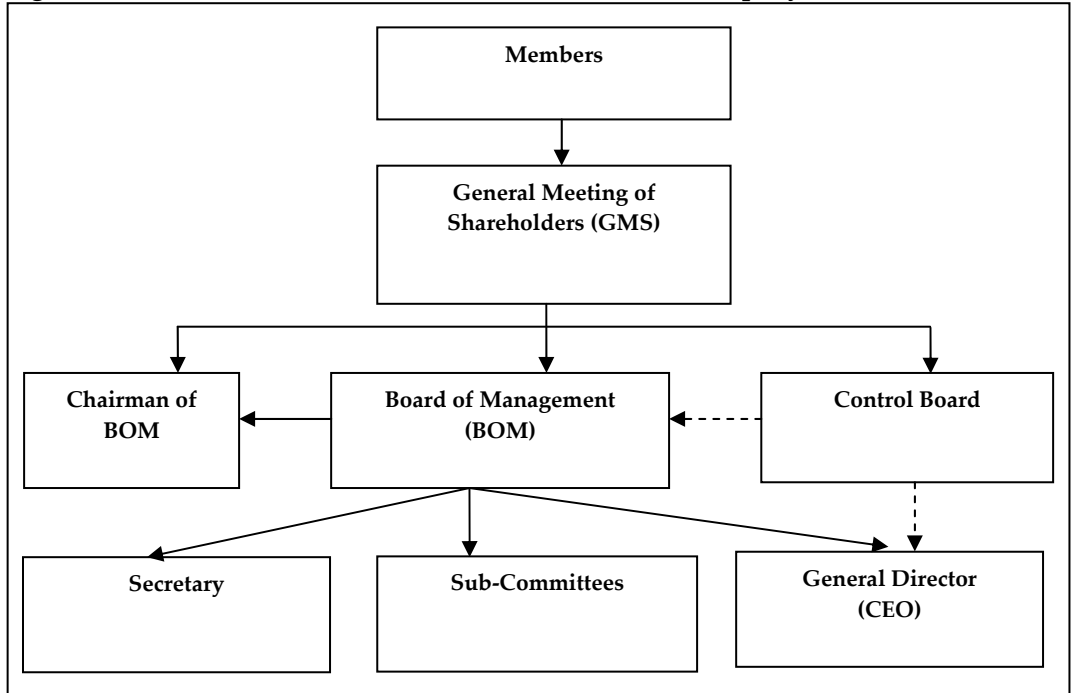
The internal governance structure of Vietnamese listed companies applies to companies listed on the Stock Exchange or a STC within the territory of Vietnam. These companies, at first, are shareholding companies operating under the provisions of the *Enterprises Law 2005*.³⁸ However, listed companies are also public companies that must abide by the provisions of the *Securities Law 2006*. The internal governance structure of Vietnamese listed companies is built on the *Enterprises Law 2005*, *Securities Law 2006*, *Model Charter 2007* and, especially, the Code.³⁹

According to the Code, the internal structure of Vietnamese listed company includes a GMS (GMS), a Board of Management (BOM), a Director or General Director (CEO) and a Control Board. The BOM may set up sub-committees to assist its activities (such as development policy, internal audit, human resources, salary and bonus). The BOM must appoint at least one person to act as a company secretary (see Figure 3).

³⁸ Article 2, the *Code of Corporate Governance for Listed Companies*.

³⁹ *Ibid*, Article 1.

Figure.3: The Internal Governance Structure of a Listed Company



Notes: Appointment and Removal: —————> Supervision: - - - - ->

2.1.1.1. General Meeting of Shareholders (GMS)

The *Enterprises Law 2005* sets out in detail the regulations regarding the procedures of the GMS.⁴⁰ Accordingly, the GMS must include all shareholders holding voting shares and it constitutes the highest management body of a SC.⁴¹ Ordinary shareholders (*co dong pho thong*) and voting preference shareholders (*co dong uu dai bieu quyet*) can attend the GMS.⁴² If a shareholder is a corporate entity, it must appoint one or more authorised representative(s) to participate in the GMS.⁴³ The list of shareholders entitled to attend the GMS is determined by the register of company shareholders which must be settled no later than thirty (30) days prior to the opening date of the GMS.⁴⁴

⁴⁰ See generally, Articles 96-107, the *Enterprises Law 2005*.

⁴¹ *Ibid*, section 1, Article 96.

⁴² *Ibid*, Articles 78, 81-83.

⁴³ *Ibid*, section 3, Article 96.

⁴⁴ *Ibid*, Article 98.

The GMS must hold a meeting at least once a year. Extraordinary meetings may be convened by the BOM in certain prescribed circumstances.⁴⁵ These include inter alia (i) requests of the Control Board⁴⁶ and (ii) a shareholder or group of shareholders holding more than 10 per cent of the total ordinary shares for a consecutive period of 6 months or more.⁴⁷ The location of a meeting of the GMS must be within the territory of Vietnam.⁴⁸ The GMS must hold an annual meeting within a time-limit of four months from the end of the financial year. At the request of the BOM, the business registration office may extend that time-limit, but not beyond six (6) months from the end of the financial year.⁴⁹

A regular meeting of the GMS considers the following matters: (a) annual financial statements; (b) the report of the BOM assessing the efficiency of the company's

⁴⁵ Under section 3, Article 97 of the *Enterprises Law 2005*, the BOM must convene an ad-hoc meeting of the GMS in the following cases: (a) The BOM considers it necessary to do so in the interests of the company; (b) The number of the remaining members of the BOM is less than the number of members required by law; (c) Upon request by a shareholder or a group of shareholders holding more than ten (10) per cent of the total ordinary shares for a consecutive period of six months or more, or holding a smaller percentage as stipulated in the charter of the company; (d) Upon demand by the Control Board; (e) In other cases stipulated by law and the charter of the company. If the charter of the company does not stipulate a time-limit, then the BOM must convene a GMS within a time-limit of thirty (30) days as from the date on which the number of remaining members of the BOM is less than the number of members required by law or from the date of receipt of the request by a shareholder or a group of shareholders holding more than ten (10) per cent of the total ordinary shares for a consecutive period of six months or more, or holding a smaller percentage as stipulated in the charter of the company. If the BOM fails to convene a GMS as stipulated, the chairman of the BOM must be responsible before the law and must compensate for any damage arising to the company.

⁴⁶ Ibid. Where the BOM fails to convene a meeting of the GMS, then within the following thirty (30) days the Control Board replaces the BOM in convening the GMS.

⁴⁷ Ibid. Where the Control Board fails to convene a meeting, the requesting shareholder or group of shareholders holding more than ten (10) per cent of the total ordinary shares for a consecutive period of six months or more, or holding a smaller percentage as stipulated in the charter of the company have the right to replace the BOM and the Control Board in convening the GMS. In this case, the shareholder or group of shareholders convening the GMS may request the business registration office to supervise the convening and conduct of the meeting if they consider it necessary. The convenor must prepare a list of shareholders entitled to attend the GMS, provide information and deal with complaints relating to the list of shareholders, prepare the program and agenda of the meeting, prepare documents, determine the time and venue of the meeting, and send an invitation to the meeting to each shareholder entitled to attend the meeting.

⁴⁸ Ibid, section 1.

⁴⁹ Ibid, section 2.

business management; (c) the report of the Control Board regarding company management by the BOM and the CEO; (d) the amount of dividends payable on each class of share; and (e) other matters within its authority.⁵⁰

The GMS is conducted where the number of attending shareholders represents at least sixty five (65) per cent of the voting shares. Where the first meeting cannot take place because the condition is not satisfied, the meeting may be convened for a second time within thirty (30) days of the intended opening of the first meeting. When a GMS convened for a second time is conducted, the number of attending shareholders must represent at least fifty one (51) per cent of the voting shares. The specific percentage in the first and second meetings are stipulated in the charter of the company. Where a meeting convened for a second time cannot take place because a condition is not satisfied, it may be convened for a third time within twenty (20) days from the date of the intended opening of the second meeting. In this case, the GMS is convened irrespective of the number of attending shareholders, and irrespective of the percentage of shareholders with voting rights attend the meeting. Only the GMS may make changes to the agenda accompanying the invitation to the meeting.⁵¹

The GMS may pass resolutions which fall within its power by way of voting in the meeting or collecting written opinions. If not regulated by the company's Charter, a resolution of the GMS on certain matters needs to be passed by way a vote. These include:

- (a) Amendment of or addition to the charter of the company;
- (b) Approval of the development direction of the company;
- (c) Decision on classes of shares and the total number of shares of each class which may be offered for sale;
- (d) Appointment, discharge or removal members of the Board of Management and Control Board;
- (e) Decisions on investments or the sale of assets valued at equal to or more than fifty (50) per cent of the total value of assets recorded in the most recent financial statement of the company, if the charter of the company does not stipulate another percentage;
- (f) Approval of the annual financial statements;
- (g) Reorganisation or dissolution of the company.⁵²

⁵⁰ Ibid.

⁵¹ Ibid, Article 102, sections 1-4.

⁵² Ibid, Article 104. 2.

A resolution of the GMS is passed in a meeting when all the following conditions are satisfied:

- (i) It is approved by a number of shareholders representing at least sixty five (65) per cent of the total voting shares of all attending shareholders; the specific percentage shall be stipulated in the charter of the company.
- (ii) Unless otherwise provided by the charter of the company, the approval by a number of shareholders representing at least seventy five (75) per cent of the total voting shares of all attending shareholders shall be required; the specific percentage shall be stipulated in the charter of the company. This requirement is in respect of resolutions on classes of shares and total number of shares of each class which may be offered; on amendments of and additions to the charter of the company; on re-organisation or dissolution of the company; in respect of investments or sale of assets equal to or more than fifty (50) per cent of the total value of assets recorded in the most recent financial statement of the company.
- (iii) Voting to elect members to the BOM and the Control Board are implemented by the method of cumulative voting, whereby each shareholder shall have as his total number of votes the total number of shares he owns multiplied by the number of members to be elected to the BOM or Control Board – and where each shareholder shall have the right to accumulate all his votes for one or more candidates.⁵³

However, these requirements are in conflict with Vietnamese commitments to the WTO in some cases. For example, under Resolution 71/2006/QH11 on Approving the Protocol of Accession of Viet Nam dated 29 November 2006 (*Resolution 71*), a resolution of the GMS is passed in a meeting when it is approved by a number of shareholders representing a majority (including a majority of fifty one per cent) of the total voting shares of all attending shareholders.⁵⁴ Further, the *Enterprise Law 2005* states that ‘If an international treaty of which the Socialist Republic of Vietnam is a member contains provisions which are different from the provisions in this Law, the provisions of such international treaty shall apply’ (article 3.3). A complicated matter is whether a listed company can apply *Resolution 71* to give a 51 per cent majority at the GMS to pass a resolution instead of these conditions as mentioned above. By application Article 3.3 of the *Enterprise Law 2005*, a listed company can apply *Resolution 71* above. However, if a listed company sets a ratio of 51 per cent or 60 per cent of the total voting shares of all attending shareholders to pass a resolution of the

⁵³ Ibid, Article 104. 3.

⁵⁴ See further, World Trade Organization, ‘The Report of the Working Party on the Accession of Vietnam into the WTO’ (Working Party on the Accession of Viet Nam, 2007).

GMS, the GMS's resolution is invalid. This means that the shareholders need to amend their company's Charter.

Resolutions passed at the GMS by shareholders or authorised persons representing one hundred (100) per cent of the total number voting shares are legal and immediately effective. This is so even if the order and procedures for convening the meeting were not implemented in accordance with the regulations and even if the contents of the meeting agenda and the procedures for conducting the meeting were not duly disclosed.⁵⁵ Where a resolution is passed by the collection of written documents or opinions, a resolution of the GMS is passed when it is approved by a number of shareholders representing at least seventy five (75) per cent of the total voting shares. The specific percentage is stipulated in the charter of the company.⁵⁶ Resolutions of the GMS must be notified to shareholders entitled to attend the GMS within fifteen (15) days from the date of approval thereof.⁵⁷

Within ninety (90) days from the date the minutes of the GMS are received or the minutes of the results of the counting of votes or written opinions from the GMS are received, shareholders, members of the Board of Management, the director (or general director) and the Control Board have the right to request a court or an arbitrator to consider and cancel a resolution of the GMS in the following cases:

- (i) the order and procedures for convening the GMS did not comply with this Law and the charter of the company; or
- (ii) the order and procedures for issuing a resolution and the content of the resolution breach the law or the charter of the company. These rules may help to protect investors and keep the company operating lawfully.⁵⁸

Moreover, the Code stipulates that, at the annual and extraordinary sessions of the GMS, a listed company must regulate the order and procedures for convening and voting at the GMS.⁵⁹ The BOM arranges the agenda for the GMS and allows for a reasonable time of discussion and voting on each issue. Shareholders are entitled to

⁵⁵ Ibid, Article 104. 4.

⁵⁶ Ibid, Article 104. 5.

⁵⁷ Ibid, Article 104. 6. For the authority and procedures for collecting written opinions in order to pass a resolution of the GMS, see Ibid, Article 105.

⁵⁸ Ibid, Article 107.

⁵⁹ Article 6 of the Code. Such as: (a) Notice of convening the GMS; (b) Method of registering for attending the GMS; (c) Method of voting; (d) Method of counting votes; in the case of sensitive matters or at the request of shareholders, a listed company shall appoint a neutral organization to collect and count votes; (e) Announcing voting results; (f) Method of opposing resolutions of the GMS; (g) Recording minutes of the GMS; (h) Taking minutes of the GMS; (i) Publishing resolutions of the GMS; (j) Other issues.

participate in the GMS directly or indirectly via a proxy and may authorize the BOM or some other depository organization to be their representative at the GMS. If a depository organization is authorised to be a shareholder's representative, it must show the contents of its voting authorisation. A listed company guides shareholders on the procedures to authorise, and on preparation of a power of attorney. Auditors or representatives of an auditing company may be invited to attend the GMS in order to state their opinion on auditing issues at such meeting. In order to increase the efficiency of the GMS, a listed company must do its best to apply the most advanced information technology so that shareholders may attend the GMS in the best manner. A non-listed company must actually convene the annual GMS: the collection of shareholders' opinions in writing does not constitute the convening of a GMS. In contrast, a listed company can stipulate in its Charter the principles, order and procedures for collecting shareholders' opinions in writing so as to approve decisions of the GMS.⁶⁰ This law is further discussed in VIPCO and Vinaconex cases.

2.1.1.2. *The Board of Management (BOM) and members of BOM*

Except for issues which fall within the authority of the GMS, the BOM is the body managing the company and has full authority to make decisions in the name of the company and to exercise the rights and discharge the obligations of the company.⁶¹ The powers and duties of the BOM are specifically regulated by the law and as agreed by the parties in the charter. Those specified by law include decisions on or approval of: (i) medium term development strategies and annual business plans of the SC; (ii) marketing, technology transfer; loan agreements and contracts for sale of assets valued at 50 per cent or more of the total assets; and (iii) appointment/dismissal of the General Director and other key managers.⁶² In addition, the BOM is authorised to make recommendations to the SC in relation to certain specified matters. In this way, the BOM has a more direct role in the operations of the company (daily management) than the supervisory board of the German two-tier board structure (discussed above). The BOM comprises 3 to 11 members and members are appointed and dismissed by the GSM. A member need not also be a shareholder of the SC. BOM members are appointed for a maximum 5 year term, but may be re-appointed for additional terms.⁶³

Under the *Enterprise Law 2005* provisions, the members of the BOM of a shareholding company must satisfy the following criteria and conditions: (i) have full capacity for

⁶⁰ Ibid, Article 6, sections 2-7.

⁶¹ Article 108, the *Enterprises Law 2005*.

⁶² Ibid, Article 108.2.

⁶³ Ibid, Article 109. For standards and conditions for acting as a member of the BOM, see Article 110.

civil acts and not be prohibited from establishing and managing an enterprise as stipulated in article 13.2 of the *Enterprise Law 2005*; (ii) a shareholder being an individual must own at least five (5) per cent of the total ordinary shares; or a shareholder must own at least five (5) per cent of the total shares or in the case of a person not a shareholder then he or she must have expert qualifications or actual experience in business management or in the principal line of business of the company. If the company charter stipulates different criteria and conditions from those in this clause, then the provisions of the company charter shall apply.⁶⁴

The BOM passes resolutions by way of voting at meetings, obtaining written opinions, or otherwise as stipulated in the charter of the company. Each member of the BOM has one vote. The BOM must hold at least one ordinary meeting per quarter.⁶⁵ Extraordinary meetings must be convened at the request of (i) the Control Board, (ii) the General Director (CEO) or five (5) other management personnel, (iii) two (2) BOM members or more, or (iv) any circumstance stipulated in the charter.⁶⁶ The chairman must convene a meeting of the BOM within a time-limit of fifteen (15) days from the date of receipt of a request. If the chairman fails to convene a meeting of the BOM pursuant to a request, the chairman is responsible for any damage to the company; and the requester has the right to replace the BOM in convening a meeting of the BOM.⁶⁷ A meeting of the BOM is conducted where there are three quarters or more of the total members attending. A resolution of the BOM is adopted if it is approved by the majority of the attending members; in the case of an equal vote, the vote of the chairman is effective.⁶⁸ This issue is further discussed in FPT and VIPCO cases.

