



1-1-2002

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Recommended Citation

Claude D. Rohwer, *Enforcing New Commercial Rights in Emerging Nations*, 15 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3 (2002).
Available at: <https://scholarlycommons.pacific.edu/globe/vol15/iss1/4>

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Enforcing New Commercial Rights in Emerging Nations

Claude D. Rohwer*

I. INTRODUCTORY COMMENTS

I am looking forward to today's symposium. We have a line-up of speakers who have sufficient depth and experience in their fields, such that their comments and predictions about where things are going in the twenty-first century will be of great interest to me.

My message for this symposium relates not to substance, but to procedure. This may seem a bit odd to you, as my whole background is on the substantive law side. I have never been directly or deeply involved in procedural questions. However, my experiences in Vietnam, as well as my comments and observations of others regarding second- and third-world countries have made me appreciate the significance of the issues I wish to discuss.

Three years have passed since I have been in Vietnam, and some of my experiences go back as early as 1996.¹ There is no doubt that some things have changed recently, and one would hope that most of these changes were for the better. Nonetheless, I think that problems of the type I observed while I was there are not quickly cured, and I suspect that they exist in too many countries around the globe. Although this paper will focus on Vietnam, I believe that such problems stretch far beyond Vietnamese borders.

II. DISCUSSION

A. *The Absence of an Established Court Structure to Handle Commercial Matters: Examples in Kosovo*

Governments everywhere find it necessary to establish some sort of court or tribunal system to handle criminal offenses. My McGeorge School of Law colleague, Ed Villmore, recently completed a one-year tour as a volunteer in

* Professor of Law, University of the Pacific McGeorge School of Law. This paper is based on a speech given on March 3, 2001, at the 20th Annual International Law Symposium: Transnational Business Law in the Twenty-First Century, hosted by University of the Pacific, McGeorge School of Law in Sacramento, California. I wish to express thanks for encouragement and insight from Charles D. Kelso, veteran of fifty years of law teaching.

1. In June, 1996, the author was sent to Hanoi for a month by the U.S. Department of Commerce to serve as advisor to the Vietnamese Ministry of Justice in the drafting of regulations to be issued pursuant to the then-new Civil Code; and, in the additional capacity concurrently by the United Nations Development Program [hereinafter UNDP] to serve as advisor to the committee charged with the responsibility of drafting a new Commercial Law, which was ultimately adopted by the National Assembly effective January 1, 1998. The opportunity for a second visit arose with the UNDP in January, 1998, to lecture on practical problems related to the implementation of the Commercial Law, and a third visit in June of that year to advise the Commission that was then redrafting the Economic Contract Ordinance.

Kosovo. Under the auspices of the American Bar Association, Professor Villmore and others are working to try to reconstruct a functioning court system in that province. Ed is a great writer and can really weave interesting stories. He sent us lengthy e-mails that I have encouraged him to collect and publish. I find them to be fascinating reading.

One of Ed's most prominent observations about Kosovo is its absence of any effective criminal investigative agency or any effective criminal justice system. For example, Ed wrote about four Ashkali Gypsy men, returning to the rural neighborhood from which they had fled, in an attempt to ensure the neighborhood was safe to bring their families back. They spent a day inspecting their farms and burned-out homes, and talking with each of the neighbors. The UN representatives suggested that the men come into town for the night, but the men elected to sleep outside—on the ground on their farms. The next morning, the bodies of the four men were found in a draw behind the farms. The men had been killed by gunfire, but when the immediate neighbors were interviewed, the neighbors claimed they had not seen or heard anything. There is no one to pursue an investigation; and right now, few locals even have the desire or will to investigate.

I predict that the citizenry of Kosovo will tire of criminal acts being committed with impunity. In relatively short order, someone will create the structure to apprehend and punish murderers, common burglars, and other miscreants. The citizens will discover that life without a criminal justice system is too unstable. But, how long will it be before Kosovo has a court in which a company such as Levi Strauss may bring an action for violation of its trademark? In addition, how much longer will it be before that case can be resolved fairly and competently?