The *Enterprises Law 2005* provides that the CEO and members of the Control Board have the right to attend and discuss, but not to vote, at all meetings of the BOM. This is a significant way for supervisors to monitor the board, and for the CEO to make proposals and obtain opinions of the board on running the company. On the other hand, a board member has the right to request the CEO and other managers to

⁶⁴ See section 3, Article 13 of Decree 139/2007/ND-CP dated 5 September, 2007 (hereinafter, *Decree 139*).

⁶⁵ See Article 112 of the *Enterprise Law 2005*.

⁶⁶ *Ibid*, section 4

⁶⁷ *Ibid*, section 5.

⁶⁸ *Ibid*, Article 112.8. Members not directly attending a meeting shall have the right to vote by sending a written vote. The written vote must be enclosed in a sealed envelope and delivered to the chairman of the Board of Management at least one hour prior to the opening of the meeting. Written votes shall only be opened in the presence of all the people attending the meeting.

provide information and materials related to the operation of the company;⁶⁹ for example, information on the companies financial situation and business operations. This may assist the board to oversee the daily management.

For listed companies, the Code also provides that a report on activities of the board of management submitted to the GMS must contain at least the following contents: (i) Assessment of the company's activities during the fiscal year; (ii) Activities of the board of management; (iii) Summarised contents of meetings of and decisions of the board of management; (iv) Result of supervision of the director or general director; (v) Result of supervision of managers; and (vi) Proposed plan for the future.⁷⁰

The head of the BOM is a chairperson who is appointed by the GSM or the BOM in accordance with the charter. The chairperson of the board can also be the CEO of the company, unless otherwise provided for by the charter. The chairperson of the BOM is responsible for, *inter alia*, convening and chairing meetings and monitoring the execution of BOM resolutions.⁷¹

Under the Code, shareholders or a group of shareholders holding less than 10 per cent of the voting shares for a consecutive period of at least 6 months are entitled to nominate one member; shareholders holding from 10 per cent to less than 30 per cent are entitled to nominate two members; shareholders holding from 30 per cent to less than 50 per cent are entitled to nominate three members; shareholders holding from 50 per cent to less than 65 per cent are entitled to nominate four members; and shareholders holding from 65 per cent upwards shall be entitled to nominate all candidates.⁷²

⁶⁹ Ibid, Article 114.1

⁷⁰ See the Code, Article 7.

⁷¹ Sections 1 and 2, Article 111 of the *Enterprise Law 2005*. The chairman of the BOM has the following rights and duties: (a) to prepare working plans and programs of the BOM; (b) to prepare, or organize the preparation of agenda, content and documents for meetings of the BOM; to convene and preside over meetings of the BOM; (c) to organize for resolutions of the BOM to be passed; (d) to monitor the implementation of resolutions of the BOM; (e) to chair the GMS; (f) Other rights and duties stipulated in this Law and the charter of the company. See further, Articles 112-115.

⁷² See sections 3-5, Article 9, the Code. If the number of candidates who are nominated and who stand for election is still insufficient, the incumbent [currently in office] BOM may nominate more candidates or organize for nomination in accordance with a mechanism stipulated by the company. The nomination mechanism or the method by which the incumbent BOM nominates candidates for the BOM are clearly announced and approved by the GMS before nominations are commenced. A listed company regulates and gives detailed instructions to shareholders on voting on membership of the BOM by the method of cumulative voting.

In order to ensure a separation between the supervisory and managerial roles of the company, a listed company is required to limit the number of members of the BOM who may concurrently hold other positions in the managerial apparatus of the company. However, a member of the BOM of a listed company must not concurrently be a member of the BOM of more than five other companies. The chairman of the BOM must not concurrently hold the position of the CEO, unless approved at the annual GMS.⁷³

It is noteworthy that, in a listed company, one third of the members of the BOM must be non-executive independent members.⁷⁴ Moreover, members of the BOM must attend all meetings of the board of management and state their opinions on issues raised for discussion. When selling or purchasing shares of the company, members of the BOM and affiliated persons must report to the SSC, SE or STC and disclose information about matters such as purchases and sales in accordance with law. A listed company may purchase liability insurance for members of the BOM after obtaining approval from the GMS; however, they may not purchase insurance for the liability of members of the BOM for breach of the law or the company Charter.⁷⁵ The *Enterprise Law 2005*, the Code and the *Model Charter 2007* applicable to listed companies do not provide guidelines with regard to non-executive independent members' qualifications and nomination procedures. Alternatively, only a few listed companies have non-executive independent members in their BOM.⁷⁶

Under the Code, the BOM is accountable to shareholders for the company's activities. A listed company formulates a corporate governance mechanism to ensure that the BOM implements its obligations in compliance with the law and the company Charter. The BOM is responsible for ensuring that the company's activities comply with the law and the company Charter, ensuring equal treatment to all shareholders and consideration of persons with interests related to the company. The BOM formulates provisions on the order and procedures for nominating, standing for election, voting for and dismissing members of the BOM. The order and procedure for holding meetings of the BOM must include the following contents:

⁷³ Ibid, Article 10.

⁷⁴ Ibid, section 1, Article 11. If a member loses membership status pursuant to law and the company Charter, is dismissed or cannot continue to be a member for some reason, the BOM may appoint another person as a replacement. In this case, the replacing member of the BOM must be voted for and approved at the next GMS.

⁷⁵ Ibid, Article 12.

⁷⁶ Such as Rang Dong JSC, Sacombank as of July 2008. See further statistics at SSC website at www.ssc.gov.vn; HOSE website at www.hsx.vn and HASTC website at www.hastc.org.vn.

- (i) Order and procedure for nominating, standing for election, election and dismissal of members of the board of management;⁷⁷
- (ii) Order and procedure for holding meetings of the board of management;⁷⁸

The BOM formulates provisions on the order and procedure for selecting, appointing and dismissing senior managers and the order and procedures for co-ordination of activities between the board of management, the board of directors and the board of controllers. These include:

- (i) Order and procedures for selecting, appointing and dismissing senior managers.
- (ii) Order and procedures for co-ordination of activities between the board of management, the board of controllers and the board of directors.⁷⁹

The BOM is responsible for formulating a mechanism for assessing the activities of the company, and for rewarding and disciplining members of the BOM, the board of controllers, the board of directors and other managers. The BOM is responsible for preparing the report and providing it to the GMS.⁸⁰

The Code also stipulates that the BOM may set up sub-committees to assist it in its activities. Sub-committees may be formed for policy development, internal audits, to manage and recruit personnel, to administer salary and bonuses and to undertake other special tasks in accord with resolutions of the GMS.⁸¹ The sub-committee for an internal audit must have at least one member who specialises in accounting and is

⁷⁷ Article 13.3 of the Code. Such as criteria for membership of the board; method for nominating and/or standing for the post of member of the board of management by a nominee of a group of shareholders so qualified by law and the company Charter; method of election of members of the board of management; circumstances in which members will be dismissed; notification of election and dismissal of members of the board of management.

⁷⁸ Ibid, Article 13 such as notification of a meeting of the board of management (including the agenda, time, venue, relevant documents, and voting slips for members who cannot attend a meeting); conditions for validity of the meeting; method of voting; method of approving resolutions of the board of management; taking minutes of the meeting of the board of management; approving minutes; announcing resolutions of the board of management.

⁷⁹ Ibid, section 4, Article 13.

⁸⁰ See Article 7, the Code. A report on activities of the board of management submitted to the GMS must contain at least the following contents: Assessment of the company's activities during the fiscal year; activities of the board of management; summarized contents of meetings of and decisions of the board of management; result of supervision of the director or general director; result of supervision of managers; proposed plan for the future.

⁸¹ Ibid, Article 15.

not a person working in the accounting/financial department of the company. The BOM provides detailed rules on the establishment of sub-committees, and on the responsibility of sub-committees and of each member of a sub-committee. Where a company does not set up sub-committees, the BOM nominates the person(s) in charge of each task such as auditing, salary and bonuses and personnel.⁸²

In order to assist the company's activities to be conducted effectively, the BOM must appoint at least one person to act as secretary of the company. The secretary of the company must have a good knowledge of law, and may not concurrently work for the auditing company which currently audits the company.⁸³

2.1.1.3. Director or General Director of the company

A fundamental principle of corporate governance is that 'good' corporate governance requires the responsibility and accountability of company directors. However, the provisions of the *Enterprise Law 2005* on company directors do not ensure accountability and responsibility of persons who direct/manage a company. In particular, the law's definition of director is not comprehensive, the appointment and office-term of directors are inappropriate and the provisions on directors' duties are inadequate.

a. The definition of directors in Vietnamese Enterprises Law

Under the *Enterprise Law 2005*, the legal term for persons who are responsible for directing and managing a company is '*nguoi quan ly doanh nghiep*' (literally, persons who direct/manage an enterprise). Accordingly, '*nguoi quan ly doanh nghiep*' means the owner or director of a private enterprise, unlimited liability partner of a partnership, chairman of the Members' Council, chairman of a company, a member of the BOM, director or general director and other managerial positions as stipulated in the charter of a company.⁸⁴ As explained below, this definition reveals some of the shortcomings of the *Enterprise Law 2005*.

⁸² Ibid, sections 2-5, Article 15.

⁸³ Ibid, sections 1-3, Article 16. The role and duties of the secretary of the company comprise: (i) Organizing meetings of the BOM and of the board of controllers and the GMS at the request of the chairman of the board of management or the board of controllers; (ii) Advising on procedures for meetings; (iii) Taking minutes of meetings; (iv) Ensuring that resolutions of the BOM comply with law; (v) Providing information relating to finance and copies of minutes of meetings of the board of management and other information to members of the BOM and the board of controllers. The secretary of the company is responsible for maintaining confidentiality of information in accordance with law and the company Charter.

⁸⁴ Article 4.13 of the *Enterprise Law 2005*.

First, unlike the company laws of Anglo-American jurisdictions, the *Enterprise Law 2005* identifies the '*nguoai quan ly doanh nghiep*' of a company (hereinafter, 'company director/manager') according to their *job titles* or *formal managerial position* (emphasis added). Particularly, company directors under the *Enterprise Law 2005* include two groups (i) those defined by the Law (such as chairperson of members' council, company president, member of the BOM, and chief executive officer), and (ii) other formal managerial positions as determined by the company's constitution. Thus, a company director/manager under the *Enterprise Law 2005* is different from a 'director' and 'manager' in the company law of Anglo-American jurisdictions.

Second, unlike the company laws of certain common law jurisdictions, the *Enterprise Law 2005* does not distinguish between the terms 'director', 'manager' and 'officer'.⁸⁵ Vietnamese law in general as well as the *Enterprise Law 2005* in particular does not differentiate between the managing director, executive director, non-executive director and independent directors as understood in Western jurisdictions. Further, the company laws of some jurisdictions such as Australia, the UK, the US and China define the position of secretary who has an administrative role in the corporate governance process. By contrast, the *Enterprise Law 2005* is silent on the scope and definition of the position of the secretary of the company. However, it should be noted that the model charters for Vietnamese listed companies and joint stock commercial banks provide that each listed company and bank should have secretaries who are responsible for the administrative work of the board. The Code also requires that each listed company have at least one secretary.⁸⁶

Third, unlike the company laws of advanced economies, the definition of 'company directors/managers' in the *Enterprise Law 2005* does not include persons who direct/manage a company as a 'shadow' or 'de facto' director. In the *White Paper on Corporate Governance in Asia*, the OECD suggests that the 'attribution rules should

⁸⁵ See du Plessis et al, above n 3, 70-83; David A. Skeel, 'Corporate Anatomy Lessons' (2004) 113 *The Yale Law Journal* 1519-25. The company statutes of most Anglo-American jurisdictions provide a definition of 'director', and usually distinguish between 'director', 'manager', and 'officer' of a company. While 'director' is the term that usually refers to a member of the board of directors, 'manager' usually refers to an 'officer' who is involved in daily management. In addition, 'officer' is relatively broad definition-possibly encompassing a director, secretary, receiver and manager, administrator, employee, and liquidator. See also, ss 9, 82A of the *Corporations Act 2001 (Cth)* of Australia; American Law Institute (ALI), *Principles of Corporate Governance: Analysis and Recommendations* (1994) s. 1.27. The ALI's Principles also provide definitions of 'principal manager', 'senior executive', and 'principal senior executive'; see ss 1.29, 1.33, and 1.30.

⁸⁶ See Article 16 of the Code.

impose fiduciary duties and liabilities on 'shadow' directors as a way to discourage their existence.⁸⁷

In short, the *Enterprise Law 2005* does not provide for an appropriate definition of company directors or managers. Unlike advanced economies, particularly those of Anglo-American jurisdictions, the statutory definition of directors does not cover 'shadow' and 'de facto' directors. This can result in a lack of accountability and responsibility on the part of persons who run/manage a Vietnamese company as 'shadow' and 'de facto' directors/managers and is unhelpful for investor protection.

b. Appointment, removal, and remuneration of directors

b.1. Appointment of directors

Appointment rights are key strategies for controlling the company and addressing the agency problem.⁸⁸ In the US, the qualifications of directors are decided by the law and the company's charter.⁸⁹ In China, the *Company Law 2005* provides a list of persons who are disqualified to be a director, senior officer, and supervisor; hence, any appointment of such persons is considered void.⁹⁰ Under the *Corporations Act 2001* (Cth) of Australia, a company director must (i) be a natural person of at least 18 years old; (ii) not be disqualified, and, (iii) give consent in writing.⁹¹

According to the *Enterprise Law 2005*, the following people cannot be appointed as a 'company director/manager': (i) State officials and employees; (ii) people who work in military and police forces; (iii) leading officers, managers of SOEs (except for those who are appointed as representatives of state capital in companies); (iv) minors and incapable persons, and, (v) prisoners and those who are prohibited from conducting business pursuant to a court order.⁹² Further, a manager/director of a insolvent company may be prohibited from being a company director/manager for a period pursuant to a court's decision.⁹³

⁸⁷ See Organisation for Economic Co-operation and Development (OECD), 'White Paper on Corporate Governance in Asia' (2003) 14, 53.

⁸⁸ See generally, Henry Hansmann and Reinier Kraakman, 'Agency Problems and Legal Strategies' in Reinier R Kraakman et al (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004) 21-26.

⁸⁹ See, e.g. s 8.02 of MBCA.

⁹⁰ Article 147 of the *Chinese Company Law 2005*.

⁹¹ See Farrar, n 103 above, 99; see ss 201B, 201D of the *Corporations Act 2001* (Cth) of Australian.

⁹² As to details, see section 2 of Article 13 of the *Enterprise Law 2005*.

⁹³ See Article 94 of the *Bankruptcy Law 2004*.

Under the *Enterprise Law 2005* provisions, the director (general director) of a shareholding company must satisfy the following criteria and conditions:

- (i) have full capacity for civil acts and not be prohibited from establishing and managing an enterprise as stipulated in article 13.2 of the *Enterprise Law 2005*;
- (ii) be a shareholder owning at least five (5) per cent of the ordinary shares, or otherwise have expert qualifications or actual experience in business management or in the principal line of business of the company. If the company charter stipulates different criteria and conditions from the above, then the provisions of the company charter shall apply;
- (iii) in the case of a subsidiary company which contributes capital or has shareholding owned by the State of more than 50% of the charter capital, in addition to the criteria and conditions stipulated in sub-clauses (i) and (ii) above, the director (general director) of such a subsidiary company may not be the spouse, parent or foster parent, child, adopted child or sibling of a manager of the parent company or of the authorized representative of the State owned capital portion in the parent company.⁹⁴

Further, the *Enterprise Law 2005* stipulates the qualifications of the CEO of a company. The CEO of a SC must (i) not be prohibited from managing/directing a company as stated above, and, (ii) be either a shareholder with at least 10 per cent of the share capital or non-shareholder who has professional qualification and experience in company management or majority business lines of the company or other qualifications and conditions as prescribed in the company's constitution.⁹⁵ The *Enterprises Law 2005* provides that the CEO must not concurrently be the CEO of another company; this is designed to reduce conflicts of interests.⁹⁶ In addition, a member of the BOM of a SC must either be an individual shareholder holding at least five per cent of ordinary shares or a non-shareholder who has professional qualifications and experience in company management or major business lines of the company or other qualifications as prescribed in the company's constitution.⁹⁷ In this way, the *Enterprise Law 2005* prefers a manager being a shareholder rather than a non-shareholder. However, a shareholder who lacks management experience and qualifications can still meet the statutory requirements for a board member or CEO. This law is further discussed in TAC case.

⁹⁴ See Section 1, Article 13 of Decree 139.

⁹⁵ See section 2, of Article 116 of the *Enterprise Law 2005*.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*, Article 110.