B. The Quality of the Commercial Courts Where They Exist

On my first trip to Vietnam in 1996, I was initially sent to Ho Chi Minh City to get the lay of the land and to meet with businessmen, bankers, accountants, and lawyers to become familiar with the problems that confronted them. My ultimate mission was to consult with drafting committees in Hanoi, but the heart of the commercial action was in the south in what many still refer to as Saigon.

This first trip was an eye opener. Historically, the Socialist Republic of Viet Nam has had a court system. Apparently, these Peoples' Courts principally handled criminal and family matters. Those who served as judges had little or no legal training, and unfortunately, this situation still exists. In order to provide for a court with judges who are competent in commercial matters, Vietnam created a separate court system known as "Economic Courts." These courts were created to handle matters relating to commercial law. While the general goal was clear, my reading had left uncertainty as to the exact jurisdiction of these new courts.

My hosts in Ho Chi Minh City arranged to give me an interview with the Judges on the local Economic Court. My lawyer friends explained that most

Vietnamese provinces did not yet have functioning Economic Courts, and where they existed, there were few experienced judges. However, Ho Chi Minh City was different. One local lawyer provided the analogy:

The Ho Chi Minh City Economic Court is like the U.S. Federal District Court in the Southern District of New York. Ho Chi Minh City is the commercial center. Like New York, this is where the important cases are filed. This is where you will find the expertise in the bar and on the bench. That is why it is so important that we have lined up an interview for you with these judges.²

I noted that all of my handlers included themselves in the interview. They were also very interested in learning what the judges might have to say.

When we met with the judges, we had a very good interpreter. He was a Vietnamese-American who happened to live in Davis, California, a few blocks from my home. He was a law student at the University of California, Davis, and was working a summer job in Ho Chi Minh City. His sophistication was most helpful in the always-difficult task of translating legal jargon. He and I compared notes later as we discussed what he had heard, and how it compared to what he had been taught by our good friend, Jim Hogan, in his Civil Procedure class at King Hall.

The introductory speeches were not noteworthy, but the question and answer period was informative. I asked questions concerning the court's jurisdiction. These questions proved to be troublesome because the judges who responded had no consistent answer. Some thought the court had jurisdiction only over transactions between merchants. Others thought a consumer could elect to seek relief against a merchant in their courts, but that a merchant could not sue a consumer. Yet another saw no limitation based upon parties. More disturbing, the judge's opinions seemed to be based upon what each assumed the jurisdiction should be.³ No one appeared to be influenced by the language of the Act under which the Court was created. No one referred to any legislation on the subject.

Let me give you some background to clarify my next point. At this time, in June, 1996, the new Vietnamese Civil Code had been adopted and was to become effective on July 1, 1996.⁴ Like European Civil Codes, this document covers a

2. As with other conversations and meetings in Vietnam, there is no recorded source to be cited. The quotes are as accurate as the author's notes and recall permit, and the substance is believed to reflect accurately the information that is being conveyed.

3. I thought there was no coincidence that perhaps the most frequently held view of jurisdiction seemed to coincide with what I understand to be the German approach to commercial court jurisdiction, including cases involving merchant against merchant and consumer against merchant if the consumer so elects. The seemingly unconscious following of law and principles from the German system was a recurring phenomenon.

4. The Civil Code of the Socialist Republic of Viet Nam, adopted by the National Assembly (Legislature IX, 8th Session) Oct. 28, 1995, effective July 1, 1996 [hereinafter Civil Code].

broad range of civil law subjects, including the basic rules of contract law. One of the tasks for which I was going to Hanoi that year was to offer suggestions regarding the writing of interpretative regulations to be promulgated under this Civil Code. At that time, Vietnam also had an existing Ordinance on Economic Contracts.⁵ This law provided a few incomplete rules governing commercial transactions. It was a drastic document that was drafted shortly after Vietnam started down the path toward a market economy in 1986.⁶ The Civil Code would displace this law only where there was a contradiction between them, and the overlap between the two was clearly going to create problems. My second task in Hanoi that year was to assist in writing a new Commercial Law that would come into force jointly with the Civil Code.⁷ If the Ordinance on Economic Contracts was not repealed (and ultimately, it was not), this presence of three laws, each potentially applicable to a commercial law matter, would only add to the confusion. How these laws would mesh was obviously a significant issue for all of us at that time. Unfortunately, the issue still remains today.

Thus, while I had an opportunity to ask questions of these top-ranking judges, I took advantage of the situation by asking them a general question about the interrelationship of the new Civil Code with the existing Ordinance on Economic Contracts. In response, one of the judges reminded me that I was visiting the Economic Court, that the Civil Court was in another building, that the Civil Court will apply the new Civil Code, and that the Civil Code will have no application in the Economic Court. Of course, the fact is that the Civil Code deals with the basics, including such matters as how contracts are formed. The judge who addressed me clearly conveyed his belief that consideration of such “civil” matters by a court that was created to deal only with commercial law issues would be inappropriate. Interestingly, none of the other judges dissented from this view—impliedly agreeing that the Economic Courts should make decisions without giving any consideration to the new Civil Code.

There were many other distressing moments in my visit with the judges. Answers to specific questions made it very clear that when reading any codes, statutes or ordinances, these judges intended to enforce them very literally. Matters such as existing business practices or simple common sense were to be parked at the door when one entered this court.

5. The Ordinance on Economic Contracts became effective Sept. 25, 1989. It was supplemented by a Decree on Economic Contracts, Decree No. 17-HDBT, which became effective Jan. 16, 1990.

6. The Ordinance and Decree provide specific contract terms with respect to many matters, rather than leaving them to be negotiated by the parties. For example, Article 13 of the Decree provides a variety of automatic damage formulas, such as 2% damages for performance delays of 10 days or less and “between six percent and twelve percent” for “breach of an obligation to complete or provide proper products, goods, services and tasks required.” This Ordinance and Decree were written when commercial business was carried on primarily by government agencies, and their provisions were perhaps drafted with government agencies in mind.

7. The result of this Committee’s efforts became the Commercial Law of the Socialist Republic of Viet Nam, adopted by the National Assembly (Legislature IX, 11th Session, 2 April to 10 May 1997), effective Jan. 1, 1998 [hereinafter Commercial Law].

Later on, in Hanoi, I worked closely with a number of government officials. As we discussed drafts of the Commercial Code, a pattern became clear. I wanted general rules that left detailed interpretation to the judges. My Vietnamese colleagues wanted detailed rules that anticipated every conceivable circumstance and provided for specific results for all situations. In their effort to leave nothing to interpretation, their handiwork reminded me of some of the consumer protection statutes that some misguided souls have drafted for our legislatures in this country. God forbid that we leave any discretion to the judges!

To some extent, this difference of opinion might be explained by the fact that my background is in the common law while the background of almost every attorney in Vietnam is in civil law. In addition, most were trained in legal systems that have laws based upon the German codes.⁸ Thus, you might assume that there would naturally be a difference in our approach to detail and specificity in codes, but I am talking about far more than that. I have some familiarity with the German codes that relate to commercial law; and in most cases, I would have been quite satisfied if they adopted provisions analogous to the appropriate German code.

What I am talking about here is such things as the requirement that all contracts must contain express provisions covering six, seven, or eight different subjects, the precise number being dependent upon the type of contract. Furthermore, any contract that fails to do so was declared to be void. The old Ordinance on Economic Contracts had such provisions,⁹ and I had anticipated this problem while still in Ho Chi Minh City by asking the Economic Court judges in that City how such a provision should be interpreted. In response to a specific question on this subject, they advised me that they would absolutely refuse to recognize any rights arising out of a contract that omitted any required term. Using my best hypotheticals that any first year law student would recognize, we explored whether a court could enforce a contract that failed to provide a required term or required information if in fact there was a course of prior dealing or if in fact the information was known to both parties. I was told that I did not understand the requirements of the law. If a required term or factual

8. With the exception of a fine elder statesman in the law, Professor Luu Van Dat, all of the Vietnamese attorneys with whom I dealt whose educational background became known to me had their basic juris doctor training in the USSR, Poland, Czechoslovakia or East Germany. Historically, Russia, Poland, and Czechoslovakia had adopted the German Civil and Commercial Codes early in the last century, and these laws remained as the basic commercial law in matters such as contract formation. However, when the author referred to this education as a background in "German Law," he was quickly corrected with the information that it was a background in "Roman Law." In addition to being more politically correct in countries ruled by a communist party, there is also a substantial element of historical truth in this correction.