Under the *Enterprise Law 2005*, only a shareholders' meeting has the powers to appoint a board member, and Vietnamese courts have no power to appoint a director/manager to a company. Under Australian company law a person must give a company a signed consent to act as a director before being appointed. The *Enterprise Law 2005* does not require a written consent from a 'company director/manager'.⁹⁸ Since the *Enterprise Law 2005* does not require a signed consent of the person appointed as a director, a person can effectively be appointed without his/her consent.

b.2. Removal of directors

The *Enterprise Law 2005* provides that a member of the BOM as well as the Control Board of a SC may be removed in one of the following circumstances: (i) disqualification; (ii) not participating in activities of the BOM for (6) consecutive months; (iii) resigning; (iv) by a resolution of shareholders' meeting, and, (v) other cases stipulated in the company's charter.⁹⁹ Accordingly, shareholders can remove a member of the BOM and Control Board with or without cause. Other officer/managers can be removed in accordance with the company's charter or a decision of the governance body which appointed her/him. A BOM member can be dismissed at any time pursuant to a resolution of the shareholders.¹⁰⁰

The length of a directorial term in other jurisdictions range from a low of two years (such as in Japan), to no statutory term limits (for example, in the UK). In the US a one-year term is the default rule and ordinarily there is a maximum term of three years.¹⁰¹ The company law of Anglo-American jurisdictions does not stipulate an office-term for the CEO; however, the service contract of the CEO is decided by the board of directors. If a CEO is appointed by contract for a fixed term, then if the company removes the CEO before the term expiry the company can be held liable in damages.¹⁰² However, a director who does not have a separate service contract and is appointed under the company's constitution can be removed at any time and he/she cannot recover any damages.¹⁰³

⁹⁸ See, e.g., s 201D of the *Corporations Act 2001* (Cth) of Australian.

⁹⁹ Articles 115 and 127 of the *Enterprise Law 2005*.

¹⁰⁰ *Ibid*, Article 115.2.

¹⁰¹ Henry Hansmann and Reinier R Kraakman, n 125 above, 37. See also, s 8.06 of MBCA.

¹⁰² See John H Farrar and Brenda Hannigan, *Farrar's Company Law* (4 ed, 1998) 343.

¹⁰³ *Ibid*.

The *Enterprise Law 2005* stipulates that the office-term for members of the BOM, the Control Board, and the CEO of a SC should be no more than five years.¹⁰⁴ The Law does not provide service terms for other governance positions.

The provisions relating to office-terms and removal of directors under the *Enterprise Law 2005* are inappropriate for at least two reasons. First, Article 109.1 of the Law provides that a member of the BOM has five years office-term but Article 115.2 prescribes that a board member can be removed at any time. Second, the *Enterprise Law 2005* does not prescribe the circumstances in which the CEO of company can be removed or dismissed. It also does not state whether the CEO can be removed with or without a cause. This raises questions about the removal of the CEO before his/her office-term expires. The *Enterprise Law 2005* requires the CEO of each company to have a service contract with the company. Such contracts are subject to the *Enterprise Law 2005* and the *Labour Code 1994* (as amended) as a term-determined-employment contract.¹⁰⁵ Accordingly, there are very few opportunities for the company to dismiss the CEO before the expiration of the service contract. If the company finds a cause, the obligation of advance notice of at least 30 or 45 days applies to the employer.¹⁰⁶ In case breach of the term of the service contract, the company must pay damages for the CEO.¹⁰⁷

In short, the statutory office-term for company directors/managers under the *Enterprise Law 2005* lacks flexibility in terms of corporate governance: a company may find it difficult to remove directors before the expiration of a term of office. Further, the Law prescribes inconsistent provisions on the office-term of the CEO and the proceedings for the dismissal of a board member.

b.3. Directors' remuneration

Directors' remuneration is a significant issue in corporate governance. The remuneration of directors and executives should be transparent, fair, and reasonable.¹⁰⁸ In US firms, unless the company's constitution or the law provides otherwise, the board of directors may decide on the compensation of directors.¹⁰⁹ In Germany, the remuneration of board members must be approved by shareholders and must be reasonable and in conformity with the financial situation of a

¹⁰⁴ See Articles 109 (1); 116(2); 121(1) of the *Enterprise Law 2005*.

¹⁰⁵ See Article 27 of the *Labour Code 1994* (as amended).

¹⁰⁶ *Ibid*, Article 38.

¹⁰⁷ *Ibid*.

¹⁰⁸ See New Zealand Principles of Corporate Governance, Principle 5; cited in John Farrar, *Corporate Governance: Theories, Principles, and Practice* (2 ed, 2005) 521.

¹⁰⁹ See, eg, section 8.11 of MBCA.

company.¹¹⁰ In France, the remuneration of directors is also decided by annual shareholders' meeting; nevertheless, the board of directors may also decide to compensate directors for any special tasks or assignment given to them.¹¹¹ In general, the directors of a company have no authority to pay themselves from the company's money unless they are given authority by the company's constitution or the payment is approved by the shareholders.

Under the *Enterprise Law 2005*, the remuneration, salary, and bonus of company managers/directors and supervisors are decided by the company based on the business results of the company.¹¹² In a SC, the total remuneration of the board members is decided by the shareholders' meeting and the remuneration of the CEO is decided by the board.¹¹³ Unless the constitution provides otherwise, the remuneration of a board member of a SC is determined by working time and other reasonable expenses, and decided by the board's unanimous decision. The total annual remuneration of the BOS of a SC is also decided by the shareholders' meeting, and supervisors are paid according to their work.¹¹⁴ The CEO of a SC has the power to decide the remuneration of managers/officers whom they have appointed.¹¹⁵ However, the remuneration of managers must be disclosed and reported to the annual shareholders' meeting.

b.4. Directors' duties

The law governing the duties of directors and officers is a fundamental area of company law.¹¹⁶ Directors' duties are derived from two distinct functions of the director; the entrepreneurial function to maximize the profits of the company and the agent function to protect the assets of the principal. One aspect of directors' duties is to ensure the loyalty of directors to their company. In general, as the OECD has stated, members of the board 'should act on a fully informed basis, in good faith,

¹¹⁰ See Michael Bradley et al, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 63(2) *Law and Contemporary Problems* 53.

¹¹¹ See Jean-Pierre Le Gall and Paul Morel, *French Company Law* (2 ed, 1992) 104.

¹¹² Article 117 of the *Enterprise Law 2005*.

¹¹³ *Ibid.*

¹¹⁴ *Ibid*, section 2 (c) of Article 117; Article 125.

¹¹⁵ *Ibid*, section 3(e) of Article 116.

¹¹⁶ See also Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2 ed, 2002) 316; R.P. Austin, H A J Ford and I.M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 5.

with due diligence and care, and in the best interests of the company and the shareholders'.¹¹⁷

Among corporate law regimes around the world, the laws governing directors' duties of Anglo-American jurisdictions are the most significant. In common law jurisdictions, a director is considered as a fiduciary of the company, and fiduciary duties are a core part of in Anglo-American corporation law for delineating the rights and responsibilities of directors and managers.¹¹⁸ In equity, officers and directors owe fiduciary duties to the company because they are in a position of trust.¹¹⁹

The concept of directors' duties is comparatively new in Vietnam. While some basic duties of directors appeared in the *Enterprise Law 2005*, it can be argued that existing Vietnamese company law, particularly the *Enterprise Law 2005*, does not provide satisfactory provisions regarding the duties of company directors. Notions of a director's legal duties are not as developed as they are in, for example, Anglo-American company law.

The terms '*nghĩa vụ*' (obligation) and '*nhiệm vụ*' (duty) are used interchangeably in the *Enterprise Law 2005*. Nevertheless, the so-called '*nghĩa vụ*' (obligation) of directors appears to be similar to the 'duty' of directors in common law countries. According to the *Enterprise Law 2005*, directors/managers of Vietnamese companies have the following *nghĩa vụ* (obligations or duties):

- (i) To exercise their delegated powers and perform their delegated duties strictly in accordance with this Law, relevant legislation, the charter of the company, resolutions of the GMS;
- (ii) To exercise their delegated powers and perform their delegated duties honestly, diligently to their best ability in the best lawful interests of the company and of the shareholders of the company;
- (iii) To be loyal to the interests of the company and shareholders of the company; to not use information, secrets or the business opportunities of the company to their personal advantage; not to abuse their position and

¹¹⁷ See Organisation for Economic Co-operation and Development (OECD), 'The OECD Principles of Corporate Governance' (2004), (Principle VI.A).

¹¹⁸ Katharina Pistor and Chenggang Xu, 'Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory' (2002) 1 *Law Working Paper*, *European Corporate Governance Institute (ECGI)* 3. See also Chee Keong Low, 'A Road Map for Corporate Governance in East Asia' (2004) 25 *Northwestern Journal of International Law and Business* 165-9.

¹¹⁹ See R P Austin, H A J Ford and I M Ramsay, above n.147, 211; Michael A Adams, *Essential Corporate Law* (2005) 46-8; Jonathan C Lipson, 'Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation' (2003) 50 *UCLA Law Review* 1189-95.

powers and assets of the company for their own personal benefits or for the benefit of other organisations or individuals;

- (iv) To fully and accurately and in a timely fashion notify the company of enterprises which they or related persons have contributed capital or controlling shares; this notice shall be displayed at the head office and branches of the company.
- (v) Other obligations in accordance with this Law and the charter of the company.¹²⁰

Accordingly, the *Enterprise Law 2005* imposes statutory duties of loyalty, good faith, care, and diligence on company directors/managers that appear similar to those of the jurisdictions discussed above. Directors/managers have to act in the best interests of the company and for proper purposes, and they must disclose personal interests to avoid conflicts of interests. However, the provisions regarding the directors/managers' duties under the *Enterprise Law 2005* also have shortcomings.

First, unlike the laws of other jurisdictions, the *Enterprise Law 2005* does not prescribe a duty to prevent insolvent trading. In addition, the *Enterprise Law 2005* does not require directors/managers to notify creditors when the company cannot pay debts due and payable in full. The Law merely requires directors/managers not to increase salaries and pay bonuses while the company has not paid in full all debts due and payable. In this way, creditor protection appears to be undermined.¹²¹

Secondly, Anglo-American corporate law provides sanctions for directors who are in breach of duties. These may include damages (based on principles of contract or tort), compensation, injunctions and declarations. The offender may be punished by strict civil or criminal penalties. Australian company law, for example, provides sanctions or remedies for breaches of director's duties such as civil or criminal penalties. Examining corporate governance in Asia, the OECD recommends that 'sanctions for violations of fiduciary duty should be sufficiently severe and likely to deter wrongdoing'.¹²² However, the *Enterprise Law 2005* lacks the necessary penalties to force directors to fulfil their duties.¹²³

¹²⁰ See Article 119, the *Enterprise Law 2005*.

¹²¹ *Ibid*, Articles 116, 117.

¹²² Organisation for Economic Co-operation and Development (OECD), 'White Paper on Corporate Governance in Asia' (2003) 53.

¹²³ It is noteworthy that in a recent survey by Ministry of Planning and Investment (MPI) of nearly 63,000 enterprises in 36 provinces it was found that only 2.99 per cent of enterprises directors/managers had an advanced level of education (master degrees or higher), 43.3 per cent had primary level of education (graduated from high schools or lower), and 53.71 per cent had education from universities, colleges or lower. A similar survey by the Institute of

2.1.1.4. The Control Board

Under the *Enterprises Law 2005*, a Control Board (*Ban Kiem Soat*) must be established in a SC with more than 11 natural shareholders or having organizations owning more than fifty (50) per cent of the total shares of the company. A Control Board has from three (3) to five (5) members on the term of the Control Board can be no more than five (5) years. Members of the Control Board may, however, be re-appointed for additional terms.¹²⁴ Unlike Anglo-American jurisdictions, where a Control Board often belongs to a board of directors, the Control Board of a Vietnamese SC is a body elected by shareholders and distinct from the BOM.¹²⁵

The members of the Control Board elect one member to be the head of the Control Board. The rights and duties of the head of the Control Board are stipulated in the company Charter. More than half of the members of the Control Board must permanently reside in Vietnam and at least one member of them must be an accountant or auditor. Interestingly, in order to assure the independence of the Control Board, company managers and their relatives cannot become a supervisor of the company. Moreover, members of the Control Board may not hold managerial positions of the company. Members of the Control Board need not be a shareholder or the employee of the company.¹²⁶ The Code also requires that a member of the Control Board must have specialized qualifications and experience and the head of the Control Board must have specialized accounting qualifications but must not work in the accounting/financial department and must not be the financial director of the company.¹²⁷ Similarly, the Control Board must have at least one member who is an independent accountant or auditor. This member must not be a member of staff of the accounting/financial department of the company, and must not be a member of staff of an auditing company which currently audits the company's financial statements.¹²⁸

Development Research (IDR) in Ho Chi Minh City (HCMC) also showed that the Vietnamese CEO' companies are not only weak regarding capital and technology, but also short of knowledge, management skills, visibility and management ability. See further, Ho Van, 'The Vietnamese COE: Majority Self-taught (CEO Viet: Tu hoc la chinh)', *Tuoi Tre (Youth Newspaper)* 28th August 2007, available at <http://www3.tuoiitre.com.vn/Vieclam/Index.aspx?ArticleID=217421&ChannelID=269>, last visited 28 August 2007.

¹²⁴ Ibid, Article 121.

¹²⁵ Ibid, Article 96.2; Article 121.

¹²⁶ Ibid, Article 122.

¹²⁷ See Article 18, the Code.

¹²⁸ Ibid, Article 19.

A main function of the Control Board is to supervise the BOM and the CEO in managing and running the company.¹²⁹ In particular, the Control Board (i) inspects the reasonableness, legality, truthfulness and prudence in management and administration of business activities, in the organization of statistical and accounting work and the preparation of financial statements; (ii) evaluates reports on the business, including semi-annual or annual financial statements and reports on evaluation of the management of the Board of Management; (iii) reviews books of accounts and other documents of the company, the management and administration of the activities of the company at any time deemed necessary or pursuant to a resolution of the GMS or as requested by a shareholder or group of shareholders holding more than 10 per cent of the total ordinary shares for a consecutive period of 6 months or more;¹³⁰ (iv) recommends to the BOM or the GMS regarding changes and improvements of the organizational structure, management and administration of the business operations of the company. Interestingly, the Control Board may use an independent consultant to perform the assigned duties. The Control Board may consult the BOM prior to the submission of reports, conclusions and recommendations to the GMS.¹³¹ This issue is further discussed in FPT, TAC and BBT cases.

The *Enterprises Law 2005* also ensures that controllers have access to management information. For example, a controller has the statutory right to attend the meetings of the BOM, and the CEO has to report to the BOM and the Control Board at the same time and in the same manner. Members of the Control Board have the right to access the files and documents of the company retained in the head office, branches and other locations; they also have the right to access locations where managers and employees of the company work. Further, the BOM, members of the BOM, the CEO and other managers must provide in full, accurately and on time all information and documents relating to the management, administration and business operation of the company upon demand by the Control Board.¹³² Additionally, the Code states that a listed company must formulate a mechanism to ensure that members of the Control

¹²⁹ Article 123, the *Enterprises Law 2005*.

¹³⁰ *Ibid*, section 5. The Control Board shall carry out an inspection within a period of seven working days for the date of receipt of the request. The Control Board must submit a report on results of the inspection of the issues required to be inspected to the BOM and the requesting shareholder or the group of shareholders within a period of fifteen (15) days from the date of completion of the inspection.

¹³¹ *Ibid*, sections 8 and 9.

¹³² *Ibid*, Article 124.

Board are independent their activities, and implement their duties in accordance with law and the company Charter.¹³³

Under the Code, the Control Board has at least six responsibilities and obligations.¹³⁴ First, the Control Board is accountable to shareholders for its supervisory activities. The Control Board is responsible for supervising the financial status of the company; the legality of actions of the members of the BOM, of actions of the board of directors and managers; co-ordination between the Control Board with the board of management, the board of directors and shareholders; and other duties stipulated by law and the company Charter with a view to protecting the legitimate interests of the company and its shareholders. Second, the Control Board must meet at least twice each year, and the number of attendees must be at least two-thirds of the total number of members of the board. Minutes of a meeting of the Control Board must be prepared clearly. The secretary and members of the Control Board attending the meeting must sign the minutes. Minutes of a meeting of the Control Board must be filed as important documents of the company in order to clarify liability of each member of the Control Board for resolutions of the board. Third, the Control Board has the right to request members of the BOM or of the board of directors, internal auditors and independent auditors to attend a meeting of the Control Board and answer questions on issues which concern the board. Fourth, the Control Board may report directly to the SSC or other State administrative bodies if it discovers acts committed by a member of the BOM or of the board of directors or by a manager which it considers breach the law or the company's Charter. Fifth, the Control Board is entitled to select an independent auditing organisation to audit the financial statements of the listed company, and to request the GMS to approve its selection. Sixth, the Control Board is responsible for making the report at the GMS. The report on activities of the Control Board submitted to the GMS must contain at least the following contents: (i) activities of the Control Board; (ii) summarized contents of meetings of and decisions of the Control Board; (iii) result of supervision of activities and financial status of the company; (iv) result of supervision of members of the BOM, the CEO; and (v) report of assessment of co-ordination between the Control Board, the BOM, the CEO.¹³⁵

The *Enterprises Law 2005*, the *Securities Law 2006* and the Code have enhanced the supervisory mechanisms in SCs. However, the law does not (i) provide for the operation of the Control Board as a collective corporate body, and (ii) specify how this body adopts a decision. Further, the efficiency of a Control Board's operation

¹³³ Article 20, the Code.

¹³⁴ *Ibid*, Article 21.

¹³⁵ See Article 8, the Code.

depends on various factors. A survey by MPDF in 2004 showed that 36 per cent of the respondents believed that the Control Board 'just exists on paper' (*chi ton tai tren giay*) because it is required by law.¹³⁶

In summary, the mandatory internal governance structure of a listed company under the provisions of the *Enterprises Law 2005*, *Securities Law 2006*, and the Code comprises four bodies: the GMS, a BOM, a CEO and a Control Board, each with certain statutory powers and functions. However, in addition to the statutory powers prescribed by law, the company's constitution can expand - but not decrease - the powers of the above corporate governance bodies.