9. For example, article 12 of the Ordinance provides: "An economic contract shall include terms and conditions on the following: (a) The date on which the contract is signed; the names and addresses of the banks which will handle the transactions between the parties and the relevant account numbers; the full names of the representatives of the parties and the registered business owner. . . ." There are a total of twelve such provisions specifying required terms and the first four are designated "essential terms" omission of which presumably makes the contract void.

information is omitted, the contract is void. There was no thought of giving consideration to even a long history of existing practice between the parties that covered the point in question.

I desperately wanted to get the drafting committee to agree that we could list contract terms without providing that deletion of any one made the contract void. Ultimately, I failed in this effort.¹⁰ But before I gave up, the Committee members and I had a frank discussion about this perceived need for specificity throughout the code. I made my pitch that judges were experienced people. They could be expected to take good general rules and find an appropriate interpretation to handle cases before them. My hosts explained that their judges were not of that type. I can almost quote them verbatim today: “We have few lawyers—even fewer who are highly capable and experienced. Our experienced lawyers are needed in the executive branches of government.” These Vietnamese believed that they could not afford to waste the qualified talent of experienced lawyers by appointing them to the bench. Whether true or not, this perception had a significant impact on the laws that came out of this Committee. Details had to be specified because we could not trust the judges to reach a proper solution unless we gave them a road map that covered every situation that the drafters could foresee.

C. Enforcement of Judicial Decisions

As we discuss legal problems in the United States and other western countries, the enforceability of court judgments is not a topic about which we worry. There is no doubt that there are problems with actual enforcement, but we assume the legal right to enforce. If I can prove a contract breach and establish in court my right to damages, I am going to get a judgment—and the sheriff will do my bidding to garnish accounts, or chase other property that I can locate to satisfy my judgment. When I was in Vietnam, the practicing bar explained to me that enforcement of judgments in that country was problematic. There was apparently no concept of governmental officials responding with alacrity to a request that papers be served or that property be turned over.

While in Ho Chi Minh City, I heard a wild story about IBM or a company that leased IBM equipment finding itself unable to find legal procedures through which the company could repossess computers it had leased for which no payments were being made. The lessor finally sent out pickup loads of hired hands with AK-47 rifles to repossess their computers. Unfortunately, the party in possession had some contacts in high places, and a phone call produced a detachment of the Vietnamese Army. The soldiers took the AK-47s away from the IBM employees and sent them packing. I smiled at this story and nodded

10. See Commercial Law art. 50 (listing six terms that “must” be included in a contract for the sale of goods); see also arts. 195(2) and 205(2).

politely. Some one had a wild imagination, I assumed. However, when I heard the same story in Hanoi, I inquired more closely. Many people assured me that the story was quite true, and had been reported in the Vietnamese press—even in the English language edition.

Whether correct in detail or not, when such stories are repeated and believed in the legal and business communities, they impact the course of conduct of everyone. The best of substantive civil and commercial laws will not foster investment and commerce in a developing nation if there is a perception that enforcement of rights is left to a modern day version of frontier justice.

Some might suggest that the answer to these problems is to be found in arbitration. When I was discussing this general problem recently, one of my colleagues noted that Vietnam has ratified the New York Convention on the Enforcement of Foreign Arbitral Awards.¹¹ Perhaps this is the path to a solution. My response was: “How does that help if you cannot enforce a court judgment?”

The actual problem may not be obvious at first glance. Based upon our history, we are concerned simply with the following issue: will a court recognize and enforce an arbitration award, domestic or foreign? If so, then we know we can obtain a court order or judgment and the rest is obvious and straightforward. But, if court judgments cannot be regularly enforced, then what?

Lawyers practicing in Vietnam advised me that under Vietnamese law, foreign arbitral awards were technically enforceable due to ratification of the New York Convention, but private arbitral awards obtained in Vietnam were not legally enforceable in the courts. Vietnam does have a government agency that conducts domestic arbitration. I am unfamiliar with the details, but apparently if this government agency arbitrates a dispute, it can and will take steps to enforce awards, or to obtain necessary action from other governmental agencies. However, at that time there was no vehicle for enforcement of a private arbitration award.¹² In transnational transactions, sound contract drafting would include an agreement to arbitrate in a foreign (non-Vietnamese) location where arbitral awards can be enforced. This is effective if one is dealing with a party that has reachable assets located outside of Vietnam.

11. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. Text found in United Nations, Treaty Series, Vol. 330, p. 3. Ratified by Vietnam on Sept. 12, 1995, with declarations limiting its application to differences arising out of legal relationships that are considered as commercial under the laws of Vietnam. Recognition and enforcement is limited to arbitral awards made in the territory of a contracting State, but other awards can be enforced on the basis of reciprocity.

12. Regarding the developing tools for enforcing arbitral awards in some locations, see generally Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERK. J. INT'L LAW 329 (1997); Amr. A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000); Laura A. Malinasky, *Rebuilding With Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 BERK. J. INT'L LAW 438 (1996).

D. Further Problems Relating to Judicial Competence

I would like to tell you one last story from Hanoi. In 1998, I was a consultant to the staff of the Supreme Court. While I was there, the Supreme Court rendered a decision that had the direct effect of declaring a letter of credit unenforceable. I apologize to those in this audience who may have never dealt with the law relating to letters of credit. A letter of credit is a basic and very binding promise made by a bank, which provides that when certain instruments are presented, the bank will pay the specified sums of money.

The Vietnamese State Bank had issued a letter of credit for the benefit of a South Korean Company that was delivering goods to Hanoi. When the buyer became dissatisfied, the buyer instructed the Bank not to pay. The South Korean seller sued the Bank, and the Economic Court trial judge referred the legal question of the bank's possible liability directly to the Supreme Court which Vietnamese procedures permit.

The Supreme Court ordered that the action against the Bank be dismissed. The opinion stated that the trial court should retain jurisdiction to permit the plaintiff to name the proper defendant, the buyer. For a court to blithely conclude that if the bank chooses not to pay, someone else should be sued instead is tantamount to legal blasphemy.¹³ When one finds the Supreme Court rendering such astounding interpretations of basic commercial law questions, one shudders to think what will happen when the litigants present complex issues to the Court dealing with something such as interpretation of an intellectual property treaty.

E. Some Proposed Solutions

So, other than complaining, what do I have to offer about this matter? The United States is deeply involved in substantial efforts around the globe to improve substantive laws relating to various commercial matters. Some third-world countries are making rather substantial progress.¹⁴ I believe we must also focus on helping certain countries develop the legal infrastructure that will create

13. Law dealing with letters of credit is truly "international" in the sense that this law is consistent in virtually all countries in the world. In the United States, the basics are set forth in UCC § 5-106. A true sense of the international nature of this law can be gleaned from the Official Comment to § 5-101. The directive is rather amazing in providing: "Letters of credit law should remain responsive to commercial reality and in particular to the customs and expectations of the international banking and mercantile community. Courts should read the terms of this article in a manner consistent with these customs and expectations." Seldom are American courts encouraged or directed to use international custom as a basis for adjusting the interpretation of domestic law. The Vietnamese Supreme Court was not mindful of such a philosophy.

14. Vietnam is one example. For this author's view on development of the law in Vietnam, see Claude Rohwer, *Progress and Problems in Vietnam's Development of Commercial Law*, 15 BERK. J. INT'L LAW 275 (1997); see also Hiep D. Trvong, *Encouraging Foreign Direct Investment in Vietnam: Economic Reform, Protection Against Expropriation, and International Arbitration*, 8 J. TRANSNAT'L L. & POL'Y 347 (1999); Dror Ben-Asher, *What's the Connection? Vietnam. The Rule of Law, Human Rights and Antitrust*, 21 HOUS. J. INT'L L. 427 (1999).

a system that can work.

One group of countries in particular need are those that formerly had a strong central communist control. When they had command economies, no one needed to be concerned about breach of contract actions. Civil law suits were not the incentive of choice to make people perform as directed.