2.1.2. Do the internal governance structures support the 'good' corporate governance of listed companies?

2.1.2.1. The internal governance structures of listed companies show a lack of flexibility, efficiency, and accountability.

Under the OECD Principles, 'the corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders'.¹³⁷ The first working postulate presumes that 'good' corporate governance requires the efficiency and accountability of the board (or internal governance structure). However, the internal governance structures of listed companies under the *Enterprises Law 2005*, *Securities Law 2006* and the Code lack flexibility, efficiency, and accountability. The reasons are two-fold.

First, unlike the US, Germany and Australia, the internal governance structure of a Vietnamese company is dependent on the number of shareholders at the time when the Control Board is set up. For example, if a SC has more than 11 natural shareholders or at least one organization-shareholder holding more than 50 per cent of the equity capital, they are required to have a Control Board.

Second, compared to the US and Germany, the internal governance structures of Vietnamese companies are more complex. The mandatory internal governance structures under the *Enterprises Law 2005* are even more problematic as they do not allow a company to form an appropriate governance structure. By contrast, common

¹³⁶ See Nguyen Van Lan, 'Corporate Governance in Vietnam: Initial Research Results (Thuc tien Quan tri doanh nghiep o Vietnam: Mot so ket qua nghien cuu ban dau)' (Paper presented at the IFC/OECD International Corporate Governance Meeting: Why Corporate Governance Matters for Vietnam, Hanoi, Vietnam (6 December), 2004) 5-8.

¹³⁷ See Organisation for Economic Co-operation and Development (OECD), 'The OECD Principles of Corporate Governance' (2004) 24.

law jurisdictions often allow shareholders to decide internal governance structures.¹³⁸ Moreover, the American Law Institute identifies two goals of governance structures: managerial flexibility and accountability to shareholders, and proposes flexible rules of governance structures to permit a company to respond rapidly to those goals in a changing business and social environment.¹³⁹ The flexible regulatory approach of corporate law of common law jurisdictions offers the possibility for substantially more experimentation in company structure and appears to provide more flexible and efficient in corporate governance practices.¹⁴⁰

2.1.2.2. *Inappropriate allocation of control rights in listed companies*

The division of powers between the corporate bodies in an internal governance structure is designed to achieve 'good' corporate governance. As stated before, under the company law of Anglo-American jurisdictions, the powers of a company are vested in a board of directors (except as may be otherwise provided for by the law or the company's constitution), and, a company is managed by, or under the directorship of a board of directors.¹⁴¹ The division of powers between the directors (the board) and the shareholders (the GMS) can also be found in some leading common law cases.¹⁴² The legislature in civil law countries usually distributes powers between corporate governance bodies, whereas common law jurisdictions are more flexible in that they often leave the allocation of control rights to shareholders.¹⁴³ The flexible allocation of power between the decision-making bodies of a company, particularly between shareholders and directors, enables greater flexibility, which in turn enables the company 'to react quickly to a changing environment and to

¹³⁸ See Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2003) 23(4) *University of Pennsylvania, Journal of International Economic Law* 791, 19, available at the website of SSRN at <http://ssrn.com/abstract=419881>, last visited 25 July 2007.

¹³⁹ See generally, American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Vol 1, 1994) 77-8.

¹⁴⁰ See Katharina Pistor et al, *op. cit.*, 29.

¹⁴¹ See section 198A of the *Corporation Act 2001 (Cth)* of Australia; s 128 of the *Companies Act 1993* of New Zealand; s 8.01 of MBCA, and, s 141 of *Delaware General Corporation Law* of the US.

¹⁴² Such as *Automatic Self-Cleaning Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34; *Quin & Axtens Ltd v Salmon* [1909] AC 442; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113; and *Mendes v Cmr of Probate Duties (Vic)* (1967) 122 CLR 152 at 160. See further, R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 70-4.

¹⁴³ See Pistor et al, *op cit.*, 29.

implement strategic moves without going through cumbersome procedures to ensure shareholders rights'.¹⁴⁴

The company law of some Anglo-American jurisdictions often allows a board of directors to delegate their powers to a sub-committee (such as a committee of auditing, nominating, and remuneration), or otherwise to a director or any other person.¹⁴⁵ This appears flexible and efficient when dealing with particular matters of the company, especially in large public companies.¹⁴⁶

Under the *Enterprises Law 2005*, these powers of decision-making bodies of each company type can be expanded, but not decreased, by the company's constitution. Vietnamese Law has no provisions permitting a board, or any other corporate governance body, to set up and delegate its powers to other bodies. It should be noted that although the Code states that the BOM of a listed company may establish sub-committees in order to assist the BOM in its operation, the Code does not provide for the delegation of powers of the BOM to these sub-committees. The law does not enable the shareholders' meeting to delegate its statutory powers to the BOM or to the CEO. The mandatory divisions of powers between fixed corporate decision-making bodies without delegation of powers under the legal framework of listed companies implies a lack of flexibility and efficiency. In this way, the legal framework restricts a company's capacity to set up a flexible internal governance structure and does not support 'good' corporate governance practices in the listed companies.

The OECD Principles of Corporate Governance and the company law of Anglo-American jurisdictions favour the role of the board of directors in the supervision and guidance of daily management tasks. However, under the *Enterprises Law 2005*, the BOM has the power to be involved directly in the company management. The Law provides that the board directs and supervises the CEO and other managers in running the daily operation of the company.¹⁴⁷ Further, the Law provides that the BOM has the power to decide on any matters that are not within the scope of the shareholders' meeting. This means that the board can overrule the CEO who is also mandated as the decision-making individual with statutory powers to run the daily operation of the company.¹⁴⁸ In this way, the statutory division of powers and

¹⁴⁴ Ibid, 30.

¹⁴⁵ See, eg, ss 198C (1), 198D (1) of the *Corporation Act 2001 (Cth)* of Australia.

¹⁴⁶ See, e.g. American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Vol. 1, 1994) s.305, Part III-A (ss 3A.01-3A.05).

¹⁴⁷ See 108.2.(i) of the *Enterprises Law 2005*.

¹⁴⁸ Ibid, Articles 95, 116.

functions between the BOM and the CEO in SCs is unclear and may result in a lack of accountability.¹⁴⁹

2.1.2.3. *The problem of the legal representative of companies*

A company is an artificial legal person and must have people to act on its behalf. Unlike the corporation law of Australia and some other countries,¹⁵⁰ the *Enterprises Law 2005* requires the company's constitution to decide upon the legal representative of the company. For example, the *Enterprises Law 2005* stipulates that the legal representative of a SC is either the chairperson of the BOM or the CEO. While these provisions appear to be flexible, they are inappropriate because the powers of the CEO are restricted by the chairperson and the CEO may have no authority to approve contracts and sign documents on behalf of the company. This can adversely affect the company's business and may present difficulties in daily management.¹⁵¹

2.1.2.4. *The problem of mandatory supervision*

Efficient supervisory mechanisms are important for 'good' corporate governance. The *Enterprises Law 2005* requires that a Control Board must be established when a SC has more than 11 natural shareholders or one (or more) organisation shareholder(s) holding more than 50 per cent of the equity capital. Thus, it could be assumed that a SC that has 10 natural shareholders holding 51 per cent and 490 organisation shareholders holding 49 per cent of the share capital would have no mandatory supervisor. In public companies with a large number of shareholders, mandatory supervisory mechanisms are necessary to protect minority investors. Thus, it is inappropriate that a SC having 500 shareholders has no supervisor. This is a 'gap' in the *Enterprises Law 2005*.

In summary, the current legal framework for corporate governance of Vietnamese listed companies is ineffective because of a lack of flexibility, accountability and

¹⁴⁹ Ibid, Article 108.2; Article 116.3.

¹⁵⁰ For discussion of the authority to act for a company under the company law of Australia and New Zealand, see generally, P R Austin and I M Ramsay, *Ford's Principles of Corporations Law* (13 ed, 2007) 758-63; Gordon Walker et al, *Commercial Applications of Company Law in New Zealand* (2 ed, 2005) 418-28.

¹⁵¹ By contrast, the *Corporations Act 2001 (Cth)* of Australia stipulates that 'any 2 directors of a company that has 2 or more directors, or the director of a proprietary company that has only 1 director, may sign, draw, accept, endorse, or otherwise execute a negotiable instrument' (section 198B(1)). Under Australian corporation's law, a company can execute a document without using a common seal when it is signed by two directors, or a director and a company secretary, or the sole director of the company. See further, sub-section 127(1) and 127 (2) of the *Corporations Act 2001 (Cth)*.

efficiency. The mandatory approach that has been adopted regarding company structure does not promote 'good' corporate governance.

2.2. *The rights of shareholders*

According to Hansmann and Kaakman, there are three possible principal conflicts within the company: (i) those between managers and shareholders; (ii) those between controlling and minority shareholders, and, (iii) those between shareholders and other corporate stakeholders such as employees and creditors.¹⁵² These issues relating to the rights of shareholders are also addressed in the OECD Principles. Accordingly, the corporate governance framework should:

- (i) protect and facilitate the exercise of shareholders' rights (Principle II);
- (ii) ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights (Principle III);
- (iii) recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financial sound enterprises (Principle IV).¹⁵³

The rights of shareholders or investor protection were a concern for Vietnamese law-makers when introducing the *Enterprises Law 2005*. Accordingly, 'stronger' minority shareholder protection is, *inter alia*, a main objective of the *Enterprises Law 2005*.¹⁵⁴ In general, the *Enterprises Law 2005* enhances investor protection mechanisms, and provides for basic rights of shareholders such as attending the GMS, voting directly (or via proxy) on the basis of one share one vote; selecting senior managers and supervisors; receiving dividends; being given priority in making additional capital contributions; assigning his/her shares to others; getting information of the

¹⁵² See Henry Hansmann and Reinier Kraakman, 'What is Corporate Law' in Reinier R. Kraakman et al (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004) 1-2.

¹⁵³ See Organisation for Economic Co-operation and Development (OECD), 'The OECD Principles of Corporate Governance' (2004) 18-21.

¹⁵⁴ See Report No. 444/BC-UBTVQH11 dated 19 November 2005 by Standing Committee of the National Assembly (Uy ban Thuong Vu Quoc hoi) at 7. It is noteworthy that under the Securities Law 2006, a majority shareholder is a shareholder that holds directly or indirectly at least 5 per cent of shares that are entitled to vote (Article 6. 9). By contrast, the *Enterprises Law 2005* does not provide a definition of a majority nor minority shareholder.

company's business, and receiving a part of the remaining assets upon dissolution or bankruptcy of the company.¹⁵⁵

2.2.1. Meetings and decisions of shareholders.

In general, the *Enterprises Law 2005* provides detailed provisions for procedures, agendas, and other matters concerning meetings of shareholders. Compared to the *Enterprises Law 1999*, the *Enterprises Law 2005* enhances investor protection mechanisms, especially minority shareholder protection, via provisions on meeting agendas, convening a meeting, and quorums for shareholders' meeting and passing a resolution. However, the Law also has shortcomings in this area. These are discussed below.

2.2.1.1. Right to require a GMS by minority shareholders

In order to enhance minority shareholder protection, the *Enterprises Law 2005* provides for smaller statutory proportions of the equity capital in order for shareholders to require a general meeting. This may help minority shareholders to challenge the management and discuss related issues under the shareholders' powers. Accordingly, a shareholder of a group of shareholders of a SC holding over 10 per cent of ordinary shares of the company for at least six consecutive months (or a smaller proportion as prescribed in the company's constitution) has the right to require the BOM to convene a shareholders' meeting in certain circumstances as provided for by the law and the company's constitution.¹⁵⁶ If the BOM does not call a shareholders' meeting within 30 days after receiving the request, the chairperson of the BOM is responsible to the company for any damage, and the Control Board must convene a shareholders' meeting. If the Control Board also fails to convene a shareholders' meeting, the head of the Control Board is responsible to the company for any damage, and the shareholders who put the request have the right to call a shareholders' meeting where the expenses are paid by the company.¹⁵⁷ These provisions may help to convene a GMS to deal with matters of the company such as challenging the management, directors, and supervisors of the company.

However, the provisions on convening a GMS of the *Enterprises Law 2005* have certain shortcomings. First, the *Enterprises Law 2005* provides limited circumstances for shareholders of a SC to require a meeting. This Law stipulates that a shareholder or a group of shareholders of a SC only has the right to require the BOM to convene a GMS in the following circumstances:

¹⁵⁵ See Articles 79-80 of the *Enterprises Law 2005*.

¹⁵⁶ See art 79.2; art 97.3 of the *Enterprises Law 2005*.

¹⁵⁷ *Ibid*, art 97.3-6.

- (i) the BOM makes a serious breach of rights of shareholders, obligations of managers or makes a decision which falls outside its delegated authority;
- (ii) the term of the BOM has expired for more than six months and no new BOM has been elected to replace it;
- (iii) other circumstances as prescribed in the company's constitution.¹⁵⁸

In addition, the requester(s) has to show evidence of the above circumstances.¹⁵⁹ Therefore, shareholders of a SC have limited opportunities to require a GMS, and it may be hard for them to obtain adequate evidence to support a request.

In short, compared to the company law of some other jurisdictions like China, Spain, Ireland, Italy, Australia, Germany, and New Zealand, shareholders of Vietnamese companies operating under the *Enterprises Law 2005* find it more difficult to request a GMS due to higher shareholding requirements, the limited circumstances in which such a meeting can be called and the need to show evidence. Additionally, Vietnamese shareholders and directors/managers have no right to request a court to order a GMS to be convened.

2.2.1.2. Requirement for meeting and passing a resolution

Vietnamese lawmakers contend that the higher the requirement for passing a resolution on matters raised at the meeting is require, the more minority shareholders may be protected.¹⁶⁰ Thus, so as to enhance mechanisms to protect minority investors, the *Enterprises Law 2005* increased the requirements (example, quorum) for a meeting and the passing of a resolution of the GMS. Accordingly, the GMS is conducted when the number of attending shareholders represents at least

¹⁵⁸ Ibid, art 79.3.

¹⁵⁹ Section 4 of Article 79 stipulates that '[T]he request must be in writing, must contain full name, permanent address, nationality, number of people's identity card, passport or other lawful personal identification in respect of a shareholder being an individual; name, permanent address, nationality, number of decision on establishment or number of business registration in respect of a shareholder being an organization; number of shares and time of registration of shares of each shareholder, total number of shares of the group of shareholders and the percentage of ownership in the total number of shares of the company; and grounds and reasons for the request to convene a meeting of the GMS. The request must be accompanied by documents and evidence on the breaches of the BOM, the seriousness of such breaches, or on the decision which falls outside its authority'.

¹⁶⁰ See *Report No. 444/BC-UBTVQH11 of Standing Committee of National Assembly* (Uy Ban Thuong Vu Quoc Hoi) dated 19 November 2005 at 6-7.

sixty five (65) per cent of the voting shares.¹⁶¹ In addition, shareholders can decide higher requirements for a GMS in the company's constitution.

Furthermore, to pass a resolution at the shareholders' meeting, the requirements are also higher. The requirement to adopt an ordinary resolution is 65 per cent of the total voting shares of all attending shareholders.¹⁶² Where a resolution is passed by collecting written opinions, a resolution of the GMS is passed when it is approved by a number of shareholders representing at least seventy five (75) per cent of the total voting shares. Further, the company Charter can prescribe higher quorums for adopting a resolution of shareholders compared to the above statutory requirements under the *Enterprises Law 2005*. This issues is further discussed in Vinaconex and Vietcombank cases.

Under the above mentioned requirements, minority shareholders of Vietnamese companies have a stronger 'voice' in the corporate governance process and controlling shareholders also have to consider interests of minority investors in the decision-making process. These statutory requirements are higher than those of many other jurisdictions such as Australia, New Zealand, numerous US states (including Delaware), and China, where the affirmative vote of the majority of voting rights (a simple majority) is effective on normal matters of the company.¹⁶³

However, the higher statutory requirements for passing a resolution under the *Enterprises Law 2005* are still problematic. The reasons are two-fold. First, the requirements for adopting a resolution of GMS as discussed above are higher than those in company law of the number of other jurisdictions and this may negatively affect foreign direct investment in Vietnam.¹⁶⁴ Second, when Vietnam negotiated with members of the World Trade Organisation (WTO) in the course of its accession, the WTO members discussed these requirements. The Vietnamese Government has to accept that foreign shareholders have the right to agree with other shareholders to adopt a constitution with lower requirements for passing a resolution of the GMS

¹⁶¹ See art 102.1 of the *Enterprises Law 2005*.

¹⁶² *Ibid*, art 104.3.

¹⁶³ See, eg, s 216 of the *Delaware General of Corporation Law*; Article 104 of the *Company Law 2005* of China; Gordon Walker et al, *Commercial Applications of Company Law in New Zealand* (2 ed, 2005) 198; Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2 ed, 2002) 309.

¹⁶⁴ See Ministry of Trade (Bo Thuong Mai), 'Brief Report on Results of Negotiations on Accession to the WTO and Approval of the Protocol of Accession to the Agreement Establishing the WTO (Bao cao tom tat ket qua dam phan gia nhap To chuc Thuong Mai The gioi va Phe chuan Nghi dinh thu gia nhap To chuc Thuong Mai The gioi)' (24 November 2006) 6.

compared to statutory quorums as provided for by the *Enterprises Law 2005*.¹⁶⁵ In the result, a company with only Vietnamese shareholders is treated in different way to a company having foreign equity investors.

2.2.2. Large and related-party transactions

The provisions to control and approve large and related-party transactions in the *Enterprises Law 2005* are improvements compared to the previous law. Nevertheless, the question is whether the Law has shortcomings in this area.

First, under the *Enterprises Law 2005*, a loan agreement or a contract that has a value of at least 50 per cent of the total assets of the company (or smaller percentage as prescribed in the company's constitution), excluding related-party transactions, must be approved by the BOM of the SC.¹⁶⁶ However, the *Enterprises Law 2005* does not provide legal mechanisms to monitor such transactions. This absence is not helpful for protecting investors.

Second, the term 'related - party transactions' (*cac giao dich co loi ich lien quan*) is a new concept.¹⁶⁷ Nevertheless, the definition of 'related person' (*nguai co lien quan*) under the *Enterprises Law 2005* and the *Securities Law 2006* has been widened in comparison with the 1999 company statute, and, to some extent, is comparable to the definition in *Model Business Corporation Act* (MBCA) of the US and the *Corporations Act 2001* (Cth) of Australia.¹⁶⁸

According to the *Enterprises Law 2005*, 'related person' (*nguai co lien quan*) means an organization or persons related directly or indirectly to an enterprise in the following cases:

¹⁶⁵ Ibid.

¹⁶⁶ See section 2, Article 108 of the *Enterprises Law 2005*.

¹⁶⁷ See CIEM (Vien Quan Ly Kinh Te Trung Uong), GTZ (Gesellschaft fur Technische Zusammenarbeit) and UNDPVN (United Nations Development Programme), 'High Time for another Breakthrough: Review of the Enterprises Law and Recommendations for Change (Thoi diem cho su thay doi: Danh gia Luat doanh nghiep va kien nghi sua doi)' (2004) 5.

¹⁶⁸ See section 17 of Article 4 of the *Enterprises Law 2005*; section 34 of Article 6 of the *Securities Law 2006*. See and compare, s 8.60 (3) of MBCA of the US; ss 9, 228 of the *Corporations Act 2001* (Cth) of Australia. MBCA (sub-s 8.60(3)) provides that 'related person' of a director means (i) the spouse (or a parent or sibling thereof) of the director, or a child, grandchild, sibling, parent (or spouse of any thereof) of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified in this clause (i) is a substantial beneficiary; or (ii) a trust, estate, incompetent, conservative, or minor of which the director is a fiduciary.

- a) A parent company, the managers of the parent company and the person who has the power to appoint such managers, and a subsidiary company;
- b) A subsidiary company and a parent company;
- c) A person or a group of persons being able to control the decision-making process and operations of such enterprise through the management bodies of the enterprise;
- d) A manager of the enterprise;
- e) Husband, wife, father, adoptive father, mother, adoptive mother, children, adopted children, siblings of any manager of an enterprise, any member, or any shareholder holding a share of capital contribution or controlling share;
- f) An individual who is authorized to act as the representative of the persons stipulated in paragraphs (a), (b), (c), (d) and (e) of this clause;
- g) An enterprise in which the persons as stipulated in paragraphs (a), (b), (c), (d), (e), and (f) of this clause holding shares to the level that they can control the decision-making process of the management bodies of such enterprise;
- h) Any group of persons who agree to co-ordinate to take over shares of capital contribution, shares or interests in the company or control the decision-making process of the company.¹⁶⁹

As discussed above, in SCs, company directors/managers have to disclose their personal interests, and, all related-party transactions must be approved by either the shareholders or the BOM. This is an important means of preventing the managers and controlling shareholders from pursuing personal interests. In particular, contracts between a SC with the following parties must be approved by either the shareholders' meeting or the BOM (if fewer than 50 per cent of the total assets of the company or a smaller percentage prescribed in the company's constitution):

- (i) Shareholders, authorised representative of shareholders holding more than thirty five (35) per cent of the ordinary shares of the company and their related persons;
- (ii) Members of the BOM; director or general director (CEO); and
- (iii) Enterprises where BOM members, members of Control Board, the general or general director (CEO) and other managers of the company or related person hold more than 35 per cent of the equity capital.¹⁷⁰

¹⁶⁹ Ibid, art 14.17.

¹⁷⁰ Ibid, art 120.

In addition, the shareholders or director/manager who is related to the transaction has no right to vote. If such a deal is not approved as stated, it is invalid. The related shareholders or managers/directors concerned are liable to compensate for any damage caused and must return to the company any benefits gained from the performance of such contract and transaction.¹⁷¹ This issue is further discussed in TAC case.

However, the *Enterprises Law 2005* does not provide an external review mechanism for related-party transactions approved by the BOM of a SC. In addition, the Law does not (i) give shareholders of a SC the right to challenge the board and board members or to require a court to declare an unfair related-party transaction approved by the BOM to be invalid; (ii) provide legal rules to impose responsibilities on the board and its members in unfair related-party transactions of majority shareholders. Director liability was used as a criterion to assess investor protection in various countries in the 2006 research conducted by the World Bank.¹⁷² The research showed a lack of director liability in contemporary company law in Vietnam with a score of zero (0) compared to an average of 4.4 for East Asia and Pacific economies, and 9 for Cambodia, Singapore, the US, and Malaysia (see Table 1).¹⁷³

Table 1: Protecting Investors (2006)

Indicator	Vietnam	Region	OECD
Disclosure Index	4	5.2	6.3
Director Liability Index	0	4.4	5.0
Shareholder Suits Index	2	6.1	6.6
Investor Protection Index	2.0	5.2	6.0

Source: World Bank, 'Doing Business 2007- How to Reform'.¹⁷⁴

¹⁷¹ Ibid, art 120.4.

¹⁷² See generally, World Bank, '*Doing Business 2007: How to Reform (2006)*' (2007), available at <http://www.doingbusiness.org/>, last visited 28 July 2007.

¹⁷³ Ibid.

¹⁷⁴ Notes: The indicators describe three dimensions of investor protection: transparency of transactions (Extent of Disclosure Index), liability for self-dealing (Extent of Director Liability Index), shareholders' ability to sue officers and directors for misconduct (Ease of Shareholder Suits Index) and Strength of Investor Protection Index. The indexes vary between 0 and 10, with higher values indicating greater disclosure, greater liability of directors, greater powers of shareholders to challenge the transaction, and better investor

2.2.3. Shareholders suit (Anti-Director Rights)

Anti-director rights, a basic right of equity investors, were an indicator used by La Porta et al in their research into corporate governance and investor protection.¹⁷⁵ Generally speaking, in Anglo-American jurisdictions, a shareholder can take legal action in their own name or on behalf of the company.¹⁷⁶ The *Enterprises Law 2005* provides that a shareholder of a multiple-shareholder limited liability company (MLLC) has the right to sue the CEO of the company if he/she fails to perform fully his/her obligations and duties, and causes damage to such a *shareholder* or the *company* (emphasis added).¹⁷⁷ However, with a SC, the *Enterprises Law 2005* does not provide the right for shareholders, either in their names or on the company's behalf, to take legal action against the CEO, directors/managers, and supervisors of the company. In this way, the *Enterprises Law 2005* does not recognize anti-director rights, a basic right of equity investors as previously stated, of SC's shareholders. Consequently, directors/managers of a SC cannot be challenged by shareholders. This may result in oppression of shareholders, and in a lack of legal mechanisms to protect shareholders and force the directors/managers to exercise their duties and obligations. This law is further discussed in VIPCO case.

In *White Paper on Corporate Governance in Asia*, the OECD suggests that company law should provide provisions for class-action suits for equity investors.¹⁷⁸ In 2006, shareholders' ability to sue officers and directors for misconduct (ease of shareholder suits index) was used as an indicator by the World Bank to assess investor

protection. Source: World Bank, '*Doing Business 2007- How to Reform*' at <http://www.doingbusiness.org/ExploreEconomies/Default.aspx?economyid=202>, last visited 10 May 2007.

¹⁷⁵ See Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58(1-2) *Journal of Financial Economics* 3, 5. Available at the website of SSRN at <http://ssrn.com/abstract=183908>, last visited 28 July 2007. They are six anti-director rights including: (i) the country allows shareholders to mail their proxy vote to the company; (ii) shareholders are not required to deposit their shares prior to a General Shareholder's Meeting; (iii) cumulative voting or proportional representation of minorities in the board of directors is allowed; (iv) an oppressed minorities mechanism is in place; (v) then minimum percentage of share capital that entitles a shareholder to call an Extraordinary Shareholders' Meeting is less than or equal to 10%; (vi) shareholders have pre-emptive rights that can only be a waved by a shareholders' vote.

¹⁷⁶ See further, Stephen M Bainbridge, *Corporation Law and Economics* (2002) 362-5.

¹⁷⁷ See section 1(g) of Article 41 of the *Enterprises Law 2005*.

¹⁷⁸ See generally, Organisation for Economic Co-operation and Development (OECD), '*White Paper on Corporate Governance in Asia*' (2003) 50.

protection.¹⁷⁹ When suggesting a model of company law for transition economies, Avilov et al contend that company law should give shareholders the right to sue directors in the courts whereby the shareholder(s) seeks damages on behalf of the company for violations of the director(s), and have the right to receive compensation for his/her expenses if successful in recovering damages on behalf on the company.¹⁸⁰

The lack of anti-director rights of shareholders in Vietnamese company law is noted in the 2006 research by World Bank. Vietnam ranked 170 among 174 economies in investor protection with a shareholder suits index of 2 compared to an average of 6.1 for East Asia & Pacific jurisdictions and 6.6 for the OECD members (see Table 1 above).

In *Doing Business 2008* by the World Bank, Vietnam has improved its investor protection compared with 2007. Accordingly, three dimensions of investor protection: *transparency of transactions* (Extent of Disclosure Index), *liability for self-dealing* (Extent of Director Liability Index), *shareholders' ability to sue officers and directors for misconduct* (Ease of Shareholder Suits Index) and *Strength of Investor Protection Index* ranked Vietnam at 165 among 178 economies with a remaining shareholder suits index of 2 (see Table 2). In the reported period, Vietnam adopted the *Securities Law 2006* and the *Enterprise Law 2005*, which helped strengthen investor protection. The *Securities Law 2006* sets up a new exchange and trading centre. The *Enterprise Law 2005* mandates investor involvement in major company actions. The two laws also increase reporting requirements and disclosure for related-party transactions. However, Vietnam remains among those countries which protect investors the least. The new laws introduce fiduciary duties for directors but fail to provide a way to enforce those duties. No commercial tribunals in Vietnam have jurisdiction over investor suits against directors. Consequently the extent of director liability is among the lowest in the world. Clearly, there is still room for improvement in this area. More reform is required to all dimensions of investor protection¹⁸¹

¹⁷⁹ See generally, World Bank, '*Doing Business 2007: How to Reform*' (2007), at <http://www.doingbusiness.org/ExploreTopics/ProtectingInvestors/>, last visited 28 July 2007.

¹⁸⁰ See Gainan Avilov et al, 'General Principles for Company law for Transition Economies' (1999) 24 *Journal of Corporation Law* 40-1, available at the website of SSRN at <http://ssrn.com/abstract=126539>, last visited 28 July 2007.

¹⁸¹ It is noteworthy that, the World Bank's *Doing Business 2008* report conducted from 1 April 2006 to 31 June 2007. During this period, the Vietnamese Government continued to improve business environment with *Enterprise Law 2005* and the *Securities Law 2006* were enforcement. For more comments about Vietnam, see World Bank in Vietnam at

Table 2: Protecting Investors (2008)

Indicator	Vietnam 2008
Extent of disclosure Index	6
Extent of director Liability Index	0
Ease of shareholder Suits Index	2
Investor Protection Index	2.7

Source: World Bank, '*Doing Business 2008*'.

2.2.4. Mandatory disclosure and transparency

Under the *Enterprises Law 2005*, mandatory corporate disclosure is enhanced through the imposition of disclosure obligations on directors/managers and the company. First, the *Enterprises Law 2005* imposes further disclosure obligations on company directors/managers. Accordingly, members of the BOM, the Control Board, the CEO, and other directors/managers of a SC are required to disclose interests such as details of enterprises where they are shareholders or where a related person holds more than 35 per cent of the equity capital.¹⁸² This must be disclosed at the shareholders' meetings, the head office and branches of company. Every shareholder, supervisor, and manager has the right to access information disclosed by directors/managers and supervisors. Information on related-party transactions must also be displayed at the company's office and branches.¹⁸³ Further, the remuneration of directors/managers must be displayed in a separate section of the annual financial report and reported to the shareholders' meeting. Such provisions are an important on the previous law.

Second, the *Enterprises Law 2005* requires a company to retain documents of the company such as the constitution, registers, certificates, minutes of meeting, resolutions and decisions of the company, report, books of accounts, account records, annual financial statements.¹⁸⁴ Before the shareholders' meeting, the convener has to send the agenda and related information to shareholders. A shareholder or a group of shareholders of a SC holding more than 10 per cent of the ordinary shares for at least six months has the right to request the Control Board to check accounting files and other materials of the company. In such a case, within seven days after receiving

www.worldbank.org.vn. See more in "*Doing Business 2008*" at <http://www.doingbusiness.org>, last visited 27 September 2007.

¹⁸² See sections 1-4 of Article 118 of the *Enterprises Law 2005*.

¹⁸³ *Ibid*, Article 120.

¹⁸⁴ *Ibid*, Article 12.

the request, the Control Board has to check the company files and submit a report to the requester(s) and the BOM.¹⁸⁵

Shareholders of a SC also have the right to access the register of shareholders, the constitution, and the minutes of the shareholders' meeting and its resolution.¹⁸⁶ A shareholder or a group of shareholders of a SC holding more than 10 per cent of the ordinary shares for at least six months or more can access resolutions and the minutes of the BOM, reports of the Control Board, mid-year and annual financial reports of the company.¹⁸⁷ The *Enterprises Law 2005* also provides that the public also has the right to access the annual financial report of a SC that is submitted to the business registration authority.¹⁸⁸ In this way, as in many other jurisdictions, creditors can access information about capital and assets of a company.¹⁸⁹

However, the *Enterprises Law 2005* lacks legal rules to deal with violations of disclosure obligations of the company and directors/managers. Lack of appropriate legal rules to enforce a company and directors/managers to comply with their disclosure requirements may result in 'poor' disclosure. This law is further discussed in FPT, BIBICA, TAC, Vietcombank, Vinaconex and BBT cases.

2.2.5. Cumulative voting rules

So as to enhance the representation of minority shareholders on the BOM and Control Board, the *Enterprises Law 2005* introduced a mandatory cumulative voting rule for SCs. Accordingly, 'voting to elect members of the BOM and of the Control Board must be implemented by the method of cumulative voting, whereby each shareholder shall have as his total number of votes the total number of shares he owns multiplied by the number of members to be elected to the BOM or Control Board, and each shareholder shall have the right to accumulate all his votes for one or more candidates'.¹⁹⁰ Under the *Enterprises Law 2005*, the voting rule applies not only to members of the BOM, but also supervisors in order to enhance the representation of minority shareholders on these governance bodies.

The value of the cumulative voting rule has not been fully determined in practice or the literature. This voting system has just been adopted in Vietnam by the *Enterprises Law 2005*. It may be helpful for providing representatives of minority shareholders on

¹⁸⁵ Ibid, sections 4-5, Article 123.

¹⁸⁶ Ibid, section 1, Article 79.

¹⁸⁷ Ibid, section 2, Article 79.

¹⁸⁸ Ibid, section 3, Article 129.

¹⁸⁹ See, eg Gerard Hertig and Hideki Kanda, 'Creditor Protection' in Reinier R Kraakman et al (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004) 71-9.

¹⁹⁰ See section 3(c) of Article 104 of the *Enterprises Law 2005*.

the BOM and Control Board, but the mandatory application of this voting rule to all SCs may not be helpful for effective corporate governance.

The method of cumulative voting stipulated in Article 104.3(c) of the *Enterprise Law 2005* applies to all shareholding companies including listed companies, unless the law on securities otherwise provides.¹⁹¹ Before and during the GMS, shareholders have the joint right to form a group in order to nominate a candidate/s and to cast cumulative votes for their candidates.¹⁹² The number of candidates which each group has the right to nominate depends on the number of candidates decided by the general meeting and the share ownership ratio of each group. Unless the company charter stipulates otherwise and unless the GMS decides otherwise, the number of candidates which a group can the right to nominate is regulated as follows:

- (i) A shareholder or a group of shareholders holding from ten (10) to below twenty (20) per cent of the total voting shares shall have the right to nominate a maximum of one candidate;
- (ii) A shareholder or a group of shareholders holding from twenty (20) to below thirty (30) per cent of the total voting shares shall have the right to nominate a maximum of two candidates;
- (iii) A shareholder or a group of shareholders holding from thirty (30) to below forty (40) per cent of the total voting shares shall have the right to nominate a maximum of three candidates;
- (iv) A shareholder or a group of shareholders holding from forty (40) to below fifty (50) per cent of the total voting shares shall have the right to nominate a maximum of four candidates;
- (v) A shareholder or a group of shareholders holding from fifty (50) to below sixty (60) per cent of the total voting shares shall have the right to nominate a maximum of five candidates;
- (vi) A shareholder or a group of shareholders holding from sixty (60) to below seventy (70) per cent of the total voting shares shall have the right to nominate a maximum of six candidates;
- (vii) A shareholder or a group of shareholders holding from seventy (70) to below eighty (80) per cent of the total voting shares shall have the right to nominate a maximum of seven candidates;

¹⁹¹ See Section 1, Article 17 of *Decree 139*.