Certainly, there has been a good deal of recent effort focused upon the countries in Central and Eastern Europe from Estonia to Bulgaria to Russia. In a sense, however, those are the easy targets. Within the last fifty or eighty years, they all had reasonably sophisticated judicial systems, and the framework was never totally dismantled. If we look elsewhere in the world, we will find much more difficult targets. I do not wish to imply that no efforts are being made,¹⁵ but this challenge should be getting more attention from us than has been the case thus far.

I believe that we must also focus more effort on helping to educate and train lawyers in those countries that have inadequate numbers. This would include training for those already on the bench and training for those who may ascend to the bench tomorrow. Additionally, we must convince them that when one is appointed to the bench, one is “ascending.”

Denmark and Sweden have been major contributors to the effort to develop the legal infrastructure in countries such as Vietnam. The United States has tended to devote what aid we have given in the third world to items such as major development projects, financial liquidity, or currency stabilization. I think we must do far more than we have done in the areas of legal training and infrastructure.

This is a job for U.S. Government Agencies. More importantly, this is a job for non-governmental organizations, such as our law schools, and for individuals who can offer their services in furtherance of these objectives. We need a few more Ed Villmores in places like Kosovo, and we need more judges and lawyers from places like Vietnam on our campuses in the United States.

III. CONCLUDING REMARKS

There are two huge sociopolitical factors that separate Vietnam and the United States. The first is a difference between Americans and people in the Far East. The other is the difference between growing up under a communist government and a different system.

15. For recent articles describing various projects, see Cynthia H. Hall & Michael M. Mihm, *Conference: The History of the Committee on International Relations of the United States Judicial Conference*, 42 ST. LOUIS U. L.J. 1163 (1998); J. Clifford Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 MICH. J. INT'L L. 849 (2000); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

Throughout the Far East, people do not see any particular need for courts to be able to enforce promises. People have no intention of resorting to the courts. They deal with other people only because they trust them. If the other party does not act properly and play fair, they do not deal with that party again. Note that I said “play fair,” not “keep their promises.” Circumstances change constantly, and one does not expect other people to keep specific promises when circumstances change. A contract relationship, like a good marriage, is constantly being adjusted and “renegotiated.”

If prices of materials increase drastically, in the Asian view the contract price is no longer valid, and the buyer should not expect the seller to perform at that price. The buyer should know that a market change has impacted adversely upon the seller and the buyer should propose renegotiation. Good manners dictate that the buyer initiate this discussion of a price increase and not force the seller to come begging for a change.

I was once informed that the Vietnamese look upon the signing of a contract as the beginning of serious negotiations. This was intended as a bit of sarcasm from an American lawyer. In truth it is not totally incorrect, nor is this Asian approach necessarily wrong. Maybe this is where America is heading with its recently discovered fascination with “good faith.” I leave it to experts on economics and the law to comment on the relative efficiency of these different approaches.

The second major difference is in how society motivates people to deliver properly made goods to the right place on time. Under the communist system, the party boss in Hanoi calls the party boss in Haiphong to explain that the shoe factory is sitting idle because the longshoremen have not unloaded the leather from the boats and shipped it inland. If the matter is not cleared up, heads will roll - politically or, in an extreme case, literally. No one goes to court. There is no discussion of damages. There is no concept of profits, so how could one ever calculate “damages?”

When I tried to explain our system in lectures at California State University, Sacramento to visiting government leaders from Turkmenistan, they listened to a point and then one of them (clearly an unreconstructed communist) exploded. He shouted that if a seller did not deliver grain on time, his people would starve. He shouted: “What good would your damages do to my starving people? They cannot eat the damages. If someone does not deliver the grain on time, we must shoot them. That is the way to get the grain delivered.”

From this outburst, one can see the product of: (1) an economy with no market. There is no other source of supply down the street. If the coal is not delivered, people freeze, and (2) a “command” economy in which people act because they are told to act and criminal law sanctions (yes, literally - nothing other than criminal law) are the only legally recognized way of forcing compliance with orders from the central administration.

The old guard communists know this. That is why some of what I encouraged the Committee to write in the new Vietnamese Commercial Law was

undone at the National Assembly. However, this is also why I am so interested in helping to develop contract and commercial law in former communist countries. Such development is a very real and very direct vehicle to a totally different political system.

You cannot have free trade and investment while simultaneously maintaining a communist system for long. This cannot be done. Watch China change. Thank you.