¹⁹² *Ibid*, section 2.

- (viii) A shareholder or a group of shareholders holding from eighty (80) to below ninety (90) per cent of the total voting shares shall have the right to nominate a maximum of eight candidates.
- (ix) Where the number of candidates nominated by a shareholder or group of shareholders is lower than the number of candidates they are entitled to nominate, then the remaining candidates shall be nominated by the board of management or by the inspection committee or by other shareholders.¹⁹³

Persons elected to be members of the board of management or of the inspection committee are verified on the basis of a count from the highest number down to the lowest number of votes, starting with the candidate with the highest number of votes and then moving to the candidate with the next highest number until all the number of members as required by the company charter have been elected.¹⁹⁴

In summary, this section discussed the rights of shareholders under the provisions of the *Enterprises Law 2005*, the *Securities Law 2006* and the Code. It finds that the *Enterprises Law 2005* has shortcomings. First, the *Enterprises Law 2005* limits opportunities for shareholders to request a meeting. Second, the Law does not impose legal responsibilities on the board members when they approve unfair related-party transactions. Third, the *Enterprises Law 2005* does not provide a right for shareholders to sue the CEO, directors/managers, and supervisors of SCs. Fourth, there is a shortage of provisions to enforce disclosure obligations and to require directors to avoid insolvent trading. Fifth, the higher statutory quorums for meeting and for passing a resolution of shareholders and the cumulative voting system can be helpful for minority shareholder protection but these mechanisms may be unsupportive for 'good' corporate governance practices.

2.3. *Conflicts of interest and related party transactions*

In addition to provisions regarding large and related-party transactions under the *Enterprises Law 2005* as discussed above, the Code also provides detailed rules to control conflicts of interests and related party transactions in listed companies.¹⁹⁵

Firstly, the Code stipulates that the members of the BOM and of the board of directors must act honestly and avoid conflicts of interest.¹⁹⁶ Accordingly, members of the BOM, the CEO, managers and affiliated persons are not permitted to take advantage of business opportunities for their own personal purposes. They are not

¹⁹³ Ibid, section 3.

¹⁹⁴ Ibid, section 4.

¹⁹⁵ See Articles 23-25 of the Code.

¹⁹⁶ Ibid, Article 23.

permitted to use information obtained by virtue of their position in order to gain any personal benefit or a benefit for other individuals and organizations.¹⁹⁷ Furthermore, a member of the BOM, the CEO and a manager must notify the BOM of any contract between the company with such member or with an affiliated person of such member. Such entities (the member or manager and any affiliated person) are permitted to continue to perform such contract when members of the board of management who do not have a related interest (to the contract) decide not to investigate the matter.¹⁹⁸ The company is not permitted to make a loan or provide a guarantee to a member of the BOM or of the board of controllers, to the CEO, to a manager or affiliated person or to any other legal entity with which the above-named have a financial interest, unless otherwise decided by the GMS.¹⁹⁹ It is notable that a member of the BOM is not permitted to vote on a transaction in which such member or an affiliated person participates, including a case where the interest of the member of the board in the transaction has not been confirmed and irrespective of whether the interest is material or non-material. The above-mentioned transactions must be presented in the financial statements for the relevant period and announced in the annual financial statements.²⁰⁰ Members of the BOM, the CEO, managers and their affiliated persons are not permitted to use information which has not yet been announced in order to reveal it to others or to carry out the relevant transaction on their own behalf.²⁰¹ The Code also requires that a listed company provides rules on rewarding and disciplining members of the BOM, of the board of controllers and of the board of directors, and of managers including the following matters:

- (i) Formulating the assessment criteria;
- (ii) Formulating the reward and discipline system;

¹⁹⁷ Ibid, section 1, Article 23. It is noteworthy that the term 'affiliated person' means an individual or organization with interactive relations in the following circumstances: (a) Parents, adopted parents, spouses, children, adopted children and siblings of any such individual; (b) Organizations in which there are individuals who are staff, the director or general director, or the owner of more than fifteen (15) per cent of the voting shares in circulation; (c) Members of the board of management or board of controllers, the director or general director and the deputy director or deputy general director and other managerial personnel of such organization; (d) People who in a relationship with another person directly or indirectly control or are jointly controlled by such other person, or who jointly with another person are subject to the same control; (e) A parent company and its subsidiaries; (f) A contractual relationship in which one person is the representative of the other (See section 34, Article 6 of the *Securities Law 2006*).

¹⁹⁸ See section 2, Article 23 of the Code.

¹⁹⁹ Ibid, section 3.

²⁰⁰ Ibid, section 4.

²⁰¹ Ibid, section 5.

- (iii) Organizing the apparatus making assessments and [deciding] to reward or discipline;
- (iv) Organization of implementation.²⁰²

Secondly, when conducting a transaction with an affiliated person, a listed company must sign a contract under the Code provisions. The contents of the contract must be clear, and the terms and conditions on execution, supplements, amendments, validity, price and basis for determining the contractual price constitute information to be disclosed in accordance with law.²⁰³ Furthermore, a listed company must take measures to prevent (i) affiliated persons from interfering in the company's activities and causing loss to the company's interests by monopolising selling and purchasing channels and by rigging prices; (ii) shareholders and affiliated persons from carrying out transactions which may cause a loss of capital, assets or other resources of the company. A listed company must not provide financial guarantees for shareholders and affiliated persons.²⁰⁴

Thirdly, the Code stipulates that a listed company must respect the legitimate rights of persons with interests related to the company including banks, creditors, employees, consumers, suppliers, the community and others.²⁰⁵

2.4. Information disclosure and transparency

First, a listed company is obliged to announce promptly, completely and accurately both periodical and extraordinary information about its business, financial status and corporate governance status to shareholders and the public. Information and the method of announcing information are implemented in accordance with law and the company Charter. In addition, a listed company must announce other information in a prompt and complete manner if such information could affect the value of securities and could affect decision-making by shareholders and investors.²⁰⁶ Furthermore, the announcement of information must be implemented by a method which ensures that shareholders and the investing public may access it simultaneously and equally. The wording of an announcement needs to be clear and easy to understand, and should avoid language which could cause misunderstanding by shareholders and the investing public.²⁰⁷

²⁰² Ibid, section 6.

²⁰³ Ibid, section 1 of Article 24.

²⁰⁴ Ibid, sections 2, 3.

²⁰⁵ Ibid, section 1, Article 25.

²⁰⁶ Ibid, section 1, Article 27.

²⁰⁷ Ibid, section 2, Article 27.

Second, a listed company must announce information on its corporate governance status at the annual GMS and in annual reports of the company. Such information must at least consist of:

- (i) Members and structure of the BOM and of the board of controllers;
- (ii) Activities of the board of management and of the board of controllers;
- (iii) Activities of independent non-executive members of the board of management;
- (iv) Activities of sub-committees of the board of management;
- (v) A plan to increase the efficiency of the company's activities;
- (vi) Remuneration and expenses for members of the board of management, the board of directors and the board of controllers;
- (vii) Information about transactions of the company's shares by members of the board of management, the board of directors, the board of controllers and major shareholders; and about other transactions by members of the board of management, the board of directors, the board of controllers and their affiliated persons;
- (viii) The number of members of the board of management, of the board of directors and of the board of controllers attending training courses on corporate governance; and
- (ix) Actions not yet undertaken [but required by] these Codes, the reasons and [proposed] solutions.²⁰⁸

In addition, a listed company is obliged to report on a quarterly and annual basis and to announce information about its corporate governance status in accordance with regulations of the SSC to the SSC and to the Stock Exchange or Securities Trading Centre.²⁰⁹

Third, a listed company must regularly announce information about each major shareholder, including: (i) full name and date of birth (individual shareholder); (ii) contact address; (iii) occupation (individual shareholder), or scope of business (institutional shareholder); (iv) number and ratio of shares owned in the company; (v) status of fluctuation in ownership by major shareholders; (vi) information which may lead to a major change in the company's shareholders; and (vii) status of increase or decrease in shares, and pledge or mortgage of shares of major

²⁰⁸ Ibid, section 1, Article 28. These issues are further discussed in FPT, VIPCO, TAC and Vietcombank cases.

²⁰⁹ Ibid, section 2, Article 28.

shareholders.²¹⁰ A listed company is obliged to report on a quarterly and annual basis and to announce information about fluctuations in ownership by major shareholders to the SSC and to the SE or STC.²¹¹

Fourth, a listed company must organize information disclosure the announcement of information to include the following: (i) formulating and promulgating rules on announcing information as stipulated in the *Securities Law 2006* and its guiding documents; (ii) appointing at least one staff member in charge of announcing information.²¹² The staff member in charge of announcing information may be the secretary of the company or another officer. The staff member in charge of announcing information must:

- (i) have knowledge of accounting and finance and have specified computer skills;
- (ii) publish his or her name and telephone number so that shareholders may readily contact him or her;
- (iii) have sufficient time to implement his or her duties, especially contacting shareholders, receiving shareholders' opinions, periodically publicly answering shareholders' opinions and matters relating to corporate management as stipulated in regulations; and
- (iv) be responsible for announcing information of the company to the investing public in accordance with law and the company Charter.²¹³

3. Observations on a principle-by-principle assessment of Vietnam's compliance with the OECD Principles of Corporate Governance

The discussion and analysis above related to corporate governance of Vietnamese listed companies. In June 2006, the World Bank Representative in Vietnam (WBVN) completed a report which made key observations on a principle-by-principle assessment of Vietnam's compliance with the OECD Principles of Corporate Governance.²¹⁴ This report provided a benchmark for Vietnam's observance of corporate governance practices against the OECD Principles of Corporate Governance. It described current practice and provided policy recommendations in six areas: (i) corporate governance framework; (ii) rights of shareholders; (iii)

²¹⁰ Ibid, section 1, Article 29.

²¹¹ Ibid, section 2.

²¹² Ibid, section 1, Article 30.

²¹³ Ibid, sections 2 and 3, Article 30. This law is further discussed in BIBICA, VIPCO, BBT and TAC cases.

²¹⁴ See more comments in World Bank Representative in Vietnam (WBVN), '*Corporate Governance Country Assessment: Vietnam*' (2006), 2-4.

equitable treatment of shareholders; (iv) role of stakeholders in corporate governance; (v) disclosure and transparency; and (vi) responsibilities of the Board.

The report showed that Vietnam has taken significant steps to establish a corporate governance framework. There remain, however, some significant challenges moving forward. These included: ensuring implementation of recent legislative changes; strengthening the capacity of the securities regulator; improving enforcement of regulatory compliance; setting the framework and standards for the informal securities market; promoting awareness and training of corporate directors on corporate governance and encouraging better quality, timely, and accessible information (see Table 3).

Table 3: Summary of Observance of OECD Corporate Governance Principles

Principle	O	L	PO	M	NO	Comment
	O	O		O		
I. ENSURING THE BASIS FOR AN EFFECTIVE CORPORATE GOVERNANCE FRAMEWORK						
IA. Overall corporate governance framework				X		Rapidly evolving corporate governance framework
IB. Legal framework enforceable/transparent				X		New Securities Law (2006), effective in 2007
IC. Clear division of regulatory responsibilities			X			Clear division of responsibilities
ID. Regulatory authority, integrity, resources				X		SSC and STCs have limited capacity
II. THE RIGHTS OF SHAREHOLDERS AND KEY OWNERSHIP FUNCTIONS						
IIA. Basic shareholder rights			X			Basic rights in place
IIB. Rights to participate in fundamental decisions			X			Fundamental decisions made with 65% majority
IIC. Shareholders AGM rights			X			Advance notice period of 7 days
IID. Disproportionate control disclosure			X			Ownership disclosure required
IIE. Control arrangements allowed to function				X		Mandatory tender offer rule at 25%
IIF. Exercise of ownership rights facilitated				X		No requirements in place
IIG. Shareholders allowed to consult each other			X			No legal obstacles to consultation
III. EQUITABLE TREATMENT OF SHAREHOLDERS						
IIIA. All shareholders should be treated equally				X		Limited protection of minority shareholders, limited redress
IIIB. Prohibit insider trading				X		Weak insider trading rules, no enforcement
IIIC. Board/managers disclose				X		Prevalent related-party

interests						transactions
IV. ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE						
IVA. Legal rights of stakeholders respected			X			Limited awareness of corporate social responsibility
IVB. Stakeholder redress			X			Access by stakeholders to legal process
IVC. Performance-enhancing mechanisms			X			Practice becoming more common
IVD. Stakeholder disclosure				X		Limited access by stakeholders, low compliance
IVE. Whistleblower protection				X		Limited whistleblower protection
IVF. Creditor rights law and enforcement				X		Weak legal rights, creditors rarely use their rights
V. DISCLOSURE AND TRANSPARENCY						
VA. Disclosure standards				X		Weak disclosure requirements and enforcement
VB. Standards of accounting and audit			X			Improving accounting standards and compliance
VC. Independent audit annually			X			VSA compatible to ISA
VD. External auditors should be accountable				X		Limited accountability, no lawsuits
VE. Fair and timely dissemination			X			Few information channels available
VF. Research conflicts of interests				X		No specific provisions
VI. RESPONSIBILITIES OF THE BOARD						
VIA. Act with due diligence, care			X			Fiduciary duties provided in law
VIB. Treat all shareholders fairly				X		Weak compliance
VIC. Apply high ethical standards				X		Code of ethics not common
VID. Fulfil certain key functions				X		Directors' training in early stage
VI E. Exercise objective judgment				X		Directors' independence a

						new concept
VIF. Provide access to information			X			Legal access available to board members
<p>Notes:</p> <p>Observed (O) means that all essential criteria are met without significant deficiencies.</p> <p>Largely observed (LO) means only minor shortcomings are observed, which do not raise questions about the authorities' ability and intent to achieve full observance in the short term.</p> <p>Partially observed (PO) means that while the legal and regulatory framework complies with the Principle, practices and enforcement diverge.</p> <p>Materially not observed (MO) means that, despite progress, shortcomings are sufficient to raise doubts about the authorities' ability to achieve observance.</p> <p>Not observed (NO) means no substantive progress toward observance has been achieved.</p>						

Source: World Bank Representative in Vietnam (WBVN), 'Corporate Governance: Country Assessment' (2006) 9.

Case studies on corporate governance of listed companies

1. FPT corporation case

1.1. Facts ²¹⁵

The FPT Corporation (FPT) was officially established in October 1990. After 12 years of operation, FPT was equitized in February 2002 with a total charter capital of VND 608 billion. The shareholdings were as follows: the State shareholder, internal shareholders, and outside shareholders held 7.3 per cent, 66.64 per cent, and 26.06 per cent, respectively. In December 2006, FPT officially listed its shares on HOSTC. The share price on initial listing was VND 160,000.

In March 2007 FPT's shares peaked at VND 672,000, but declined afterwards. On 10 August 2007, FPT shares were trading at VND 240,000. There were three major factors that impacted on FPT's share price. First, there were some rumours about FPT

²¹⁵ For reference to this case, see generally, *Thoi bao Kinh te Vietnam* (Vietnam Economy Times) at http://www.vneconomy.vn/?home=detail&page=category&cat_name=01&id=110bacc68e64e8, last visited 11 August 2007; *Vnexpress* website at <http://vnexpress.net/Vietnam/Kinh-doanh/2007/08/3B9F9104/>, last visited 10 August 2007; *FPT* website at www.fpt.com.vn, last visited 11 August 2007; *VietnamNet* website at <http://vietnamnet.vn/kinhte/2007/08/729630/>, last visited 14 August 2007; *Tuoi tre* (Youth Newspaper) website <http://www.tuoi-tre.com.vn/Tianyon/Index.aspx?ArticleID=215376&ChannelID=86>, last visited 15 August 2007.

which were not corrected in a timely fashion. Second, TPG Capital, FPT's strategic shareholder which held 5.89 per cent of its issued capital, registered to sell a large volume of shares. Third, two members of FPT's management board also registered to sell a number of shares.²¹⁶ However, the main reason for FPT's stock devaluation was FPT's expansion into several new fields such as banking, securities and fund management. FPT established three new subsidiary companies, namely FPT Bank (FPTB), FPT Securities (FPTS), and FPT Capital (FPTC) and the ratio of capital contribution in these subsidiary companies caused some concern to investors. On 10th August 2007 Mr. Truong Gia Binh, Chairman and CEO of FPT, held an online chat via the *Vnexpress* website (www.vnexpress.net) as a form of information disclosure to explain the stock decline in the share price and reassure nervous FPT's shareholders.

According to Mr. Binh, FPT's investment in a wide range of other sectors such banking, finance and education was an ordinary business expansion. All business sectors of FPT showed good prospects. For example, FPT mid-year business results showed an increase in profits of 118 per cent over the same period in 2006. Moreover, at the end of the 2006, when FPT decided to expand its operations to other sectors, the FPT's BOM discussed whether FPT would hold controlling stakes or a minority interest in these new companies. As a result, FPT's stake in the new companies only accounted for 25 per cent, 33 per cent, and 15 per cent in FPTS, FPTC and FPTB, respectively. The reasons given as to why FPT did not hold larger stakes were: (i) FPT had a total capital of VND 608 billion while the combined capital needed for the three companies (FPTB, FPTS, and FPTC) was VND1.31 trillion; (ii) though the new sectors were full of potential, FPT needed to ensure its own financial security; and (iii) FPT did not want the new institutions to depend on one entity with a controlling stake.

It was notable, however, that in these three new companies, members of FPT's BOM held 29 per cent, 47.7 per cent, and 4.5 per cent in FPTS, FPTC, and FPTB respectively. Mr. Binh as a Chairman of FPT's BOM and CEO held 4.3 per cent, 6.8 per cent, and 1.1 per cent respectively (see Table 4).

²¹⁶ Ibid. Two members of FPT's management board registered to sell shares.

Table 4: Structure of charter capital in the subsidiary companies.

Shareholders	FPTS (VND 200 billion)	FPTC (VND 110 billion)	FPTB (VND 1,000 billion)
FPT	25%	33 %	15 %
FPT's BOM	29%	47.7%	4.5%
Of which, CEO	4.3%	6.8%	1.1%
Outside	46%	19.3%	81.5%
Total	100%	100%	100%

Source: FPT.

1.2. Analysis

The FPT case raised several questions. Who decided that members of FPT's BOM could buy shares in the new subsidiary companies (FPTS, FPTB, and FPTF)? Who decided that shareholders in FPT and outside shareholders could not buy shares in the new companies? In relation to corporate governance, this case raised concerns about investor protection and law enforcement, the rights and duties of members of BOM and CEO in internal governance structure, conflict of interests, and information disclosure and transparency.

1.2.1. Investor protection and law enforcement

In the FPT case, shareholders' interests were negatively affected by corporate governance matters. First, FPT and its BOM discriminated between the minority shareholders and controlling shareholders when the BOM decided on the ratio of shares in the new subsidiary companies (see Table 5.2). Accordingly, the members of BOM and CEO were given the right to buy shares at a pre-listing price in these subsidiary companies as founding shareholders. For example, in FPTS, the share market price on listing was VND 85,000 (or 8.5 times) in comparison with the pre-listing price (VND 10,000). The total capitalization of FPTS was VND 1,700 billion. The members of BOM and CEO paid only VND 58 billion for their shares at the pre-listing price but had shares worth VND 493 billion upon listing. In other words, the members of BOM preferred their own interests over those of the minority shareholders (see Table 5).

Table 5: Structure of charter capital in FPT.

	Chapter capital (VND billion)	Total market capitalization (VND billion) ²¹⁷
FPTS	200	1,700
Of which:		
- FPT shareholders (25%)	50	425
- FPT's BOM (29%)	58	493
- Outside shareholders (46%)	92	782

Source: FPT (8/2007).

Second, under the FPT's Charter, the BOM had the right to establish subsidiary companies.²¹⁸ This provision also appears in the *Enterprises Law 2005* where the BOM has the rights 'to make decisions on the organizational structure and internal management rules of the company, to make decisions on the establishment of subsidiary companies, the establishment of branches and representative offices and the capital contribution to or purchase of shares of other enterprises'.²¹⁹ However, the *Enterprises Law 2005* also requires that 'when implementing its functions and performing its duties, the BOM must strictly comply with the provisions of law, the charter of the company and resolutions of the GMS. If the BOM passes a resolution which is contrary to law or contrary to provisions of the charter of the company causing damage to the company, then the members who agreed to pass such resolution are personally jointly liable for that resolution and they must compensate the company for the damage; any member who opposed the passing of such resolution is exempt from liability'.²²⁰ In the FPT case, the BOM was not only able to establish the subsidiary companies but also to decide the ratio of capital contribution in the subsidiary companies without referring to section 2 (d) of Article 96 of the *Enterprises Law 2005*. It is noteworthy, in the FPT's Charter, it was the GMS that had the right 'to make investment decisions or decisions on sale of assets valued at fifty (50) or more per cent of the total value of assets recorded in the most recent financial statement of the company unless the charter of the company stipulates some other

²¹⁷ Notes: The total market capitalization of FPTS was based on statistics from free market at of August 2007. For details, see *San OTC* website at www.sanotc.com.vn, last visited 12 August 2007.

²¹⁸ See more in Article 20.4.b of FPT's Charter.

²¹⁹ See Section 2 (k) of Article 108 of the *Enterprises Law 2005*.

²²⁰ *Ibid*, section 4.

percentage'.²²¹ For example, the total value of assets of FPT was VND 3,400 billion in the 2006 financial statement of FPT. This meant that investment decisions with value of assets from VND 1,700 billion had to be decided by the GMS.²²²

Third, the FPT case also shows that the role of State shareholder and outside shareholders (minority shareholders) in term of investor protection was weak although they held 7.3 per cent and 26.06 per cent of charter capital, respectively.

Fourth, the FPT case raises questions about the responsibility of FPT's Control Board in its role of supervising the BOM and the CEO in the daily management of the company.

1.2.2. The roles of BOM and members of BOM in corporate governance.

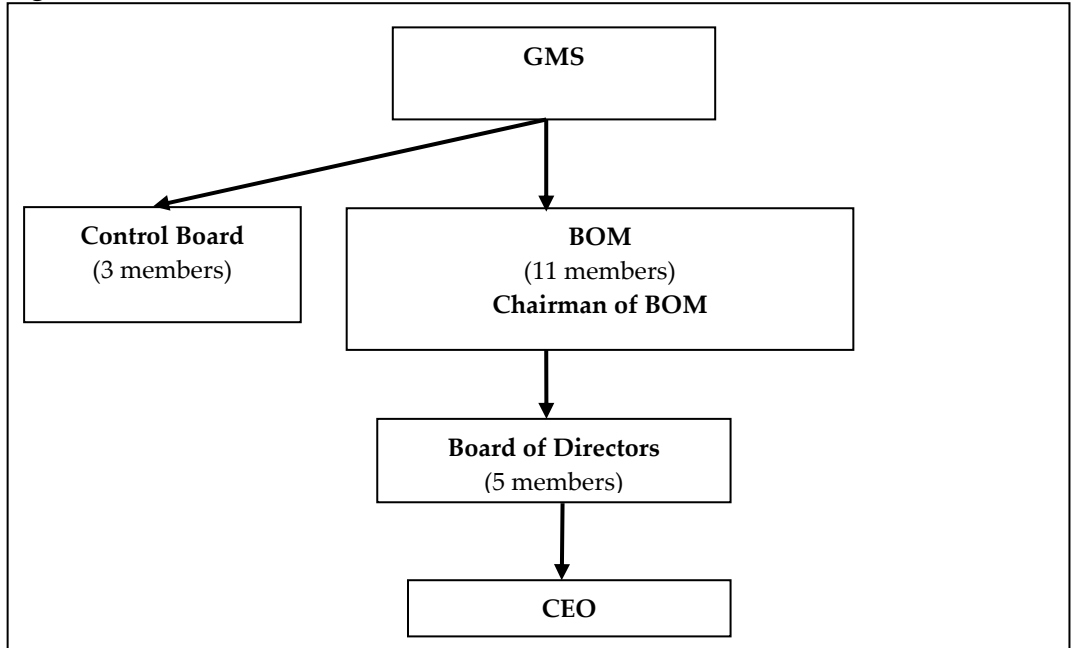
The internal governance structure of FPT included: GMS, BOM (11 members), Control Board (3 members), Board of Directors (5 members) and CEO. The Chairman of FPT's BOM was also FPT's CEO (see Figure 4). This structure shows that the FPT's BOM had no non-executive independent members as required by the Code.²²³

²²¹ See section 2 (l) of Article 13 of the FPT's charter. This provision also stipulates in section 2 (d) of Article 96 of the *Enterprises Law 2005*.

²²² The combined charter capital of the three subsidiary companies (FPTB, FPTC, and FPTD) was VND1.31 trillion. The decisions to establish three subsidiary companies belonged to the BOM.

²²³ Under the Code (section 1, Article 11), one-third of the BOM is non-executive independent members.

Figure 4: The Internal Governance Structure of FPT



Source: FPT

Under FPT's prospectus in 2006, FPT's shareholders included State shareholders, internal shareholders (including members of BOM and employees) and outside shareholders (including strategic shareholders) who held 7.3 per cent, 66.64 per cent, and 26.06 per cent, respectively (see Table 6).²²⁴ It is notable that, the members of FPT's BOM held 37.4 per cent of the charter capital. Mr. Binh held 8.42 per cent. This meant that members of BOM were the controlling shareholders. Table 7 shows the list of shareholders holding over 5 per cent of the shares in FPT.

²²⁴ There were more than 8,100 employees as of August 2007.

Table 6: Structure of charter capital in FPT (2006)

Ownership structure	Number of shares	Percentage
State	4,437,280	7.3
Internal shareholders (including members of BOM and employees)	40,526,610	66.64
Others (including strategic shareholders)	15,846,340	26.06
Total equity	60,810,230	100

Source: FPT's Prospectus on 20 November 2006.

Table 7: List of shareholders holding over 5 per cent shares in FPT (2006)

Ownership structure	Number of shares	Percentage
State	4,437,280	7.3
Mr. Truong Gia Binh (Chairman and CEO)	5,117,280	8.42
Mr. Le Quang Tien (Vice Chairman)	3,709,630	6.1
TPG Ventures - FPT, LLC	3,581,030	5.89
Total equity	16,845,220	27.7

Source: FPT's Prospectus on 20th November 2006.

The FPT case shows a conflict of interest between shareholders as principals and managers/directors of company as agents in the relationship between shareholders and managers/directors.²²⁵ Under agency theory, on the traditional view, a principal hires a person (an agent) to do something on his/her behalf, which he/she cannot do

²²⁵ See generally, Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (2004) 58-9; M.M. Blair and Lynn A. Stout, 'A Team Production Theory of Corporate Law' in Thomas W. Joo (ed), *Corporate Governance: Law, Theory and Policy* (2004) 53.

by his/herself.²²⁶ The agency relationship is related to 'agency costs' that include 'the monitoring expenditures by principal,' 'the bonding expenditures by the agent,' and 'the residual loss'.²²⁷ The level of agency costs depends, among other things, on statutory and common law and human ingenuity in devising contracts.²²⁸ Analysis of the relationship between principals and agents is concerned with two key issues: (i) how to reduce agency costs, and (ii) how to maximize the principals' interests.²²⁹ The natural characteristics of principal-agent relationships assume that the principal (shareholders) often has to monitor the agent (managers/directors) in the principal's interests because the latter 'may be tempted to maximize their own welfare rather than the profits of the firm than employs them'.²³⁰ In these relationships, agents are possibly opportunistic and self-serving. Another concern is whether or not the agents can do their best for the interests of principals.²³¹ To deal with these issues, first, an effective information system operating between the shareholders and the managers/directors is necessary; and second, the managers/directors should have appropriate compensation and incentives to make agents' motivation align with the company's shareholders.²³²

In the FPT case, the relationship between the BOM (an agent) and shareholders (principals) displays on an information asymmetry. Under agency theory, the agent (FPT's BOM) had full information about the company when it made decisions on the establishment of these subsidiary companies (FPTS, FPTB, and FPTF) and decided the ratio of the capital contribution in these subsidiary companies. In contrast, the principals (FPT's shareholders) did not have enough or any information to make an informed decision. This incident created an information asymmetry and a conflict of interest between the minority shareholders and FPT's BOM.

²²⁶ See M M Blair and Lynn A Stout, op cit, 51.

²²⁷ See Michael C Jensen and William H Meckling, op cit, 60.

²²⁸ Ibid at 72.

²²⁹ See M M Blair and Lynn A Stout, op cit, 51 for discussion of agency costs problems, see H N Butler and F S McChesney, 'Why they Gove at the Office: Shareholder Welfare and Corporate Pilanhtropy in the Contractual Theory of the Corporation' in Thomas W Joo (ed), *Corporate Governance: Law, Theory and Policy* (2004) 6; Michael C Jensen and William H Meckling, op cit, 59-60.

²³⁰ See H N Butler and F S McChesney, op cit, 5.

²³¹ See M M Blair and Lynn A Stout, op cit, 51.

²³² See also James Kirkbride and Steve Letza, 'The CEO in Law and in Practice: A Study of Categorisation and Control' (2002) 10(3) *Corporate Governance: An International Review* 136-40; Nguyen Van Thang, 'Corporate Governance in Vietnam's Equitized Companies' in Ho Khai Long (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (2005) 354-5.

1.2.3. Information disclosure and transparency

Information disclosure and transparency play an essential role in the corporate governance process. The *Enterprises Law 2005*, the *Securities Law 2006* and the Code require that 'a listed company is obliged to promptly, completely and accurately announce both periodical and extraordinary information about its business, financial status and corporate governance status to shareholders and the public. Information and the method of announcing information implemented in accordance with law and the company Charter'.²³³ In the FPT case, as the Chairman and CEO conceded, one of three major factors that impacted on FPT's share price was information disclosure and transparency.

In short, the FPT case highlights several problems of corporate governance in listed companies. This case shows 'poor' investor protection due to 'weak' law enforcement, the lack of regulation of anti-director rights of shareholders in *Enterprises Law 2005*, the ineffective role of the company's shareholders in the corporate governance process, and 'weak' information disclosure and transparency of listed companies in Vietnam.

2. BIBICA Case

2.1. The Facts²³⁴

The Bien Hoa Confectionary Corporation (BIBICA) was established in 1998 and was listed on HOSTC in December 2001 with a total charter capital of VND 101.6 billion.²³⁵ This case shows lack of disclosure by a listed company in relation to accounting and auditing practice, the ineffective role of the securities regulator in

²³³ See section 1, Article 27 of the Code.

²³⁴ For reference to the BIBICA case, see the SSC website at www.ssc.gov.vn; BIBICA website at www.bibica.com.vn and several popular Vietnamese websites: VietnamNet at <http://vietnamnet.vn/>; Stock Investment (*Dau Tu Chung Khoan*) at www.vir.com.vn, Vietnam Economy Times (*Thoi bao Kinh te Vietnam*) at www.vneconomy.vn; all last visited 10 August 2007. See more Van Tien, 'BIBICA: A profit of VND 4.1 billion in the first three quarters, a loss of VND 5.4 billion in the whole year' (*Cong ty BIBICA: 3 quy lai 4,1 ty; ca nam lo 5,4 ty*) at <http://www.vnn.vn/kinhte/2003/5/12893/>; Van Tien, 'BIBICA proposed the delay by 30 September to make the loss clear' (*Cong ty BIBICA xin gia han den 30/9 de lam ro khoan lo*) at www.vnn.vn/kinhte/taichinhnganhng/2003/7/18639/; all last visited 10 August 2007. For more information about this event, see also, Nguyen Van Thang, 'Corporate Governance in Vietnam's Equitized Companies' in Ho Khai Long (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (2005) 352-68.

²³⁵ See the SSC at www.ssc.gov.vn; the HOSTC at www.vse.org.vn; and the BIBICA www.bibica.com.vn, all last visited 10 August 2007.

dealing with breaches of disclosure requirements, and, a shortage of provisions on anti-director rights of shareholders.

In 2003, the BIBICA's annual financial report for 2002 made by the BOM and signed by the CEO for auditors stated that the company made a profit of VND 8.9 billion. However, this report was rejected by the BOS of the company. The report was then revised by the BOM with the assistance of an auditing company to show that BIBICA lost VND 2.7 billion in the financial year 2002.

Because BIBICA did not release the audited 2002 financial report within 90 days from the end of financial year 2002 as required under the current legislation,²³⁶ the HOSTC required the company to explain the reasons for this failure. BIBICA reported that they had encountered accounting problems such as inconsistent accounting data and changes of accountancy staff. The late submission of the 2002 financial report caused the delay of the ordinary meeting of GMS and submission of the first quarter financial report of 2003. As a result, in May 2003, the BIBICA share price was around VND 10.500 (a 60 per cent decline in comparison with the first date of listing). Some investors asked the SSC to suspend trading of the BIBICA shares but the SSC did not do so.

On 23 May 2003, BIBICA released its 2002 financial report audited by external auditors stating that the company lost VND 5,422 billion in the financial year of 2002. In order to discover why BIBICA delayed disclosing the annual financial report and whether it was reliable, the SSC decided to inspect the company. In June 2003, an inspection report by the SSC concluded that (i) BIBICA had broken disclosure rules in a systematic manner, and (ii) there was misleading accounting practice. Consequently, the authority required the company to re-check the accounting data and submit a detailed financial report audited by external auditors to the SSC and the HOSTC by 30 June 2003.

On 26 June 2003, the BOS of BIBICA submitted a report to the HOSTC saying that the company lost VND 12.3 billion in 2002, but the HOSTC viewed the report as an unofficial document because it was not verified by the BOM, the CEO of the company, and external auditors. Two days later, the GMS of BIBICA declined to approve the 2002 financial report submitted by the BOM because it was inconsistent with a report made by the BOS. While the former said that BIBICA lost VND 5.4 billion, the latter claimed that the company lost VND 12.3 billion in 2002. Therefore, BIBICA could not submit the audited 2002 financial report by 30 June 2003 as the SSC

²³⁶ Article 32 of the Regulation on Members, Listing, Disclosure and Securities Transactions (under Decision 79/2000/QĐ-BTC, dated 29 December 2000) required a listed company to disclose and submit financial reports for every three months no later than 15 days and the annual financial reports no later than 90 days from the end of the term.

required, and the company also asked the authority to allow a late submission by 30 September 2003.

On 30 September 2003, after re-auditing, BIBICA released a revised annual financial report showing a loss of about VND 10.086 billion in the year of 2002. Because of the breach of the disclosure rules discussed above, BIBICA was fined VND 20 million by the SSC (see Table 8).

Table 8: Business results of 2002 reported by BIBICA.

Time	Reported by	For purpose	Loss (VND billion)	Profit (VND billion)
The first report	CEO and BOM	Auditing		8.9
The second report	CEO and BOM	Auditing	2.7	
23 May 2003	CEO and BOM (audited)	Disclosure at HOSTC	5.422	
26 June 2003	Supervisory Board	Reporting the HOSTC	12.3	
30 September 2003	CEO and BOM (audited)	Disclosure at HOSTC	10.086	

Source: BIBICA, SSC, HOSTC.

2.2. Analysis

The BIBICA case raises questions about lack of transparency and disclosure by listed companies, breach of disclosure rules and the ineffective role of securities regulator in dealing with the incident.

Firstly, the BIBICA case raises questions about the accounting and auditing standards of listed companies. As mentioned above, accounting and auditing standards as well as their practices are important to corporate governance and development of financial market.²³⁷ Black comments that overly flexible accounting rules 'can reduce

²³⁷ IL Chong Nam, Yeongjae Kang and Joo-Kyung Kim, 'Comparative Corporate Governance Trends in Asia' in OECD (ed), *Corporate Governance in Asia: A Comparative Perspective* (2001) 85, 108.

comparability, increase opportunities for fraud, and increase overall information asymmetry between companies and investors'.²³⁸ Accounting rules, according to Black, should facilitate evaluating a company's business and 'limit managers' flexibility to pick and choose among alternate accounting practice in order to make their own firm appear more profitable.²³⁹ However, the accounting practices of BIBICA raise concerns about Vietnamese accounting standards promulgated by the MOF since BIBICA produced five different business results for the year 2002, among them two financial reports which were audited by an auditing company.

When presenting reasons for the incident, BIBICA management acknowledged that (i) its financial management system was 'weak'; and (ii) there was misleading data in accounting files, and these resulted in inconsistent financial reports. The financial management of BIBICA raises concerns about accounting practices of other Vietnamese companies. This means that contemporary accounting methods may be inconsistently applied in companies to produce different business results. In this way, contemporary accounting standards of Vietnam do not meet international standards of advanced economies, and are unreliable for investors.

The external auditors were in breach of their duties in BIBICA case. The role of the external auditors is critical in ensuring at least some degree of transparency and disclosure of listed companies. But as in other countries, Vietnamese external auditors can only perform their audits on the information provided by the company. The SSC requires every financial report of a listed company to be audited by external auditors but the auditing practices in the BIBICA case raise concerns. The auditing company made two inconsistent auditing reports of the 2002 financial year for BIBICA. In the BIBICA case, the external auditors had to re-do their audits due to inaccurate information provided by the company's management. In this way, the contemporary auditing standards and their practices lack reliability for investors. It is therefore submitted that accounting and auditing standards following international standards and their proper practices are an important for 'good' corporate governance in Vietnam.

Secondly, it is apparent that the BOM and the CEO of BIBICA were in breach of their duties of care and diligence as required by the law and the company's charter. The financial management and the implementation of disclosure obligations were under the responsibility of the BOM and CEO. However, they did not fulfill their duties.

²³⁸ Bernard Black, 'The Legal and Institutional Preconditions for Strong Stock Markets: the Nontriviality of Securities Law' in OECD (ed), *Corporate Governance in Asia: A Comparative Perspective* (2001) 55-61.

²³⁹ *Ibid*, 61.

Although these managers were in breach of statutory duties, BIBICA's shareholders could not sue them due to a lack of remedies in the current law.

In contrast, the BOS of BIBICA had a significant role in discovering and warning investors about inaccurate annual financial reports made by management. The BOS also required company management to re-check accounting data and re-make the 2002 financial report. The involvement of the supervisory body shows its important role in monitoring the management and protecting investors. It is submitted that qualified managers and efficient external supervisory mechanisms are essential for every company.

Thirdly, the BIBICA case raises questions about the ineffective role of securities regulator in dealing with the incident. It is apparent that BIBICA was in serious contravention of disclosure rules and under the current regulations of the SSC the HOSTC had the right to suspend the BIBICA shares from trading to protect investors. However, neither SSC nor HOSTC suspended the BIBICA shares from trading although it was asked to do so by some investors.

Securities regulators should play a significant role in protecting investors and ensuring the proper operation of stock market. However, what the stock regulators did in the BIBICA case was unsatisfactory. They accepted the delays of BIBICA in releasing the 2002 financial report for a long time and - more seriously - did not warn investors about the incident. Next, the fine of VND 20 million under the current legislation was quite trivial for such a gross violation of disclosure rules. Therefore, 'strong' securities regulators and strong penalties for violations of securities law are necessary to protect investors.

3. VIPCO Case

3.1. *The facts* ²⁴⁰

The Vietnam Petroleum Transport JSC (VIPCO) was established in 2005 with a charter capital of VND 351 billion. The State shareholder, internal shareholders and outside shareholders held 51 per cent, 3.7 per cent and 45.3 per cent of its equity, respectively. In December 2006, VIPCO listed on the HOSTC with charter capital of VND 421.2 billion. This case highlights issues relating to investor protection and law enforcement.

On 26 March 2007, the annual GMS passed a resolution to issue 17,880,000 shares in order to increase the charter capital to VND 600 billion. The shareholders purchased as follows: the State shareholder purchased 9,118,800 shares at a price of VND 15,000; other shareholders purchased 8,761,200 shares at a ratio of 50:21 (i.e., each investor owning 50 shares was entitled to buy 21 new shares) at a price of VND 40,000 (see Table 9). Although VIPCO's BOM explained the plan, the plan was cancelled because of shareholders' reaction to the issuing price.

²⁴⁰ For reference to the VIPCO case, see the SSC website at www.ssc.gov.vn; VIPCO website www.vipco.com.vn; the HOSTC website at www.vse.org.vn; all last visited 15 August 2007. See further about the VIPCO case in Vietnam Association of Financial Investors (VAFI) at www.vafi.org.vn; Minh Duc, 'Whether VIPCO issuing shares' plan breaches the Law?' (*Phuong an phat hanh co phan cua VIPCO co sai luat?*) at http://vneconomy.vn/?home=detail&page=category&cat_name=07&id=e18cf15adec150; Lan Huong, 'VIPCO's shareholders can be sued' (*Co dong VIPCO co the kien*) at http://vneconomy.vn/?home=detail&page=category&cat_name=07&id=07664777da27f1; Thanh Xuan, 'VIPCO: controlling shareholders force minority shareholders' (*Cong ty VIPCO: Co dong lon ep co dong nho*) at <http://www2.thanhvien.com.vn/Kinhhte/Chungkhoan/2007/3/31/187091.tno>; Hoang Ly, 'VIPCO continues to force minority shareholders' (*VIPCO tiep tục ép co dong nho*) at <http://www1.thanhvien.com.vn/Kinhhte/2007/5/29/194782.tno>; Nguyen Nhu, 'The new VIPCO's plan: Minority shareholders still has been forced' (*Phuong an moi cua VIPCO: Co dong nho van bi ép*) at <http://www.laodong.com.vn/Home/kinhhte/2007/6/39815.laodong>; all last visited 15 August 2007.

Table 9: The VIPCO's issuing shares plan

Shareholder	Number of shares	Price per share (VND)
State (PETROLIMEX Corp.)	9,118,800	15,000
Others	8,761,200	40,000
Total	17,880,000	

On 25 June 2007, the GMS's resolution produced another plan for shareholders approval. Accordingly, VIPCO issued 17,880,000 shares at a ratio of 50:21 and shareholders could choose two issuing prices: (i) if buying at a price of VND 15,000, shareholders could not freely assign their shares to other shareholders for a term of 10 years; or (ii) if buying at a price of VND 30,000, shareholders could freely assign their shares. To pass this resolution, the VIPCO's BOM conducted a vote by collecting written opinions. The BOM also stipulated that VIPCO's shareholders who did not send their written opinion to the company about this share plan were deemed to have accepted the BOM's plan.

3.2. Analysis

The VIPCO case raises questions about investor protection, especially the discrimination between State shareholder and other shareholders (including minority shareholders) in issuing shares. This case is a significant example of 'poor' corporate governance in equitized SOEs.

3.2.1. Investor protection and law enforcement.

The VIPCO case is a significant example of bad investor protection and law enforcement. In this case, minority shareholders' interests were negatively affected by two of VIPCO's resolutions.

First, the first resolution in March 2007 was contrary to the *Enterprises Law 2005* because under the *Enterprises Law 2005* 'each share of the same class shall entitle its holder to the same rights, obligations and interests'.²⁴¹ Moreover, relating to the rights of ordinary shareholders, the *Enterprises Law 2005* stipulates that the ordinary shareholders have the rights 'to be given priority in subscribing for new shares offered for sale in proportion to the number of ordinary shares each shareholder holds in the company'.²⁴² When the GMS approved a share issuance plan, the plan had to ensure that shareholders had the right to protect their legitimate interests without any discrimination among shareholders. In the VIPCO's GMS first

²⁴¹ See section 5 of Article 78 of the *Enterprises Law 2005*.

²⁴² Ibid, section 1 (c) of Article 79.

resolution, the State shareholder had the benefit of buying shares at a lower price (about 37.5 per cent) and at double the quantity of shares. This produced a conflict of interest with other shareholders and was contrary to the *Enterprises Law 2005*.

Second, the method by which the VIPCO's BOM attempted to pass the resolution by collecting the written opinion of shareholders violated shareholders rights because the VIPCO's shareholders disapproved the plan.

Third, the second resolution in June 2007 was also contrary to the *Enterprises Law 2005* because the BOM set the share price. The reasons are two-fold. First, the *Enterprises Law 2005* stipulates that each share of the same class entitles its holder to the same rights. Second, the issuance of shares with conditions to limit the assignation of shares to other shareholders was under the GMS's authority, not the BOM's authority.

3.2.2. *Anti-Director rights of shareholders*

It is apparent that the BOM of VIPCO acted contrary to the *Enterprises Law 2005* when they collected shareholders' written opinion in the two VIPCO's resolutions. The actions of the BOM were in breach of its statutory duties and directly benefited the State shareholders who held 51 per cent of the charter capital of VIPCO and benefited from both share plans. The VIPCO's minority shareholders could not sue the BOM due to lack of remedies in the *Enterprises Law 2005*.

Conclusion

Shortcomings of corporate governance of listed companies were discussed above. Therefore, to encourage better corporate governance of listed companies, we propose that the following issues should be addressed.

Firstly, corporate governance of listed companies should require the independence of directors on the BOM and a strengthening of the role of the Control Board. In addition, enhancing the oversight of the financial reporting process, internal control system, and adequate qualifications of the Control Board's members should be made to strengthen the role of Control Board.

Second, the corporate governance of listed companies should encourage shareholders' participation in GMS. Moreover, voting by proxy should be encouraged, and shareholders should be allowed to elect proxies through electronic devices. The 7-day notice for GMS is too short and needs to be increased to one month.

Third, it is necessary to lower the percentage of shares required to nominate a BOM member or an extra-ordinary GMS. Accordingly, the *Enterprise Law 2005* should consider lowering the minimum 10 percent ownership threshold required to

nominate a member of the board. In comparison with other jurisdictions, a shareholder or a group of shareholders holding at least 10 per cent of the voting rights in China, Ireland, and Italy or 5 per cent in Australia, Germany, Spain and New Zealand have the right to demand an extra-ordinary GMS, without the obligation to show evidence of reasons. Hence, the meetings requisitions rules and the obligations to show evidence of reasons to require an extra-ordinary GMS under the *Enterprise Law 2005* should be abandoned.

Fourth, performance-enhancing mechanisms should be allowed and promoted. Such mechanisms align the interests of senior executives and management of the company with those of their shareholders, and provide incentives for the former to perform. Such schemes should be approved by shareholders. No member of the BOM or the CEO should be involved in deciding on his/her own remuneration. A remuneration committee comprising non-executive members under the Board of Directors should be set up.

Fifth, I suggest that the SSC should assume a leading role in promoting corporate governance. The efforts of MOF, the SSC, SBV, the Ministry of Planning and Investment (MPI), Vietnam Chamber of Commerce and Industry (VCCI), State Capital Investment Corporation (SCIC), supervising Line Ministries of SOEs, and the National Steering Committee for Enterprise Reform and Development (NSCERD) need to be synchronised, avoiding duplications of responsibilities. It is recommended that a high-level committee consisting of relevant institutions be set up to promote corporate governance.

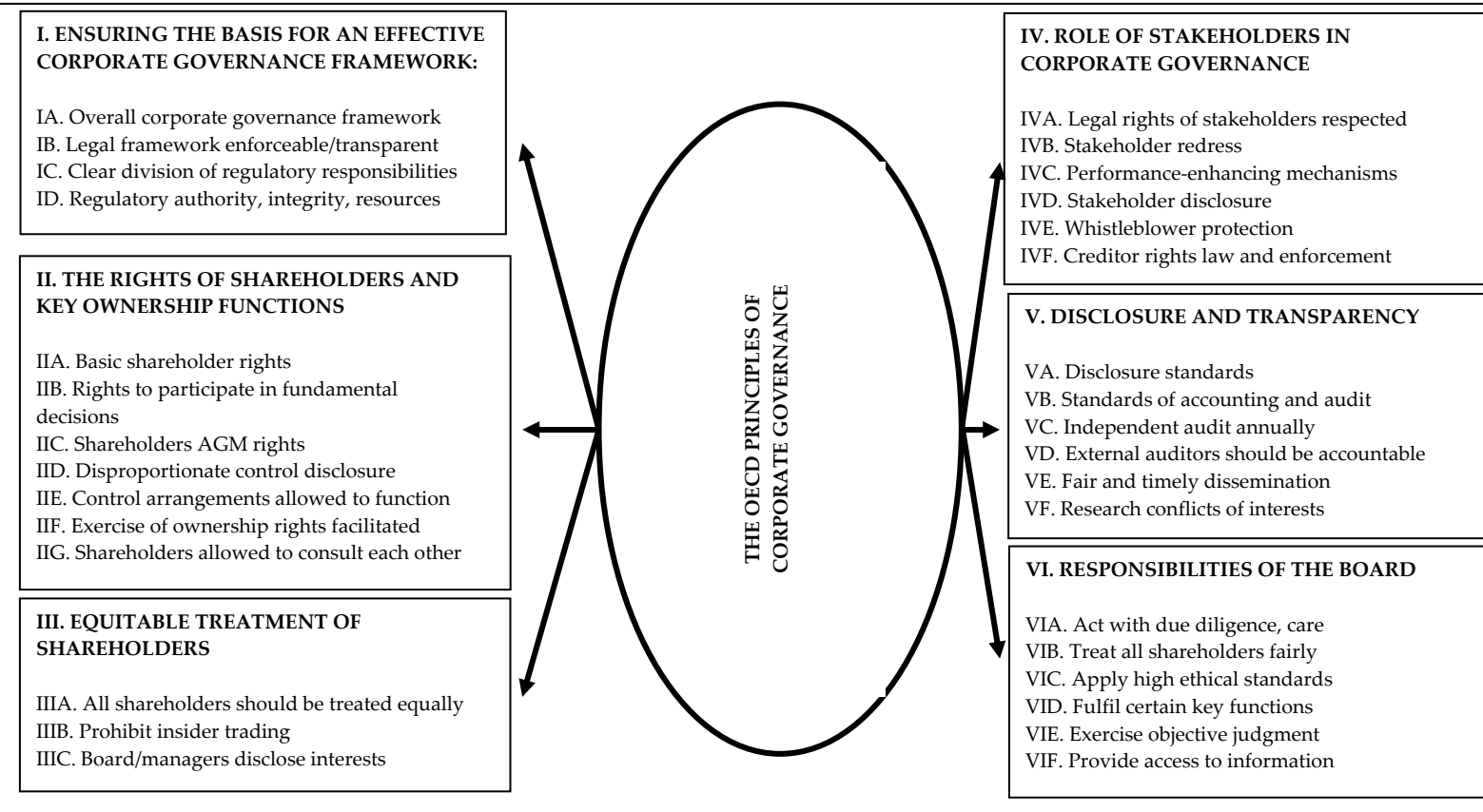
Sixth, private sector initiatives in the area of corporate governance, with the support of research institutions, universities, business associations, chambers of commerce, and the press are important. A priority should be to promote and expand the training program developed by the Academy of Finance for directors and managers of listed companies. Directors and managers of listed companies should be required to attend and complete the training course. Further efforts should be required to establish an Institute of Directors, and to develop and promote investor associations, shareholder activism, and associations of listed companies.

Seventh, along with the ongoing effort to unify the three laws governing SOEs, FIEs, and domestic private enterprises under the *Enterprise Law 2005*, it is important to establish a centralised system of company registries. This registry institution should provide the public with financial and corporate governance information for all companies.

In conclusion, this study discussed the corporate governance of listed companies in Vietnam based on provisions of the *Securities Law 2006*, the *Enterprises Law 2005*, *Model Charter 2007* and the Code. Some troubling matters of corporate governance in

listed companies showed that the framework for corporate governance in Vietnam is in the early stages of development and requires reform. Listed companies need to improve their corporate governance to ensure market transparency, investor protection and effective management.

Figure 5: The OECD Principles of Corporate Governance



Source: OECD